



CPI's North America Column Presents:

Antitrust Cooperation Among the United States, Canada, and Mexico

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Introduction

Antitrust cooperation among Canada, the United States, and Mexico is a growth industry. The antitrust agencies of the United States, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), have a long history of cooperation with Competition Bureau Canada (CBC). Recent reforms to Mexico's antitrust law have created an impetus for the U.S. and Canadian agencies to strengthen their cooperative relationship with Mexico's antitrust agency, the Federal Economic Competition Commission (known by its Spanish acronym as COFECE) as well.

While formal instruments facilitate cooperation among the four agencies, the most significant cooperation takes place through informal means. After describing the situations in which cooperation could be beneficial, this article will briefly survey the formal instruments, describe the nature of informal cooperation, and will then expand on how cooperation between the agencies operates in practice.

Why Cooperate?

As the economies of Canada, the United States, and Mexico have become more intertwined, the number of transactions or conduct with antitrust significance across borders has grown. The most significant of these is mergers. All three jurisdictions have pre-merger notification systems, and a large number of transactions are reviewed in more than one country. A second area of overlap is cartels, as price fixing and market allocation schemes often cross national borders. While monopolization (or abuse of dominance as the analogous concept is known in both Canada and Mexico) is less likely to result in cross-border enforcement issues, it can arise, especially in high-tech network industries that operate globally. Cooperation helps avoid burdening parties with potentially inconsistent timelines, remedies, and analytical approaches that could unnecessarily burden transactions that are ultimately allowed to proceed. Moreover, inadequate attention to the interests of other countries can create the potential for international friction.²

Looking beyond the effects on individual cases, cooperation on broader competition policy issues can have positive cross-border effects as well. Policy cooperation can promote the mutual adoption of best practices that facilitate convergent analysis of cases. In the case of governmentally-sponsored barriers to entry or efficient operation, a healthy dialogue among the competition agencies of the three jurisdictions is more likely to promote a common view of competition policy throughout the region.

Formal Instruments

A trio of bilateral antitrust cooperation agreements forms the foundation of the formal cooperation instruments among the three jurisdictions. The current antitrust cooperation agreement between the United States and Canada was adopted in 1995.³ The United States and Mexico entered into a similar agreement in 1999.⁴ Rounding out the trio, Canada and Mexico signed an agreement in

2001.⁵ All three agreements are broadly similar. They acknowledge that it is in the interest of each party to cooperate on enforcement matters, encourage coordination on related matters, require notification when the enforcement practices of one competition agency affects the interest of another country, require that communications between the agencies be maintained in confidence, and provide for periodic meetings among the agencies. Significantly, however, none of the agreements create new powers or obligations. They are best seen as high-level articulation of the existence of good cooperative relationships and foundations for building of practical cooperation in the context of actual cases.⁶

In the criminal area, the United States is party to Mutual Legal Assistance Treaties (MLAT) with both Canada and Mexico. Price-fixing and other per se anticompetitive conduct have long been subject to criminal sanctions in Canada⁷ as well as the United States.⁸ MLATs have been used on numerous occasions to seek the production of evidence across borders.⁹ Recent reforms have added criminal sanctions to Mexico's antitrust law as well.¹⁰ To date, however, there are no publicly reported instances of MLAT treaties being used in antitrust matters between Mexico and either the United States or Canada.

Both Canada and the United States have legislation in place that permit antitrust agencies in one country to collect information on behalf of the other in the aid of civil antitrust investigations.¹¹ In the United States, such cooperation can take place only pursuant to the adoption of an Antitrust Mutual Assistance Agreement. Despite the fact that authorizing legislation has been in place in both countries since 2003, no such agreement has yet been made.

Several multinational instruments round out the cooperation toolkit. All three jurisdictions are signatories to the Organization for Economic Cooperation and Development (OECD) recommendation concerning antitrust cooperation.¹² All four agencies are members of the International Competition Network, which in 2012 adopted a Framework for Merger Cooperation.¹³ Finally, the North American Free Trade Agreement (NAFTA), includes a competition chapter that broadly calls for cooperation in antitrust enforcement.¹⁴ The themes of all three instruments are addressed in the three bilateral agreements, so in the case of Canada, the United States, and Mexico, they have little practical effect.

Informal Cooperation

While the formal instruments create a framework, most day-to-day cooperation takes place on a less formal basis. The essence of cooperation involves the exchange of information among agency staff on matters ranging from publicly available materials to timing of investigations to views about markets and competitive effects to what has been learned in market investigations. Understanding how this works requires an understanding of the bounds of confidentiality provisions governing the competition agency's work.

Much of an antitrust agency's work is protected by confidentiality provisions of governing statutes. In the United States, this includes the provisions of the Hart-Scott-Rodino Act¹⁵, the Federal Trade

Commission Act,¹⁶ Antitrust Civil Process Act¹⁷ and, in the case of criminal proceedings, the Federal Rules of Criminal Procedure.¹⁸ Broadly speaking, these provisions provide strong confidentiality protection for any business information required to be provided to FTC or DOJ.¹⁹ Similar provisions exist in Canada²⁰ and Mexico.²¹ These laws are scrupulously observed by all four agencies, and information so protected may generally be shared only when the parties involved agree to waive those protections to facilitate cooperation. Waivers are very common in merger cases involving the United States and Canada, and they are of increasing importance between the United States and Mexico. The U.S. agencies have developed a model waiver and frequently asked questions to facilitate their use in civil cases.²² Monopolization/abuse of dominance cases are less likely to have an international dimension, and they are used less often in such cases.²³

Other information that is protected by agency policy, but not by statute, may be shared more liberally. The FTC and DOJ, for example, do not publicly announce the existence of an investigation, but may share this with CBC or COFECE.²⁴ Likewise, in the context of particular cases, they may share their theories of markets or anticompetitive harm, which essentially comprise their own work product, so long as they do not share statutorily-protected information that underlies those theories. The confidentiality provisions found in the three bilateral cooperation agreements (as well as the OECD Recommendation and the ICN Framework) give the agencies the necessary assurances that the information provided will be maintained in confidence.

Finally, some information is public. Foreign agencies may be unfamiliar, for example, with the data found in the Securities and Exchange Commission's EDGAR database, with prior enforcement actions involving the same parties, or general knowledge about the working of particular industries. Agency staffs share this kind of background information readily.

Mergers

In terms of sheer volume, most cooperation among agencies involves mergers and acquisitions. In 2009, Canada revised its premerger notification procedures so that they closely align with those of the United States.²⁵ Mexico, which until 2014 had a post-merger notification system, now has a pre-merger notification system as well.²⁶ Consequently, significant mergers may now be reviewed in all three countries simultaneously.

Within the region, merger cooperation is best developed between the United States and Canada. In 2014, the two U.S. agencies and CBC issued a document setting forth best practices for cooperation in merger cases involving both countries.²⁷ The document describes communication between agencies, coordination on timing, collection and evaluation of evidence, and approaches to remedies and settlement. In addition, agency merger staffs regularly communicate about cases under common review, and team leaders from FTC, DOJ, and CBC regularly meet in person to discuss recent cases and approaches to particular types of investigations.²⁸ FTC and CBC have participated in staff exchanges as well, using the provisions of the US SAFE WEB Act.²⁹

The high level of cooperation has manifested itself in numerous cases that have been announced simultaneously and contain complementary remedies.³⁰ In 2015, for the first time, CBC and FTC announced simultaneous litigated challenges of the same transaction, the proposed merger between Staples and Office Depot.³¹ The public record on case cooperation may be understated by the informal use of comity. The CBC has stated that in appropriate cases, it may rely on remedies obtained in other jurisdictions in lieu of imposing remedies of its own.³² While the U.S. agencies have not had many opportunities to rely on foreign agency remedies, nothing prohibits them from quietly doing likewise in appropriate cases.

Merger cooperation between the United States and Mexico is developing rapidly, inspired on the U.S. side by its positive experience with Canada and other jurisdictions. The FTC recently sent an experienced merger lawyer to spend four months with COFECE and has hosted numerous visitors from COFECE. Regular case cooperation is becoming a reality. The first public case of three-way cooperation occurred in the recent Continental/Veyance merger, in which DOJ, CBC, and COFECE worked closely together to reach consistent outcomes in a case that affected all three jurisdictions.³³ This was quickly followed by the ZF/TRW transaction, which was analyzed by FTC, CBC, and COFECE.³⁴

Cartels

The effects of cartels do not stop at national borders, so cartel investigations cannot either. DOJ estimates that international cartels account for almost half of its cartel investigations,³⁵ and about one third of Canada's cartel cases have an international dimension.³⁶

Cooperation in cartel cases often takes the form of investigative cooperation, such as coordination of searches, access to information, greater coherence in outcomes, and more effective enforcement.³⁷ Coordinating the logistical aspects of investigations, deadlines, timing of key events, and witness interview can reduce overlapping and contradictory demands on parties while accelerating the pace of investigations.³⁸ It can be particularly useful in the case of leniency applications, a key tool for cartel detection.³⁹ Cooperation between DOJ, CBC, and COFECE has been crucial for international cartel investigations in many industries such as the motor vehicle components,⁴⁰ refrigerator compressors,⁴¹ and air cargo.⁴²

Policy

While the front line of cooperation can be found in case work, the three jurisdictions work closely together to share views on appropriate competition policy. All four agencies are active participants in the International Competition Network, which promotes convergence in competition law and policy across jurisdictions.⁴³ The heads of the four agencies meet regularly to discuss common issues of competition law and policy,⁴⁴ which in turn promotes further convergence within North America.

Competition advocacy provides good examples of how the agencies cooperate in the policy area. Antitrust agencies from all three countries face common issues as new forms of doing business

come into their markets, which in turn raise questions about the role competition law and policy should play in those markets. An example is disruptive technologies such as in the urban passenger transportation markets that have seen entry of firms such as Uber and Lyft.⁴⁵ One might deduce, from reviewing the competition advocacy submissions of the FTC, CBC, and COFECE, that there had been some level of policy symbiosis between the three agencies.⁴⁶

Conclusion

The trend towards increased cooperation among the four competition agencies in the United States, Canada, and Mexico is clear. Cooperation is regular and routine among them, and is likely to continue to grow in the future.

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² E.g., Molly Askin & Randolph Tritell, Meeting the Challenges of the Evolving International Antitrust Landscape, 22 Geo. Mason L. Rev. 1269 (2015); William E. Kovacic, Transatlantic Turbulence: The Boeing McDonnell Douglas Merger and International Competition Policy, 68 Antitrust L.J. 805 (2001).

³ Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (August, 1995), https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/agree_canada.pdf.

⁴ Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws (Jul 11, 2000), https://www.ftc.gov/system/files/documents/cooperation_agreements/000711mexicanagreement.pdf.

⁵ Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws (2001), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ct02503e.pdf/\\$FILE/ct02503e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ct02503e.pdf/$FILE/ct02503e.pdf).

⁶ An enhanced positive comity agreement, which was entered into by the United States and Canada in 2004, Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws (Oct. 5, 2004), <https://www.ftc.gov/sites/default/files/attachments/international-antitrust-and-consumer-protection-cooperation-agreements/0410comityagreeenglish.pdf>, [has seen no reported](#)

use. The agreement creates a mechanism by which one country could defer to the other in certain cases involving conduct in one country that created anticompetitive effects in the other.

- ⁷ Competition Act, §45, (R.S.C., 1985, c. C-34).
- ⁸ Sherman Antitrust Act, §1, 15 U.S.C. §1.
- ⁹ E.g., “Remarks by John Pecman, Commissioner of Competition Better Together — The Importance of Cooperation Amongst Competition Authorities. (May, 2015) (Can) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03940.html>.
- ¹⁰ Mexico’s New Federal Law on Economic Competition (LFCE) increased powers to the Mexican Federal Economic Competition Commission (“COFECE”). The LFCE, strengthens the integrity of Mexico’s immunity program by creating an investigating authority to ensure the establishment of a firewall between cartel investigation phases. Ley Federal de Competencia Economica. (July, 7, 2014), https://www.cofece.mx/cofece/images/Documentos_Micrositios/Federal_Economic_Competition_Law.pdf.
- ¹¹ International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §6201 et seq.; Competition Act (R.S. 1985, c. C-34) §30.01 et seq.
- ¹² Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings, as approved by Council on 16 September 2014, [C(2014)108], <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>. The original recommendation was adopted in 1967.
- ¹³ International Cooperation Network, Framework for Merger Review Cooperation (2012), <http://www.internationalcompetitionnetwork.org/uploads/library/doc803.pdf>.
- ¹⁴ Paragraph 1501(1) of the NAFTA provides that each party shall adopt or maintain “measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives” of the agreement. See <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=1&secid=323701f4-4dd8-493b-bcc6-3698200bbeae>.
- ¹⁵ Clayton Antitrust Act §7A(h), 15 U.S.C. § 18a(h)
- ¹⁶ Federal Trade Commission Act, §§ 6, 21, 15 U.S.C. §§ 46, 57b-2.
- ¹⁷ 15 U.S.C. §§ 1311-14.
- ¹⁸ Federal Rules of Criminal Procedure, Rule 6(e).
- ¹⁹ In addition, the FTC confidentiality rules cover materials submitted voluntarily in lieu of compulsory process. FTC Rule of Practice 4.10(d), 16 C.F.R. § 4.10(d).
- ²⁰ Canada’s confidentiality provisions differ from those of the United States in one material respect. Section 29 of the Competition Act allows the Commissioner to share information for purposes of enforcement and administration of the Act, and the Competition Bureau takes the position that if the parties waive confidentiality to permit a foreign agency, such as those of the United States, to share information with the CBC, the CBC may reciprocate without a waiver, Competition Act (R.S.C., 1985, c. C-34) (Can) <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03597.html>
- ²¹ LFCE, supra note 10, Art. 125.
- ²² See <http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>.
- ²³ See Askin & Tritell, supra note 2, at §III.a.
- ²⁴ See United States, Discussion on How to Define Confidential Information, October 2013, <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-other-international-competition-fora/1310us-confidentialinfo.pdf>.
- ²⁵ Bill C-10, the Budget Implementation Act, 2009 (March 12, 2009).

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- ²⁶ See Roundtable On Changes In Institutional Design Of Competition Authorities -- Note by Mexico, Organization for Economic Cooperation and Development, Competition Committee, Document DAF/COMP/WD(2014)99 (Dec. 4, 2014), <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282014%2999&doclanguage=en>.
- ²⁷ Federal Trade Commission, Department of Justice, and Competition Bureau Canada, Best Practices on Cooperation in Merger Investigations (March 25, 2014), https://www.ftc.gov/system/files/attachments/international-competition-consumer-protection-cooperation-agreements/canada-us_merger_cooperation_best_practices.pdf.
- ²⁸ See Pecman, *supra* note 9
- ²⁹ 15 U.S.C. §57c-1.
- ³⁰ E.g., FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger (May 4, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets>; FTC Puts Conditions on Novartis AG's Proposed Acquisition of GlaxoSmithKline's Oncology Drugs (Feb. 23, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/ftc-puts-conditions-novartis-ags-proposed-acquisition>; Louisiana-Pacific Corp. Abandons its Proposed Acquisition of Ainsworth Lumber Co. Ltd. (May 14, 2014), <http://www.justice.gov/sites/default/files/atr/legacy/2015/04/13/305936.pdf>.
- ³¹ FTC Challenges Proposed Merger of Staples, Inc. and Office Depot, Inc. (December, 7, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-staples-inc-office-depot-inc>.
- ³² CBC, Information Bulletin on Merger Remedies in Canada (2006), ¶78, available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html>. See also Competition Bureau Submission to the OECD Competition Committee Roundtable on Remedies in Cross-Border Merger Cases" (October 29, 2013), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03771.html>
- ³³ Justice Department Requires Divestiture of Commercial Air Springs Business in Connection With Continental AG Acquisition of Veyance Technologies, Inc. (December. 11, 2014), <http://www.justice.gov/sites/default/files/atr/legacy/2014/12/11/310440.pdf>.
- ³⁴ See "FTC Puts Conditions on Merger of Auto Parts Suppliers ZF Friedrichshafen AG and TRW Automotive Holdings Corp". (May 5, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-puts-conditions-merger-auto-parts-suppliers-zf>.
- ³⁵ The Division also cooperated with its international counterparts on 13 significant civil investigations—often pursuant to waivers from parties and third parties. More than half of these investigations involved cooperation with multiple jurisdictions. See "International Program Update 2015, Division update", Spring 2015. <https://www.justice.gov/atr/division-update/2015/international-program-update>
- ³⁶ See Askin & Tritell, *supra* note 2, at §III.a.
- ³⁷ See "Discussions on Limitation and constraints to International Co-operation". (October, 2012) (EU) http://ec.europa.eu/competition/international/multilateral/2012_oct_limitations_en.pdf
- ³⁸ See "Deputy Assistant Attorney General Brent Snyder delivers Remarks at the Sixth Annual Chicago Forum on International Antitrust". (June 8, 2015). <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago>
- ³⁹ See "Baer and Snyder defend US anti-cartel system" (Feb, 8, 2016), <http://globalcompetitionreview.com/news/article/40469/baer-snyder-defend-us-anti-cartel-system/>; "Individual accountability for Antitrust crimes," Speech by Brent Snyder (February 19, 2016), <https://www.justice.gov/opa/file/826721/download>.
- ⁴⁰ See Pecman, *supra* note 9

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- ⁴¹ This investigation marks the first time COFECE utilized its immunity program. See “Annual Report on Competition Policy Development in Mexico” – 2014. (2014) (Mex) [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR \(2015\) 7&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR%2015%207&docLanguage=En)
- ⁴² Joseph Wayland, “International Cooperation at the Antitrust Division,” speech before International Bar Association (Sept. 14, 2012), <https://www.justice.gov/atr/file/518911/download>.
- ⁴³ Indeed, of the first seven ICN Steering Group chairs, two (Konrad Von Finckenstein and Sheridan Scott) were Canadian and two (Fernando Sanchez Ugarte and Eduardo Perez Motta) were Mexican.
- ⁴⁴ E.g., Officials From the U.S., Canada and Mexico Participate in Trilateral Meeting in Mexico City to Discuss Antitrust Enforcement, <https://www.ftc.gov/news-events/press-releases/2015/05/officials-us-canada-mexico-participate-trilateral-meeting-mexico>; U.S., Canada and Mexico Antitrust Officials Participate in Trilateral Meeting in Washington, D.C. to Discuss Antitrust Enforcement (February, 13, 2104), <https://www.ftc.gov/news-events/press-releases/2014/02/us-canada-mexico-antitrust-officials-participate-trilateral>.
- ⁴⁵ CBC, Press Release, Competition Bureau workshop addressed disruptive business models and non-price effects (March 4, 2016) (Can), at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04034.html>.
- ⁴⁶ Compare FTC Staff Comments Before the District of Columbia Taxicab Commission Concerning Proposed Rulemakings on Passenger Motor Vehicle Transportation Services (June, n 7, 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf, with Submission by the Commissioner of Competition Provided to the City of Toronto Taxicab Industry Review (February 18, 2014), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03667.html>, and Opina COFECE sobre los servicios de transporte de personas por medio de plataformas móviles (June 10, 2015), (Mex) <https://www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/opina-cofece-sobre-los-servicios-de-transporte-de-personas-por-medio-de-plataformas-moviles>.