COOPERATION ON DIGITAL COMPETITION: FROM COOPERATION TO ENHANCED COOPERATION

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By Frederic Jenny

Cooperation agreements establishing the possibility of an exchange of information between competition authorities are in general based on two hypotheses. First, they assume that the cooperating competition authorities will independently decide which cases they will investigate. Second, with respect to the cases on which cooperation is actually going to take place, it is assumed that the requested competition authority might help the requesting competition authority through the transmission of information, which the latter would not have been able to gather given the limited territorial reach of its investigatory powers and which is relevant to its investigation of the case, for which it gets the cooperation of the requested competition authority. The digital sector is one where coordination of cases between the competition authorities (as opposed to cooperation on uncoordinated cases) would be most useful. Indeed, digital platforms frequently operate simultaneously in most jurisdictions and apply the same governance rules with the same effects on their complementors or users. Yet many competition authorities have, independently of one another, opened investigations of the same practices by the same platforms (such as, for example, the compulsory use of in-app payment systems for transactions). Furthermore, the scope for helpful exchange of information concerning such cases is relatively limited as the practices are public. Enhanced co-operation mechanisms such as cross-appointments between authorities as well as joint decisions or mutual recognition of decisions or the designation in some cases of a lead competition authority would allow competition authorities in a number of countries to avoid having to face the cost of large staff of digital specialists doing the same analysis as their colleagues in other jurisdictions and could contribute to a more effective enforcement of antitrust and competition law.

The issue of cooperation on competition is important and has been extensively debated both in the context of the OECD and that of the ICN.

In 2014, the OECD issued a "Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings." In this recommendation, the OECD urged the governments of the Member States to commit to international co-operation and to promote effective enforcement co-operation between competition authorities in their investigations and proceedings. Indeed, cooperation on competition law enforcement is considered to be "essential for meeting the challenges of enforcing competition law in an increasingly inter-connected and digitalized world."

In 2022, the OECD published a report[2] on the implementation of the 2014 recommendation. According to this report, If significant progress has been made since the adoption of the 2014 Recommendation, and if co-operation is now part of the daily enforcement reality of many competition authorities, persistent legal limitations, differences in legal standards and a lack of precedents and models for enhanced co-operation, prevent more intensified international enforcement co-operation, in particular outside of regional networks. The report points out that "severe limitations stand in the way of the exchange of confidential information, investigative assistance, and joint or coordinated enforcement action."

This report updates and confirms the findings of a report co-authored by the OECD and the ICN published in 2021. A main finding of the OECD/ICN report was that international enforcement co-operation is increasing, and while significant work has been undertaken to improve it, there is significantly more to be done to better address the long-term and well-known limitations to enforcement co-operation.

The Report, based on a survey of 63 competition authorities members of the ICN (including 38 competition authorities from OECD countries) identifies a number of obstacles that limit international enforcement co-operation: the existence of legal limits on the information competition authorities can exchange (especially relating to: confidential information sharing, investigative assistance, enhanced co-operation), the absence of waivers, a lack of resources or time, a low willingness to cooperate, differences in legal standards, lack of trust and reciprocity and practical issues (e.g. language, time differences etc.).

The report further noted that regional relationships and networks (as opposed to bilateral agreements) such as the EU, which remains the most integrated and comprehensive example of regional enforcement co-operation, the Nordic Alliance and the Australia and New Zealand arrangements are still the source of the most frequent enforcement co-operation for many authorities and provide for deep and effective enforcement co-operation.

The somewhat unsatisfactory bilateral enforcement cooperation between competition authorities presents a number of characteristics worth mentioning.

First, bilateral cooperation agreements on antitrust enforcement generally assume that the cooperation on cases will take place in two types of circumstances: first, when a competition authority initiates a case involving a transaction or a practice by a foreign firm located in the cooperating country having an impact on competition in the country of the authority seeking the cooperation; second when both competition authorities investigate the same international or transnational case. In both types of case the investigating authority of a country does not have the power to investigate in the other country although this would be necessary to complete its investigation.

If there is a cooperation agreement between the two countries, it can, however, seek help from the competition authority in the requested country. Depending on the terms of the cooperation agreement this help could consist of the provision of non-confidential information about the case, exchange between the staff members of both authorities on how they view the transaction or practice, exchange of confidential information (which may in some cases require a waiver), and , in rare cases, joint investigations or dawn raids executed by the competition authority of the cooperating country for the benefit of the competition authority of the requesting country. Voluntary bilateral agreements, however, do not require a prior agreement by the relevant competition authorities on which cases they will investigate.

Second, bilateral cooperation agreements which seek to facilitate the enforcement activities of the cooperating entities and to make their decisions more consistent or less contradictory usually assume that one of the obstacles to enforcement of such cases is the difficulty faced by each competition authority to gather the information which could be useful to investigate the case they pursue because some of this information is located abroad and the assumption that a protocol allowing the cooperating competition authorities to exchange information about those cases is crucial to the effective enforcement of their cases.

2 OECD (2022), International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation, available at: https://www.oecd.org/daf/competition/international-cooperation-on-competition-investigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm.

Thus, traditional cooperation agreements on competition law enforcement seek to extend the investigatory reach of the participating national competition authorities by allowing them to overcome the geographical limits of their investigatory competence.

Recently, competition law enforcement against dominant digital players has been a priority of many competition authorities.

For example, the relationship between Google and media organizations has been examined or is being examined in Australia, France, the United Kingdom, and the Netherlands, among other countries. The effects of the price parity clauses imposed by Booking.com have been examined in Austria, Australia, Belgium, France, Germany, Italy, and Sweden, to name a few. The practices of Google and Apple forcing developers to use their own in-app purchase systems have been under scrutiny in Australia, the EU, India, Indonesia, Japan, and the United States, among others.

What is remarkable, however, is that up to now there have been relatively few cases of competition authorities using bilateral cooperation agreements to deal with the practices (or the transactions entered into) by the main digital platforms even though many proceedings against these platforms have been initiated in parallel in different countries. Two reasons may explain this state of affairs.

First, the non-territoriality of the digital platforms and the globalization of the market for digital services means that the practices or the transactions entered into by large platforms very often present the same issue in many or all of the countries in which they operate because they do not operate on a series of distinguishable national markets but on a single global market. Thus, for example, the conditions under which Apple limits the capacity of complementors to inform the users of an app about the possibility to download the app more cheaply than on the Apple platform, were applicable in all countries in which Apple operated.

To investigate those issues, there is much less need for each national competition authority to get access to information located abroad than in traditional non digital cases. Indeed the practices which are potentially objectionable are usually either embedded in the governance rules established by the core platform for the ecosystem and or are practices which are implemented throughout the operations of the ecosystem. So getting access to the information which could be gathered by another competition authority is not the main difficulty for competition authorities in the digital sector.

Second, the practices of digital firms mentioned above, such as the price parity clauses favored by Booking.com or the clauses requiring that all transactions on a platform be performed through the in-app purchase system favored by Google and Apple or the use of data gathered from the traffic generated on the platform by complementors to develop products or services that will compete with those of the complementors, are likely to have fairly similar competitive implications for competition in different countries. Unless one has evidence that cultural differences make a large difference in terms of newspaper reading habits (in the case of the relationship between Google and the media) or with respect to whether users of the services of platforms single home or multi-home (in the case of the price parity clauses of Booking.com), or in the way users behave on social medias (in the case of the acquisition of Instagram by Facebook), the likelihood is that the competitive analysis of whether a particular practice restricts price competition or excludes competitors or abuses the market power of the very large platforms indulging in this practice performed by an agency in one country is likely to lead to fairly similar results in other countries. If local considerations cannot be completely ignored, they clearly are less important than in the non-digital, sector where global markets are less integrated than is the case in the digital world.

However, it is beyond dispute that the asymmetry between the technical, legal, and financial resources of the large digital platforms and the resources available to national competition authorities in many countries limits considerably the ability of these competition authorities to actively pursue anticompetitive practices or transactions in the digital sector. Indeed, the cost of competition investigations is particularly high in the digital sector because of the technical complexity of the sector, the dynamic nature of competition and the multiplicity of business models for competitors.

In view of this, it seems that traditional cooperation on competition law enforcement through exchange of information on cases individually but separately investigated by the cooperating competition authorities does not offer much direct help to competition authorities in their fight against anticompetitive practices and transactions by large digital platforms.

It also appears that if national competition authorities choose to investigate and sanction the anticompetitive practices or transactions of large digital platforms, they run the risk of exhausting their resources in those investigations. This may be one of the reasons that competition authorities have (often successfully) lobbied to be given more (*ex ante*) regulatory tools allowing them to intervene in the digital sector at a lower cost than if they had to do full-fledged analysis.

As many commentators have noted, however, such a solution is not exempt of risks and costs because ex ante regulation is a relatively unsophisticated tool.

Except in the case of bespoke regulations (such as the proposed regulation in the UK), regulations are based on the presumption that certain behaviors are anticompetitive irrespective of the context in which they are implemented (and therefore can be prohibited by regulation) while the reality is often that these behaviors can in certain circumstances be pro-efficiency (such as for example self-preferencing).

But there may be other ways to manage the cost of competition law enforcement by competition authorities in the digital sector without allowing countries to resort to somewhat unjustified presumptions and to adopt unsophisticated restrictive regulations.

A number of these new ways to cooperate can be characterized as "enhanced cooperation" instruments.

According to the OECD ICN report "enhanced co-operation" "is best considered as a spectrum of possible co-operation activities. At one end, enhanced co-operation can include informal resource sharing (e.g. case-handlers in each authority working together on the review and analysis of non-confidential information). At the other end of the spectrum, it can include deeper work-sharing arrangements, which may require a specific legal instrument. For example it can include "lead authority" models (e.g. one authority taking the lead on an investigation and attending to all procedural matters, while the other authorities contribute advice and make decisions based on the investigation undertaken by the lead authority) and "one-stop-shop" models (e.g. as is used in the EU). In addition, enhanced co-operation can include cross-appointments between authorities as well as mutual recognition of decisions where the outside decision is recognized or even, in some cases, enforced by other countries, as if it was a decision taken by the agency of these latter countries.

The digital sector could be an excellent sector candidate for the development of "enhanced cooperation" mechanisms allowing competition authorities to " share the work" on transnational practices and transactions more efficiently than through traditional enforcement of parallel cases in the cooperating jurisdictions.

These solutions would not imply that each competition authority has to complete a full-fledged investigation of each and every case on which it wants to intervene. Competition authorities could thus save resources while domestically preventing the anticompetitive practices of global digital players without resorting to the costly over-simplification implicit in most domestic ex ante regulations.

Enhanced co-operation mechanisms would allow competition authorities in a number of countries to avoid having to face the cost of large staff of digital specialists doing the same analysis as their colleagues in other jurisdictions. Co-ordination would replace traditional cooperation which has often proved to be a difficult instrument to implement.

The use of enhanced cooperation arrangements would be particularly welcome for the digital sector because of the commonalities of national situations in this global sector. As previously mentioned, the digital sector is probably one where the consideration of local circumstances is the least important to the assessment of anticompetitive practices. But there is little doubt that co-ordination mechanisms could eventually be used in other economic sectors as well.

Promoting the co-ordination of competition law enforcement through enhanced cooperation agreements may require the adoption of new legal tools allowing competition authorities to give domestic effect to foreign decisions or to issue joint decisions with foreign competition authorities. Such possibilities do raise legal questions that deserve careful consideration as to the status of these foreign decisions in the country of adoption and whether they would be appealable in the various countries where they had been adopted by national competition authorities. They also raise some issues with respect to whether their adoption would limit the possibilities of victims of the practices to introduce follow-on damage suits in the country of adoption.

Enhanced cooperation in enforcement between competition authorities has become a necessity given the global reach of large platforms and the universality of the services they provide. While more work is needed on the legal framework for enhanced cooperation, it is encouraging to note that there are already examples of the adoption of explicit or tacit enhanced cooperation mechanisms between national competition authorities concerning the digital sector.

For example, some competition authorities have already publicly stated that they will not investigate a digital case since the practice in question is being investigated elsewhere, in the US or in Europe, and that the likely solution of the case in these foreign jurisdictions will force the relevant digital platforms to change their practices. Further, in the Booking.com case, three national European

authorities (the French, Italian and Swedish authorities) issued a common decision restricting the ability of the platform to impose price parity clauses.

A more systematic assessment of enhanced means of co-ordination of competition authorities in their enforcement practices to overcome the legal difficulties associated with the more traditional exchange of confidential information on cases individually investigated by the cooperating competition authorities is urgent, particularly in view of the specific challenges to competition raised by large digital platforms.

Thus it is not surprising that when asked what future work should be undertaken in the area of cooperation on competition the respondents of a survey conducted by the OECD in 2022 indicated as the first priority " enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple competition authorities, and at the same time avoid inconsistencies among enforcement actions (as set out in Section X.5 of the 2014 OECD Recommendation)."

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