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Cooperation on Digital Competition: Principles and Practice

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR, by Assimakis Komninos[1]

Dear Readers,

The advent of *ex ante* rules to deal with digital platforms – whether we call them "regulation" or "competition" is not so important – poses the inescapable problem of international conflicts of resolution and the demand for international coherence and cooperation. On October 12, 2022, the Digital Markets Act ("DMA") will be published in the Official Journal of the EU and as of February 2024 (at the earliest), the DMA substantive obligations will be binding on "gatekeepers" designated by the European Commission. Elsewhere, such as in Germany, the UK, and Korea, such rules are already in existence or about to be introduced. The issue of international cooperation has already been posed in the relevant fora (ICN, OECD, etc.).

Not surprisingly, the G7 has taken interest with the area and the G7 digital ministers' declaration in May 2022 refers to the aim to "*further deepen cooperation, in particular through existing international and multilateral fora, on digital competition issues including with regards to platforms regulation and its implementation.*" While doing so, the concrete objective is to compile a comprehensive overview of legislative approaches "*in order to improve mutual understanding of relevant frameworks and rules in the G7, with a view to fostering greater coordination to support competitive digital markets.*" Indeed, in the following days, a further G7 meeting will be held "to facilitate an exchange on enforcement and policy approaches related to competition in digital markets" and encourage "*the continued exchange of information and experiences among G7 competition authorities.*"[2]

All this shows that the present CPI special issue is very timely. The contributors of this CPI special issue are all particularly well placed to take a position on the question of the international impact of *ex ante* rules and of the possible cooperation in the digital area. Some are more optimistic than others are but they all recognize that some form of international cooperation is absolutely necessary.

I do not believe that the difference of substantive legal standards is an obstacle to such cooperation, although clearly divergence is not good for businesses and consumers alike. Of course, procedural and jurisdictional obstacles abound. As Harry First put it 25 years ago, "the dark side of antitrust harmonization has always been procedure, not the substantive rules of antitrust."[3] Irrespective of whether substance or procedure is the main problem, the issue remains how to deal with the proliferation of ex ante rules and regulatory intervention and enforcement in this area.

Reading the contributions, one immediately realizes that there are no easy solutions. First, we have an issue of coherence among different legislative regimes and, second, an issue of divergence of specific regulatory interventions *vis-à-vis* conduct and practices that are essentially global.

Perhaps the solution is a practical one: The coherence problem can be alleviated by the de facto abstention from legislating when other jurisdictions have already legislated or by simply modelling closely the domestic rules on one of the existing legislative models. Similarly, the divergence of results problem can be resolved in practice by enforcers in one jurisdiction showing a degree of deference of enforcers in another jurisdiction, which are already dealing with a particular digital case – Frédéric Jenny calls this "enhanced cooperation." In any event, we have to welcome that all these issues are now seriously discussed.

I hope that this CPI special issue is a useful contribution to the discussion.

Sincerely,
Assimakis Komninos & the CPI Team[4]

WHITE & CASE

1 Partner, White & Case LLP; Visiting professor at Panthéon-Assas University Paris II.

2 See Ministerial Declaration of G7 Digital Ministers' meeting, 11 May 2022, paras 25-29.

3 See Harry First, "Towards an International Common Law of Competition," in: Zäch (Ed.), *Towards WTO Competition Rules, Key Issues and Comments on the WTO Report (1998) on Trade and Competition* (Kluwer Law International, 1999), p. 96.

4 CPI thanks White & Case for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

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SUMMARIES

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CPI ANTITRUST CHRONICLES December 2022

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Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

INTERNATIONAL COMPETITION COOPERATION: ARE THERE TOO MANY COOKS IN THE KITCHEN?

BY JOHN M. TALADAY & CHRISTINE RYU-NAYA[1]

1 Christine Ryu-Naya is a Special Counsel and John M. Taladay is a Partner and Chair of the Global Competition Practice of Baker Botts. The authors would like to thank Jane Antonio for her assistance in the preparation of this article. The authors have acted on behalf of two large platform companies and have acted adversely to two large platform companies. The views herein are the authors' own. The authors were not compensated for this article.

Earlier this year, the Digital Ministers of the G7 countries issued a declaration affirming their commitment to cooperation and coordination in support of effective policy instruments for use in digital markets.[2] In the midst of ongoing and (at times) heated debate around the proper role of ex ante regulation in policing tech platforms, the declaration would seem to be a welcome relief: after all, how controversial can a plan to "further deepen cooperation" and "improve mutual understanding" be? It's not exactly a "headline grabbing" statement. But there is much more complexity to that commitment than first meets the eye.

The common, superficial reaction to the idea of international cooperation in competition law tends to be: 1) of course it's a good idea, and 2) isn't this already happening? Those impressions certainly are not wrong, but they are incomplete. The latter assumption — that it's already happening — reflects the long-standing efforts among international competition authorities on *enforcement* matters. A joint report from the International Competition Network ("ICN") and Organisation for Economic Co-operation and Development ("OECD"), published in January 2021, found an "overall increase in international enforcement co-operation across all enforcement areas" and that "authorities derive significant benefits from international enforcement co-operation, regardless of their respective size and level of maturity."[3]

But the first assumption — that "of course it's a good idea" — is a much more nuanced question, particularly when departing from competition *enforcement* and straying into competition *policy design and legal implementation*. This kind of initiative arguably invokes the prospect of convergence, not just cooperation. With each jurisdictional "cook" bringing its own policy and legal flavors to the table, this convergence creates new challenges in finding the right recipe for success. In any case, with new forms of cooperation come new risks and questions that are worth examining, as we explore below.

I. COOPERATION 1.0: WHERE ARE WE COMING FROM?

First things first: what does it mean to cooperate? In the competition context, the term is used in multiple contexts, sometimes describing formal inter-governmental agreements that approach the status of a treaty, sometimes describing formal inter-agency agreements that seek to memorialize the process and substance of cooperation, and sometimes describing quite informal discussions or (non-confidential) information sharing among agency leadership or staff.[4] But, importantly, most cooperation with respect to enforcement takes place within a framework that describes, and sometimes limits, the scope of the coordination that occurs.

The 2021 ICN/OECD report comes on the heels of countless statements from international organizations, regulators, and politicians on the importance of international cooperation. The OECD has called international cooperation "key to increasing competition in a globalized world"[5] and issued a recommendation calling on members to "commit to effective international co-operation" and take concrete steps to minimize obstacles or restrictions to such efforts.[6] The OECD has published at least two lists cataloguing the cooperation agreements that exist, including seventeen agreements among governments.[7] But cooperation also extends beyond formal agreements.

There are international policy organizations like the OECD and ICN, a variety of national laws like MLATs and free trade agreements, information sharing and confidentiality waivers, regional enforcement cooperation and networks like the ECN and COMESA, and inter-governmental engagements like the G7 itself. All of these settings can reflect competition cooperation in some form, sometimes as simple as learning what other agencies are doing and thinking (like the Fordham Conference on International Antitrust Law and Policy) and sometimes fully sharing jurisdictional authority (as with the COMESA merger notification regime).[8]

Cooperation also presents an opportunity for countries to develop and refine their tools. For example, under the European Competition Network ("ECN"), the EC and Member State competition authorities inform each other of proposed decisions and take on board comments from

2 G7 Digital Ministers, Ministerial Declaration (May 11, 2022), https://www.bundesregierung.de/resource/blob/998440/2038510/e8ce1d2f3b08477eeb2933bf-2f14424a/2022-05-11-g7-ministerial-declaration-digital-ministers-meeting-en-data.pdf?download=1.

3 Int' Competition Network & OECD, OECD/ICN *Report on International Co-operation in Competition Enforcement 20* (2021), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf.

4 See generally, *Inventory of Cooperation Agreements on Competition*, OECD, https://www.oecd.org/competition/inventory-competition-agreements.htm.

5 *International Co-operation in Competition*, OECD, https://www.oecd.org/competition/internationalco-operationandcompetition.htm.

6 OECD, Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings (2014), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408#mainText.

7 See OECD, List of Government Co-Operation Agreements (2021), https://www.oecd.org/daf/competition/competition-inventory-list-of-cooperation-agreements.pdf.

8 See https://www.fordham.edu/info/20689/competition_law_institute.

other authorities. In addition to "ensur[ing] an efficient division of work" and consistent application of EU competition rules, the ECN "allows the competition authorities to pool their experience and identify best practices."[9] This can be particularly useful for authorities considering novel theories of harm or countries with relatively new antitrust enforcement agencies.

There are also bilateral engagements that occur. Recently, the U.S. Federal Trade Commission ("FTC"), U.S. Department of Justice, Antitrust Division ("DOJ"), and the European Commission DG Competition announced the EU-US Joint Technology Competition Policy Dialogue, an initiative under which the agencies will cooperate on competition policy and enforcement "overall and especially in technology sectors."[10] In the announcement, co-chairs and agency heads Lina Khan, Jonathan Kanter and Margrethe Vestager cite the agencies' "longstanding tradition of close cooperation in antitrust enforcement and policy,"[11] which was formalized in a 1991 agreement and bolstered by a 1998 agreement on the application of positive comity principles in the enforcement of competition laws.[12] While the 1991 and 1998 agreements are formal governmental agreements, the recent announcement is not a bilateral agreement, but rather reflects the intentions of the current enforcers at the helms of the agencies within the confines of the formal agreements.

In a slightly different vein, the FTC and DOJ are also signatories to the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, along with the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, the Competition Bureau of Canada ("CCB"), and the UK Competition and Markets Authority ("CMA").[13] The Framework, a "second generation" agreement designed to improve cooperation on competition investigations, includes a memorandum of understanding reinforcing existing coordination and collaboration tools and a model agreement, the latter of which is intended to serve as a template for subsequent bilateral agreements among signatories to cooperate on competition investigations.

II. COOPERATION 2.0: WHERE TO FROM HERE?

To date, much of the effort directed at international cooperation has dealt with investigations and enforcement actions. But as the discussion about proper tools to address sprawling tech platforms shifts from *ex post* to *ex ante* regulation, the scope of international cooperation is shifting as well. The declaration of the G7 Digital Ministers marks one of the first explicit references to cooperation on regulation and implementation.[14] And while cooperation on enforcement issues remains squarely in the picture, it is clear the group is shooting for a broader exchange of ideas on legislative proposals and regulation.

Discussions of international cooperation have been quick to highlight the benefits of such collaborations, underscored by photo ops of authorities announcing new MOUs or successful cross-border enforcement actions. But they neglect to mention the areas in which cooperation may be difficult or even counterproductive. And, as we explore further later, *ex ante* regulation poses a unique set of challenges for countries seeking to collaborate with others.

Let's start with the experience to date. In the competition context, even where cooperation occurs, agencies can and do reach different outcomes. The U.S. and EC have differed on a number of significant transactions and investigations over the years including Air Products and

9 Eur. Competition Network, https://competition-policy.ec.europa.eu/european-competition-network_en.

10 Press Release, Fed. Trade Comm'n, Joint Statement from FTC, DOJ Antitrust Division, and European Commission Leadership on Launch of EU-US Joint Technology Competition Policy Dialogue (Dec. 7, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/joint-statement-ftc-doj-antitrust-division-european-commission-leadership-launch-eu-us-joint.

11 *Id.*

12 See Agreement Between The Government of The United States of America and The Commission of the European Communities Regarding The Application of Their Competition Laws (Sept. 23, 1991), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0525.pdf; Agreement Between The Government of The United States of America and The European Communities on The Application of Positive Comity Principles in The Enforcement of Their Competition Laws (June 4, 1998), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/1781.pdf.

13 Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (Sept. 2020), https://www.justice.gov/atr/page/file/1311291/download [hereinafter MMACF].

14 G7, *supra* note 2, ¶ 26.

Chemicals and Air Liquide's 2000 attempt to purchase BOC Group[15] and the initial investigations into Google's search practices.[16] Just last month, the EC announced its decision to prohibit Illumina's acquisition of GRAIL;[17] less than a week later, the FTC's administrative law judge dismissed the agency's attempt to do the same.[18] This is not always a failing of competition law or cooperation.

Remember that some of these tensions are fundamental and stem from the very different legal systems and political objectives from which competition laws in the two regions have emerged.[19] Recall also that the enforcement mechanisms (i.e. prosecutorial vs. administrative) and legal systems differ markedly. And finally, the market facts in different regions often differ significantly, even where "global" geographic markets exist.

These differences also exist in among other countries, even where they might seem to be closely aligned. For example, both the CCB and the FTC investigated sodium chlorate producer Superior Plus Corp.'s proposed acquisition of Canexus Corporation. While the FTC filed an administrative complaint challenging the deal as likely to result in anticompetitive reductions in output and higher prices,[20] the CCB issued a No Action Letter closing its investigation.[21] The CCB's decision was guided by Section 96 of the Canadian Competition Act, which mandates that the Competition Tribunal shall not issue an order where a merger is likely to bring about efficiency gains that will be greater than, and offset, and anticompetitive effects from the merger. In its announcement of the result, the CCB noted while the Bureau "cooperated closely with the United States Federal Trade Commission," each authority "reviewed the effects of the transaction under its distinct legal framework."[22] Despite the differing results, it is unlikely that either agency would characterize this as an unsuccessful cooperation. Each agency conducted its own analysis, applied its own law, and reached its own conclusion. And in this case the small nuances of the laws made a difference. Also, importantly, the decision by the U.S. to challenge the deal was not undermined or frustrated by the Canadian decision to abstain.

And let's not forget that jurisdictions are often fiercely protective of their autonomy to render independent decisions. This effect is responsible for "positive comity" – e.g. where one jurisdiction would rely on another to impose and enforce a remedy without taking action itself – being mostly a theoretical exercise. It's also evident in Germany's well-known resistance to making Article 22 referrals under the EUMR.[23]

So, given the sometimes-competing objectives of avoiding conflict while preserving independence of decision-making, the question becomes whether it makes sense for governments to cooperate not just in enforcement matters but also in the alignment of policy design and legal implementation of the competition laws.

III. ENFORCEMENT, POLICY, AND LEGISLATIVE COOPERATION

Cooperation outside the sphere of case enforcement requires consideration not only of outcomes of particular cases, but also the alignment of policy, political, social, and commercial objectives. It is one thing to conclude that agencies should coordinate on a particular case where they may

15 Dan Atkinson, "BOC carve-up bid called off," The Guardian (May 10, 2000), https://www.theguardian.com/business/2000/may/11/3.

16 Statement of the Federal Trade Commission Regarding Google's Search Practices, *In the Matter of Google Inc.*, FTC File No. 111-0163 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf; Press Release, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," European Commission (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

17 Press Release, "Mergers: Commission prohibits acquisition of GRAIL by Illumina," European Commission (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5364.

18 Press Release, "Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail," Fed. Trade Comm'n (Sept. 12, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illuminas-proposed-acquisition-cancer-detection.

19 For a more detailed discussion of the underlying motivations of the U.S. and EU competition laws, *see* Douglas H. Ginsburg & John M. Taladay, *The Enduring Vitality of Comity in a Globalized World*, 24 Geo. Mason L. Rev. 1069 (2017).

20 Press Release, Fed. Trade Comm'n, FTC Challenges Proposed Merger of Canadian Chemical Companies Superior Plus Corp. and Canexus Corp (June 27, 2016), https://www.ftc.gov/news-events/news/press-releases/2016/06/ftc-challenges-proposed-merger-canadian-chemical-companies-superior-plus-corp-canexus-corp.

21 Position Statement, Competition Bureau Canada, Superior's proposed acquisition of Canexus (June 28, 2016), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.

22 *Id.*

23 See, e.g. European Union: The Latest on Merger Controls, https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2023/article/european-union-the-latest-merger-controls.

or may not elect to agree on the appropriate outcome, but quite another to conclude that they should unify on an entire body of law applicable to a major segment of global economies.

Let's take cartel enforcement as an example. It is quite easy for two authorities to determine that the effects of a particular global cartel require severe punishment, and there are many examples of the U.S. and EC, for example, cooperating and enforcing against such cartels. There is no dispute among the authorities as to whether cartel conduct has any redeeming features or whether it causes harm to consumers. There is also no dispute as to the authority or propriety of enforcement by competition agencies. But even in this area of seemingly universal agreement, there is still significant disagreement on the appropriate punishment. The U.S. and a number of other authorities believe that individual criminal sanctions, including imprisonment, are more than justified.

The EU, and the large majority of individual European authorities, disagree and strongly contest the notion that even the significant fines imposed on companies have a criminal flavor to them. There are a large number of reasons for this difference, including social views on imprisonment, legal structures and institutions, proportionality with other offenses, and presumptions that apply to the accused, among others. In short, even if the competition officials were to agree, the countries and societies they represent have legal structures and societal mores that do not allow for convergence. But case-specific enforcement cooperation is undoubtedly appropriate, even where convergence on policy design and legal structures is not. This highlights the fact that there are different risks and trade-offs attendant to wholesale convergence as compared to case-specific enforcement.

Enforcement cooperation can also significantly benefit the parties under investigation, for example in merger cases. When it works well, it can result in less redundancy in requests for information and streamlined procedures, as well as consistency of remedies. The Multilateral Mutual Assistance and Cooperation Framework, for example, suggests that participating authorities will share public information, coordinate investigative activities, facilitate voluntary witness interviews, and provide copies of publicly available records.[24] The ECN similarly includes cooperation via the exchange of evidence and other information.[25]

Cooperation on policy efforts is decidedly trickier, and the benefits less defined. The conversation around policy cooperation has increased in the wake of the Digital Markets Act, with many countries participating in the debate about how the DMA will fit with existing and contemplated competition proposals. The path forward is also murkier than in enforcement cooperation, with no agreements dictating the bounds of policy cooperation or identifying mechanisms to do so.

For example, the DMA relies heavily on the European Commission's institutional design, where DG Comp (assuming they have the lead in enforcing the DMA) acts in its administrative authority to determine "gatekeeper" status, render final decisions on conduct, and impose remedial actions. That system does not map onto systems based on a prosecutorial function, like the U.S. Thus, adopting a DMA-like approach would require a wholesale change to the very functioning of our competition institutions, granting them far more power than Congress has ceded to them in the past.

Given the relative infancy of coordination of competition design, it is difficult to enumerate all of the factors necessary for such efforts to bear fruit. It is likely this list will grow over time. At a minimum, however, it is necessary for any participants to share an understanding of the realities and idiosyncrasies of the target their policies seek to shape — in other words, alignment on "the lay of the land." Competition authorities seeking to collaborate on competition policies that promote the growth of small businesses, for example, will find themselves hard-pressed to do so if they have wildly divergent views on the current challenges faced by small businesses and whether those policies are consistent with their overall mission. Moreover, to the extent that those challenges differ by country, one country's solution might be another country's downfall. Countries engaging in such efforts also should consider the appropriate bounds of competition policy. In the authors' views, competition policy is not a means to every end (there are, of course, those who feel differently).

Finally, there is the possibility of cooperation on legislative efforts. From a practical perspective, this is the most difficult type of international cooperation, as the legislative processes and legal structures vary significantly by country. And unlike enforcement cooperation, there is no consensus on such initiatives. This may be due in part to the lack of cooperation on legislative efforts, but also reflects that there is a more diverse set of opinions on whether convergence in legislative proposals is at all desirable.

Cooperating with other countries on legislation could raise concerns about foreign influence on a country's domestic laws. It may be hard to distinguish between bilateral cooperation on legislative proposals and one country exerting influence on another to take a particular

24 MMACF, *supra* note 13, at 3.

25 See Eur. Competition Network, *supr*a note 9.

approach. The latter raises the types of questions that led to the passage of the U.S. Foreign Agents Registration Act[26] and similar rules under consideration in other countries requiring disclosure of foreign government influence.[27]

Cooperation on legislative efforts is also the most difficult type of international cooperation to justify. Unlike enforcement cooperation, there is no real opportunity to materially reduce costs for the involved authorities or parties (see previous comment on the paucity of positive comity). And given the wide diversity in the legislative process, one country's best practices for proposing and enacting a new competition law is unlikely to be useful to another.

IV. THE RISKS AND LIMITATIONS OF COOPERATION ON COMPETITION REGULATION

International cooperation, particularly in policy design and implementation, presents a series of pitfalls that countries must be careful to avoid. Chief among these is ensuring that due process is maintained, and the rights of targets and other stakeholders preserved during the development and implementation of competition policy instruments. Countries have varying due process obligations and safeguards, and the decision or desire to collaborate with other jurisdictions does not erase these obligations. For example, while information exchange is generally a low-effort way for countries to cooperate with each other, the jurisdiction offering to share information must consider whether waivers or other approvals are necessary. This has become common practice in competition enforcement, and it is critical that it become similarly established for other types of cooperation. The temptation to act quickly cannot justify the abridgement of fundamental rights.

Large competition authorities and policymakers must also realize that their actions are likely to carry significant weight with their foreign counterparts. This makes it even more crucial that the due process rights — particularly those involving presumptions and burdens of proof — are respected.

Another serious implication of these actions is to imperil the concept of comity (not positive comity but traditional comity). Actions to regulate commerce in a jurisdiction, even when well founded, can have the effect of deciding for the global market what restrictions should be placed on competition. The DMA certainly creates the risk that Europe will decide the rules for the global digital economy. And while these rules arguably may serve Europe well by protecting Europe's consumers and businesses, the question certainly should be asked whether they are also protecting the consumers and businesses of other jurisdictions or hindering the operation of markets elsewhere in ways that might limit growth, innovation, or market development. And as other jurisdictions layer additional regulation on top of the DMA, imposing their own brand of protection for their local interests, the impact on global markets can be magnified.

Regulation without regard for out-of-jurisdiction impacts creates a formula for a "least common denominator" approach. As Ginsburg & Taladay previously noted, "If competition agencies do not apply comity in the application of their laws and in limiting the extraterritorial scope of their remedies, then international competition enforcement will quickly devolve into a 'race to the bottom,' in which the country with the most restrictive competition laws will regulate commercial conduct for the entire world."[28] And let's not overlook a key point that seems to be considered too impolite to mention: the key targets of the DMA, and any companion "platform" regulations passed by other jurisdictions, are U.S. companies.[29] From an industrial policy standpoint, would crippling these businesses be considered a feature or a bug by these other jurisdictions?

Perhaps it will not be that bad. As past efforts on competition cooperation enforcement have taught us, what's good for the goose is not always good for the gander. Significant differences in size and stage of development of economies, capabilities of enforcement authorities, dynamism of markets and other factors reinforce that there is no "one size fits all" approach to competition regulation or enforcement. The assumption that every country favors *ex ante* regulation, for example, ignores individual countries' priorities, preferences, and unique competitive landscapes. The contributions from participating delegations at the OECD's December 2021 Roundtable on *Ex Ante* Regulation and Competition in Digital Markets illustrate this point clearly.[30] While much of the discussion focused on the DMA, the amendments to the German Competition Act, and forthcoming digital market initiatives from the ACCC and UK CMA, reading this as a signal of universal alignment on *ex ante* regulation would be in error.

26 Foreign Agents Registration Act ("FARA"), 22 U.S.C. § 611 et seq.

27 For example, Canada is considering the creation of a "Foreign Influence Registry" for individuals and entities that operate on behalf of foreign governments and political organizations to influence Canadian policies, while the UK has mulled a similar foreign agent registration scheme.

28 Ginsburg & Taladay, *supra* note 19, at 1090.

29 The "gatekeeper" designation under the DMA is not limited to the so-called "GAFAM" companies and the EC undoubtedly will apply that label to one or two European businesses to provide the appearance of impartiality. But there is no mistaking the intent and principal targets of the DMA.

30 See *Ex Ante Regulation and Competition in Digital Markets*, OECD, https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm.

Brazil's contribution to the session notes that CADE has never enacted an *ex ante* regulation and instead intends to focuses on *ex post* intervention where necessary.[31] To address the specific challenges posed by the digital economy, CADE utilizes training for personnel, develops studies and technical opinions in relevant fields, and "dedicates itself to competition advocacy" before other executive and legislative bodies and cooperation with other governmental entities.[32] CADE Commissioner Victor Fernandes has pushed for the authority to define its priorities on digital market investigations and build a solid body of case law — or, as he put more bluntly, "we have experience that allows us to follow our own path."[33]

While Argentina's contribution to the same OECD roundtable leaves the door open to potential regulatory action (and specifically calls for "a closer exchange of information and ideas with other competition authorities"[34]), it notes that only two of the "GAFA" companies have made *any* inroads into Argentina.[35] And of separate note, the South African competition authority recently proposed to regulate the conduct of Amazon, despite the fact that Amazon has yet to enter the South African market.[36]

Priorities may differ even between companies that agree on the need for ex ante competition regulations. Saudi Arabia recently launched a public consultation on proposed competition regulations[37] that include many of the features seen in other proposals such as the American Innovation and Choice Online Act ("AICOA"), which contains a similar prohibition on self-preferencing.[38] But where AICOA and other ex ante competition proposals focus on "covered platforms," "gatekeepers," and other euphemisms for Big Tech, the Saudi Arabian regulations would target the use of such practices by "digital content platforms," which are specifically defined to include video, audio, and gaming platforms.

The recent rush to embrace *ex ante* regulation of the digital economy risks these nuances being lost. This brings up another potential risk of international cooperation on competition policy: that the first (or most prominent) country to act has outsize influence. Countries have always sought to export their ideas — the current global dominance of K-pop come to mind — but what may be harmless for movies and pop songs is potentially much more problematic when it comes to policies and enforcement priorities.

Countries must ensure that they do not assume that the first mover is the correct one, or that they are unduly swayed by momentum (a sort of regulatory FOMO, as we have seen in particular among some agencies in Asia). Similar to enforcement cases, countries can exchange ideas and information but must reach the conclusions that best fit their laws and circumstances. After all, iron sharpens iron: the quality of laws and policies suffer without the vigorous debate, discussion, and testing that comes from different points of view.

Indeed, the actions of a particular country to move first on new proposals may reflect more on political, social, or industrial policy motivations than superior policy design. Critically, success cannot be declared on the passing of legislation, but on whether the outcome of the legislation has benefitted consumers and markets. This success should be carefully studied and measured empirically, not based on the number of "likes" or re-Tweets. Undoubtedly, certain voices will dominate the conversation. While it is true that more experienced competition authorities and regulators have much to offer their newer counterparts, focusing only on the loudest or oldest voices leaves out valuable insights from other voices, which may be speaking from an entirely different economic reality.

31 OECD, Ex-Ante Regulation and Competition in Digital Markets—Note by Brazil, DAF/COMP/WD(2021)63, ¶ 3 (Nov. 16, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)63/en/pdf.

32 *Id.* ¶ 23.

33 Paula Mariane & Ana Paula Candil, "CADE must be at forefront of digital market discussions, Councilor Fernandes says," MLex (Aug. 5, 2022), https://mlexmarketinsight.com/news/insight/cade-must-be-at-forefront-of-digital-market-discussions-councilor-fernandes-says.

34 OECD Ex-Ante Regulation and Competition in Digital Markets—Note by Argentina, DAF/COMP/WD(2021)62, ¶ 33 (Nov. 16, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)62/en/pdf.

35 *Id*, ¶ 3.

36 S. Afr. Competition Comm'n, Online Intermediation Platforms Market Inquiry – Provisional Summary Report ¶ 23 (July 2022), https://www.compcom.co.za/wp-content/uploads/2022/07/OIPMI-Provisional-Summary-Report.pdf.

37 Saudi Arabia, Commc'n & Info. Tech. Comm'n, Public consultation document on "Competition Regulations for Digital Content Platforms" (July 28, 2022), https://regulations.citc.gov.sa/en/Pages/PublishedPublicConsultations.aspx#/PublishedPublicConsulationDetails/22.

38 American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/senate-bill/2992.

V. CONCLUSION

So where does that leave the state of international cooperation? As the initiative from the G7 digital ministers and the many statements from competition authorities and international organizations show, the need for international cooperation will only increase as the digital economy continues its breakneck growth. And on its face, it is a concept that is easy to promote — who doesn't like to get along?

But digging a little deeper, particularly considering that discussion of international cooperation now encompasses competition *policy* in addition to enforcement, it is evident that international cooperation may be easy to tout, but tricky to implement. Countries seeking to work together to develop the next generation of competition policy instruments must avoid harmful assumptions or an unwarranted push toward uniformity while preserving their individual priorities and process protections.

COOPERATION ON DIGITAL COMPETITION: FROM COOPERATION TO ENHANCED COOPERATION

BY FREDERIC JENNY[1]

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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)."

TOWARD INTERNATIONAL ANTITRUST: CHALLENGES AND OPPORTUNITIES

BY AURELIEN PORTUESE[1]

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Antitrust enforcement remains a concrete policy domestically, and an eccentricity internationally. For decades, a chorus of experts has advocated in vain for stronger, more substantial cooperation between antitrust agencies regarding both their procedures and their antitrust policies.[2] The latest case in point: The pharmaceutical company Illumina can acquire its former spinoff Grail according to the administrative judge of the Federal Trade Commission ("FTC") but not according to the European Commission ("EC"), which prohibited the very acquisition that the FTC approved one week after the EC's decision.[3]

In 2001, the divergence between U.S. antitrust and European antitrust reached its apex when, again, the EC prohibited the acquisition of Honeywell by General Electric whereas the Department of Justice ("DOJ") approved the merger.[4] What have we learned in more than twenty years? How come the cooperation between antitrust agencies remains so ineffective?[5] How can we ever think of a global cooperation between antitrust agencies when the two main antitrust agencies – namely the EC and the dual federal agencies FTC/DOJ in the U.S. – cannot effectively cooperate and ultimately coordinate their policies?[6]

Global antitrust is imperative: International mergers, international cartels, and multinationals engaging with customers across borders prove the need for greater legal certainty when it comes to antitrust enforcement and policy.[7] Despite this imperative, the Balkanization of antitrust remains *de rigueur.*

I first explain this conundrum: The impossibility theorem of global antitrust prevents antitrust coordination (1). I then focus on the current trend of *ex ante* competition rules and the internationalization of a precautionary approach to antitrust which further complexifies the advent of a meaningful international antitrust framework and content (2). Finally, I suggest a simple, yet potentially powerful, solution for precipitating the advent of global antitrust: The re-activation of the institutional and policy tools already available at the World Trade Organization ("WTO") (3). The G7 and the Organization for Economic Cooperation and Development ("OECD") have a considerable role in laying the intellectual grounds to make this solution a reality.[8]

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2 Barry E. Hawk, "Internationalization of World Economies and State/Federal Antitrust Laws and Policy," Washburn Law Journal, 293-305 (1990); Andrew Guzman, "Antitrust and International Regulatory Federalism," 76 *New York University Law Review*, 1142-1163 (2001); Yusaf H. Akbar & Bernhard Mueller, "Global Competition Policy: Issues and Perspectives," 3 *Global Governance* 59-81 (1997).

3 Mark Terry, "EU Vetoes Illumina's Acquisition of Grail Despite Win is US Court" *Biospace*, September 6, 2022, https://www.biospace.com/article/us-judge-rejects-ftc-s-anti-competitive-argument-in-illumina-grail-case/

4 See, for instance, Donna E. Patterson & Carl Shapiro, "Transatlantic Divergence in GE/Honeywell: Causes and Lessons," 16 Antitrust 18-26 (2001) (asking "in an era of close cooperation and supposed convergence, how did the North American and European antitrust authorities reach diametrically opposed conclusions about the likelihood of anti-competitive effects in a high-profile transaction involving world-wide markets?"); Eleanor M. Fox, "Mergers in Global Markets: GE/Honeywell and the Future of Merger Control," 23 *University of Pennsylvania Journal of International Economic Law*, 457-468 (2002) ("world-level antitrust is a vision for the future; it will not come tomorrow.") Following the controversy, the U.S. and EU antitrust agencies issued "best practices for coordinating merger reviews. See FTC, "United States and European Union Antitrust Agencies Issue 'Best Practices' for Coordinating Merger Reviews', October 30, 2002, https://www.ftc.gov/news-events/news/press-releases/2002/10/united-states-european-union-antitrust-agencies-issue-best-practices-coordinating-merger-reviews . Apparently, nothing has dramatically improved over the last two decades.

5 The EU and the US launched a "joint technology competition policy dialogue" despite considerable divergence and absent substantive convergence. See European Commission, "EU-US launch Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in technology sector," Press Release, December 7, 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6671.

6 See, for instance, Michal Halperin & Ketan Ahuja, "How to Converge the US and European Antitrust Approaches Toward Big Tech," *ProMarket,* September 8, 2022, https://www.promarket.org/2022/09/08/how-to-converge-the-us-and-european-antitrust-approaches-toward-big-tech/ (proposing measures competition agencies can adopt to increase convergence); Michal Halperin, Ketan Ahuja, "The Case for Convergence between American and European Regulation of Big Tech," SSRN Working Paper, August 26, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194085.

7 Christopher Yoo, "Due Process in International Antitrust Enforcement: An Idea Whose Time Has Come," *CPI Antitrust Chronicle*, September 2019, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3169&context=faculty_scholarship ; Christopher Yoo, Thomas Fetzer, Shan Jiang & Yong Huang, "Due Process in Antitrust Enforcement: Normative and Comparative Perspectives," 94 Southern California Law Review, 843-926 (2021) (identifying procedural requirements to improve decision making); Michal Halperin. & Ketan Ahuja, "The Case for Convergence between American and European Regulation of Big Tech," SSRN Working Paper, August 26, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194085 ("Divergence risks a patchwork of regulatory regimes and initiatives, confusion for businesses and their customers, and needless frictions around international technology services.")

8 The G7's last effort in this area took place in November when G7 competition heads gathered for a two-day digital summit and published a compendium that nevertheless exclusively focused on "digital markets" and that failed to propose concrete "next steps." See G7 United Kingdom, "Compendium of approaches to improving competition in digital markets," November 29, 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044981/Compendium_of_approachess_to_improving_competition_in_digital_markets_publication.pdf . See also, G7 Germany, "Ministerial Declaration: G7 Digital Minister's Meeting, May 11, 2022, http://www.g7.utoronto.ca/ict/2022-declaration.html#:~:text=We%2C%20the%20Digital%20Ministers%20of,to%20be%20'Stronger%20Together'.

I. A CONUNDRUM: GLOBAL ANTITRUST'S IMPOSSIBILITY THEOREM

More than two decades ago, Professor Andrew Guzman asked, "is international antitrust possible?," and concluded that international cooperation on antitrust policy "will continue to be difficult–and may be impossible…"[9] The last two decades demonstrated that international antitrust remains an "impossible dream."[10] Indeed, how can countries restrain themselves through principles of international antitrust when they have all the incentives to free-ride and distort competition with subsidies and favorable treatment to domestic companies while subjecting foreign companies to less favorable market conditions, in other words to engage in protectionism?

Antitrust policy and enforcement fundamentally remain subject to each country's political desire to regulate and intervene on free markets according to its own political and economic environment. Not only capitalisms vary,[11] but antitrust policy and enforcement will vary according across periods of time within a specific country.

For instance, in the U.S., antitrust laws were unenforced during World War II, enforcement varies depending on the relative importance of populism at any given time, and some sectors expressly enjoy antitrust exemption to pursue industrial policy objectives or other sectoral objectives. Similarly, international antitrust appears impossible when countries shift from communism to market-based economies. In other words, beyond international disagreements on how to regulate market economies, the internal dynamics and economic change within countries render international antitrust less feasible.

Therefore, antitrust cooperation faces a dual obstacle: (i) the inevitable economic changes within societies, thus leading to changes in domestic antitrust policies, and (ii) the legitimate desire for countries to elaborate industrial policies, thus leading to distortions of competition between domestic firms with foreign companies.

Be that as it may, international antitrust remains necessary. Companies strive for greater legal certainty and quicker regulatory processes. When they engage in mergers with extraterritorial effects, not only cooperation and consistency across jurisdictions would help and avoid the conundrums such as the *Illumina/Grail* drama, but it would also reduce transaction costs with speedier decision-making processes. Also, the lack of international antitrust facilitates the formation and pervasiveness of international cartels which decrease global welfare and harm consumers across the globe due to the absence of effective tools to remedy these situations.

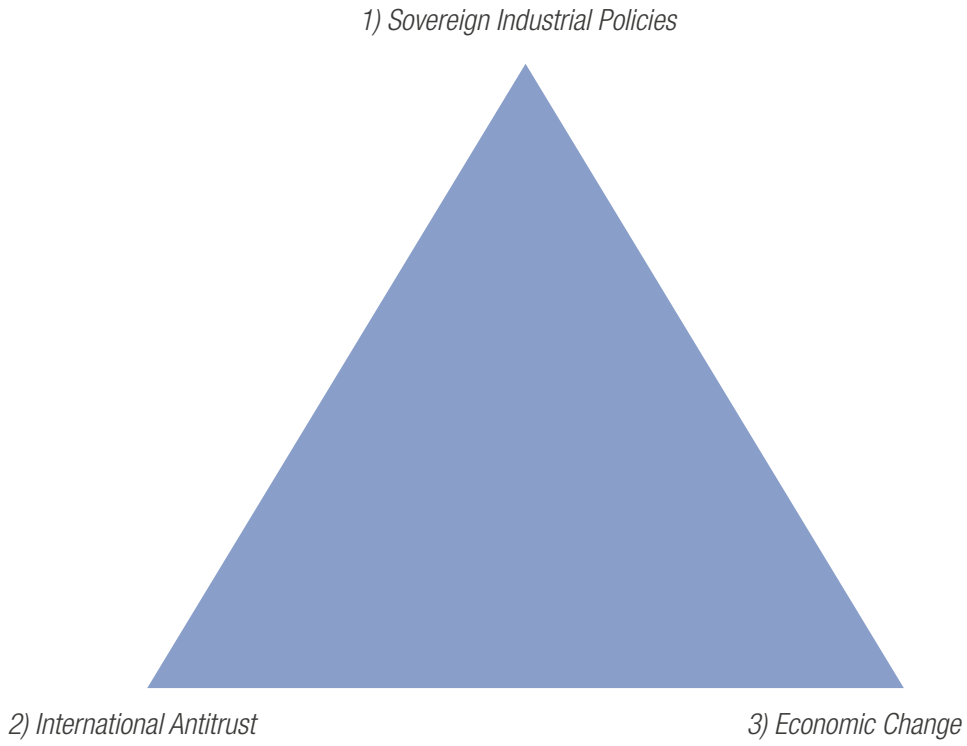
Though beneficial, international antitrust remains an impossibility. The impossibility theorem of international antitrust rests upon three decisive factors which cannot come together at any point in time:

9 Andrew T. Guzman, "Is International Antitrust Possible?" 73 *New York University Law Review*, 1501-1548, 1548 (1998). See also, Andrew Guzman, "The Case for International Antitrust," 22 *Berkeley Journal of International Law*, 355-374 (2004).

10 Diane P. Wood, "The Impossible Dream: Real International Antitrust," 12 *University of Chicago Legal Forum*, 277-313 (1992) (noting that "the search for either harmonization of national competition law rules or the establishment of any kind of supranational procedural or substantive regime seems to be an impossible dream.")

11 Peter A. Hall, David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, (Oxford University Press, 2001).

Figure 1: The Impossibility Theorem of International Antitrust



There cannot be international antitrust if countries seek sovereign industrial policies and societies face economic changes. There can nevertheless be sovereign industrial policies (1) with economic changes (3): Countries would individually adapt and adjust their market regulations and economic incentives in light of changing economic circumstances. For example, the recent crackdown by China on its domestic tech companies who were economically successful but represented a political threat to the Chinese Communist Party illustrates an industrial policy reacting to economic changes without international cooperation despite obvious extraterritorial effects.

Also, there can be international antitrust (2) with economic changes (3): By giving up sovereign industrial policies, countries can vigorously enforce cooperation in antitrust whilst reacting to economic changes. The prime example here is the European Union's competition policy which effectively prevents Member States to independently decide their market regulations and to carry on their national industrial policies without stringent and corseted European cooperation for the sake of a fair and undistorted competition within the European Union.

Finally, there could theoretically be international antitrust (2) with sovereign industrial policies (1) if no economic change would ever take place – obviously a quasi-impossible condition. International antitrust would take place in a "frozen" state of affairs where economic conditions remain forever preserved through heavy-handed regulations and subsidies that minimize any potential economic changes. This situation would be close to the economic arrangements which took place within the U.S.S.R. when each semi-sovereign Republic had their own industrial policies coupled with strong economic cooperation while minimizing economic changes and pressures from outside the U.S.S.R. This possibility comes at a prohibitive cost for taxpayers and at a considerable effort to ignore the dynamics of the free markets.

Consequently, because each of these three scenarios is impossible to achieve globally, international antitrust remains trapped in its "impossibility theorem:" Two sides of the above triangle are always achievable, but it is impossible to have the three sides of the triangle altogether.

International antitrust's impossibility theorem in practice materializes by the fact that international cooperation between antitrust agencies remains superficial: It exclusively focuses on procedural, information-sharing cooperation without substantive policy coordination.[12] Moreover, any substantive attempt to international cooperation between antitrust agencies will inevitably lead to soft law instruments which, absent

12 See Andrew Guzman, "The Case for International Antitrust," 22 *Berkeley Journal of International Law*, 355-374 (2004) ("cooperation must extend beyond the current set of information-sharing agreements and bilateral negotiations to include substantive antitrust issues.").

any legal binding effect, fall short of any tangible consequences. Indeed, the OECD, the G7, the International Competition Network ("ICN"), and the Working Group on the Interaction between Trade and Competition ("WGTCP") of the World Trade Organization ("WTO") are powerless bodies and institutions when it comes to effectively embody international antitrust. The impossibility theorem of international antitrust appears inescapable.

II. A TREND: THE INTERNATIONALIZATION OF PRECAUTIONARY ANTITRUST

The prospect of international antitrust is further rendered impossible because of a recent trend to complement, if not substitute, antitrust policy and enforcement as an *ex post* adjudication mechanism with a shift towards ex ante regulatory rules of competition. Claiming that antitrust enforcement is too slow in light of highly dynamic markets and that the outcomes of enforcement actions are too uncertain in courts, antitrust agencies and government started to suggest the adoption of laws and regulations which would regulate and prohibit some practices especially present in the digital industry.

This shift from *ex post* antitrust to *ex ante* antitrust reveals a shift towards regulating innovation: The *ex ante* rules of competition often prohibit practices which are pro-competitive and not anti-competitive. Importantly, these rules regulate highly innovative companies and practices, thereby increasing considerably the legal risks for entrepreneurs to embark in disruptive, novel practices with innovative products and services. For instance, a company deemed to be a "gatekeeper" who wishes to enter a new market may successfully do so, but would therefore be considered to have "tipped the market," leading regulators to force this company to share data and grant access to strategic proprietary assets. The prospect of sharing assets with rivals as a result of entrepreneurial efforts will deter the company to enter the new market on the first place.

To illustrate, as Facebook (Meta) enters the metaverse, its success may lead regulators to force the company into sharing data and access with rivals who have not invested in entering the metaverse and in innovating.[13] Consequently, the level of investments may decline as the company anticipates the regulatory obligations to share strategic assets with rivals in the name of "fair competition."

The legal risks created by *ex ante* antitrust are in reality not a bug but a feature of the current trend of antitrust globally. These legal risks are part of the precautionary approach regulators have increasingly adopted when it comes to highly dynamic and innovative markets such as digital markets. Indeed, the elements of the precautionary principle find a welcoming environment in the *ex ante* regulation of competition.[14]

According to the precautionary logic, because of the scientific uncertainty, antitrust regulators ought to intervene to stop the unproven, yet hypothetical, risk of irreversible harm caused to the structure of the markets, unless the market actors can demonstrate the absence of risks. The foundational elements of the precautionary principle are found as justification for ex ante antitrust: scientific uncertainty, need to regulate in absence of harm, hypothetical risks of irreversible harm, and the reversed burden of proof are all elements of the precautionary principle which constitute rationales for the passage of the EU's Digital Markets Act, but also for the FTC's rulemaking on unfair methods of competition, and other U.S. antitrust bills. Throughout the world, the internationalization of the "precautionary antitrust"–or the pervasiveness of the precautionary principle in antitrust especially regarding digital markets–appears to be an underlying trend.[15]

But the on-going trend of the internationalization of precautionary antitrust further renders impossible international antitrust. First, it demotes antitrust since the alleged slowness and ineffectiveness of traditional antitrust tools justify the adoption of precautionary antitrust. As traditional antitrust (i.e. adjudicative antitrust) becomes secondary, international antitrust itself becomes secondary: The regulation of market competition increasingly takes place through legislation rather than through enforcement actions.

Second, the unilateral adoption of precautionary antitrust prevents the emergence of international antitrust. For instance, as the EU adopted the Digital Markets Act ("DMA"), but the U.S. has not adopted antitrust bills, transatlantic discussions over antitrust cooperation and coordination appear increasingly impossible since the EU's DMA will remain outside the scope of the discussions whereas it will be the leading

13 Aurelien Portuese, "Antitrust and the Internet of Things: Addressing the market tipping fallacy," *Concurrences,* N.3-2021, 28-34, https://www2.itif.org/2021-ai-competition-law-concurrences-no3.pdf.

14 Aurelien Portuese, "Precautionary Antitrust: A Precautionary Tale in European Competition Policy" in Klaus Mathis and Avishalom Tor (Eds.) *Law and Economics of Regulation,* Economic Analysis of Law in European Legal Scholarship, 203-231 (2021).

15 Aurelien Portuese, "European Competition Enforcement and the Digital Economy: The Birthplace of Precautionary Antitrust," in Joshua D. Wright, Douglas H. Ginsburg, (Eds.) *Report on the Digital Economy*, Global Antitrust Institute, 597-651 (2020); Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust," (ITIF Report, May 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust/; Aurelien Portuese, "American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority," (ITIF Report, January 2022); Aurelien Portuese, "The Digital Markets Act: Precaution Over Innovation," Epicenter, June 2021, http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf.

text regulating competition in the digital industry. How can international antitrust ever come to fruition if transatlantic antitrust alone is out-of-reach due to regulatory divergence?

Third, the internationalization process of precautionary antitrust itself constitutes a formidable obstacle to international antitrust as a global and coherent policy. As precautionary antitrust seldom internationalizes, countries adopt ex ante rules of competition, but approaches and content differ substantially. In other words, how can antitrust agencies effectively coordinate their approaches and enforcement policies if most of traditional antitrust is stripped out in favor of precautionary antitrust for major economies whereas most of the developing economies have not embarked in the trend of adopting ex ante rules of antitrust? International antitrust suffers from the increasing divide between developed countries and developing countries when it comes to precautionary antitrust: If the former led the path to precautionary antitrust, the latter mostly have so far remained absent in such process, thereby increasingly the regulatory obstacles for the advent of international antitrust.

Precautionary antitrust is largely detrimental – because it instills a precautionary logic and increase legal risks to entrepreneurs who operate in highly dynamic markets and who strive to offer innovative products and services. Precautionary antitrust is foremost costly because it turns risk-loving entrepreneurs into risk-averse managers, a fundamental mismatch with the disruptive process of capitalism. But precautionary antitrust is also detrimental for a reason that has largely been overlooked so far: Regulatory divergence leads to a less credible advent of international antitrust at the expense of global welfare and consumers across the globe.

III. A (POSSIBLE) SOLUTION: THE REACTIVATION OF THE WTO'S WORKING GROUP

International antitrust, however difficult and impossible, can only take place in a multilateral, global forum which has the capacity to issue legally binding rules for countries to effectively enforce them and which has a dispute resolution mechanism. In that regard, only the WTO has such characteristics. Indeed, the WTO is a competent and effective multilateral institution when it comes to market regulation and cooperation.

The only direct involvement of the WTO in antitrust matters materialized in 1996. The Working Group on the Interaction between the Trade and Competition Policy ("WGTCP")–or Singapore Group – is of particular relevance. The Ministerial Conference which took place in Singapore in 1996 established the WGTCP. Paragraph 20 of the declaration stated that the WTO establishes a "working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework."[16]

The WGTCP started working on matters such as transparency; non-discrimination; procedural fairness; voluntary cooperation; capacity building; and limitation of international cartels.[17] The WTO's Working Group was obviously not a sort of international antitrust authority.[18] The decade of the 90s with its enthusiastic embrace of free-market principles across the world led to a considerable debate regarding the prospect of the substantive harmonization of competition principles in what should have become an international antitrust regime.[19]

As an institutional response to this momentum, the WTO effectively acted in the direction towards international antitrust. For instance, paragraph 25 of the ministerial declaration issued after the Doha meeting of the WTO called for the inclusion within the WTO of "core principles, including transparency, nondiscrimination and procedural fairness, and provisions ... [prohibiting] hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building."[20]

16 World Trade Organization, Ministerial Declaration, WT/MIN(96)/DEC (Dec. 18, 1996), 20.

17 Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge UK: Cambridge University Press, 2010):123.

18 See John O. McGinnis, "The Political Economy of International Antitrust Harmonization," 45 *William & Mary Law Review*, 549-594 (2003)

19 See, for instance, Eleanor M. Fox, Toward World Antitrust and Market Access, 91 American Journal of International Law, 1-25 (1997); Spencer Weber Waller, "The Internationalization of Antitrust Enforcement," *Boston University Law Review*, 343-404 (1997) ("the decline of the regulatory power of the nation state has not led to a shift of antitrust law or its enforcement to the international level."); Andrew T. Guzman, "Is International Antitrust Possible?" 73 *New York University Law Review*, 1501-1548, 1548 (1998); Andrew Guzman, "The Case for International Antitrust," 22 *Berkeley Journal of International Law*, 355-374 (2004); Diane P. Wood, "The Impossible Dream: Real International Antitrust," 12 *University of Chicago Legal Forum*, 277-313 (1992).

20 World Trade Organization, Ministerial Declaration, WT/MIN(01YDEC/1 (Nov. 20, 2001), 41 I.L.M. 746 (2001) (noting that "specific problems have raised competition law to the level of a world issue, possibly to be addressed in the context of the World Trade Organization (WTO)").

However, despite such efforts, hardly any agreement at the WTO level has addressed competition law matters in order to substantively harmonize antitrust regimes across the globe.[21] Worse, on August 1, 2004, the WTO's General Council decided that the issue of competition will no longer be "part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round."[22] The website of the WTO states that "the Working Group is currently inactive."[23]

In other words, the WTO is no longer interested in or working on bringing together antitrust regimes. The prospect of international antitrust, already illusory, has since become a chimera. It is nevertheless time to re-active the WGTCP.[24] A recent call from multiple think tanks argued that the:

> *"WTO urgently needs to re-activate the WGTCP in order to design multilateral, legally binding principles within an adequate institutional framework…A WTO-led global antitrust framework should not only lay down multilateral principles fostering coordination among antitrust agencies but should also articulate domestic principles fostering convergence of antitrust assessments….The work of the International Competition Network and the Competition Division of the OECD are also essential and necessary."*[25]

Because the Singapore Group had made "a major contribution to the initiation of a debate on a WTO competition law agenda,"[26] it is necessary to re-activate the WGTCP in order to address distortion of global competition through mercantilist and protectionist policies at the expense of global welfare. This work can potentially (and ideally) lead to a multilateral agreement following other work in areas with competition law implications such as the Telecommunications Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications,[27] the General Agreement on Trade in Services,[28] the General Agreement on Tariffs and Trade, the Agreement on Trade-Related Investment Measures,[29] the Trade-Related Aspects of Intellectual Property Rights,[30] the Agreement on Government Procurement, and the Agreement on Technical Barriers to Trade.

Of course, the obstacles for the coming to the fore of international antitrust based on substantive harmonization of competition principles are herculean. Not only domestic changes of antitrust policies, as illustrated by the recent emergence of antitrust populism, complicate international convergence, but also the internationalization of precautionary antitrust where *ex ante* rules of competition take precedence over traditional antitrust principles further make international antitrust an impossibility rather than a reality. And yet, institutional efforts need to be made despite difficulties – with the first and most straightforward effort being the re-activation of the WTO's WGTCP, to lay the ground for a potential multilateral agreement on competition matters. In that regard, the G7 nations, and more generally the OECD Competition Division can play a key role in being instrumental for garnering a momentum among nations to better use the WTO capabilities to reach what could come close to the "impossible dream" of international antitrust.[31]

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21 Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge UK: Cambridge University Press, 2010):121.

22 World Trade Organization, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579, August 2, 2004.

23 World Trade Organization, Working Group on the Interaction between Trade and Competition Policy (WGTCP)–History, Mandates, and Decisions, https://www.wto.org/english/tratop_e/comp_e/history_e.htm#singapore (Accessed on September 22 2022).

24 See, for example, Global Trade and Innovation Policy Alliance, "Principles and a Framework of Antitrust for Global Innovation," (ITIF June 2021), https://www2.itif.org/2021-gti-pa-principles-global-dynamic-antitrust.pdf

25 *Ibid*, 2. See also ITIF, "A Vision for International Antitrust at the WTO," (ITIF Event, June 30, 2021), https://itif.org/events/2021/06/30/vision-international-antitrust-wto/

26 Maher M. Dabbah, *International and Comparative Competition Law*, (Cambridge UK: Cambridge University Press, 2010):123.

27 Section 1.1 of the Fourth Protocol to the General Agreement on Trade in Services (GATS).

28 See Articles VIII, IX, and IX:2.

29 See Article 9.

30 See Article 41 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

31 See Diane P. Wood, "The Impossible Dream: Real International Antitrust," 12 *University of Chicago Legal Forum*, 277-313 (1992).

PROPOSALS FOR INTERNATIONAL COOPERATION FOR COMPETITION IN DIGITAL MARKETS

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I. INTRODUCTION

Some countries have called for several years for international cooperation for competition in digital markets. However, there are not yet concrete proposals to achieve it. The clock is ticking. Countries worldwide are investigating and enacting new competition rules against the same firms and the same practices globally. Yet, there are no concrete cooperation mechanisms that would lead to a common solution. Instruments are vital. Competition authorities and legislators are duplicating investigations and legislation, increasing compliance and enforcement costs with a risk of inconsistency — all the ingredients for ineffective and costly enforcement. International cooperation would minimize costs and ensure effective enforcement thanks to a common approach. But how to achieve it? This paper proposes three cost-effective solutions to inform decision-makers, bearing in mind the G7 Autumn 2022 discussions related to digital markets.[2]

Section II reviews the calls for international cooperation. It shows that the declarations are political without concrete policy proposals. Section III examines the benefits and costs of international cooperation. It argues that the benefits of cooperation outweigh the costs, as the digital economy is often borderless, raises cross-border competition issues, and faces legislations that are still nascent. Section IV then proposes some recommendations for international cooperation. It recommends the creation of a public database on competition cases in digital markets at the OECD with the assistance of the ICN, the development of guidance for the application of the relevant legislation at the ICN, and the creation of a center of digital expertise within the ICN. Section V concludes.

II. REVIEW OF THE CALLS FOR INTERNATIONAL COOPERATION

Some countries have called for international cooperation for competition in digital markets for several years since 2019 as competition authorities worldwide focus their work at both the enforcement and advocacy level in the digital economy.

In 2019, the G7 competition authorities, under the French presidency, issued a common understanding on tackling competition issues in digital markets.[3] This was at a time of a wave of expert reports on competition in digital markets in Japan,[4] Australia,[5] the United Kingdom,[6] the European Union,[7] and the United States.[8] The common understanding clearly stated that the borderless nature of the digital economy requires the promotion of greater international cooperation and convergence in applying competition laws through existing international and multilateral fora, such as the Organisation for Economic Co-operation and Development ("OECD") and the International Competition Network ("ICN") representing 140 competition authorities. They welcomed work commissioned by governments and competition authorities and committed to pursuing international cooperation. In other words, the only concrete proposal was the pursuit of ongoing discussions.

Furthermore, as part of the French presidency, the OECD co-chaired a conference on competition and the digital economy. Participants from the G7 competition authorities, the private sector, the OECD, and academia agreed to pursue international cooperation in the context of international fora and among competition authorities, notably through information exchange, coordination of cartel leniency programs, and joint investigations.[9]

Since then, the G7 has issued a declaration concerning competition in digital markets each year.

2 Ministerial Declaration G7 Digital Ministers' Meeting, May 11, 2022.

3 Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy," July 5, 2019.

4 Japan Fair Trade Commission, Report of the Study Group on Data and Competition Policy, June 6, 2017.

5 Australian Competition and Consumer Commission, Digital Platforms Inquiry Preliminary report, December 2018.

6 Furman et al., Unlocking Digital Competition, Report of the Digital Competition Expert Panel, March 2019.

7 Crémer et al, Competition Policy for the Digital Era, May 2019.

8 Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century (accessed August 22, 2022). https://www.ftc.gov/enforcement-policy/hearings-competition-consumer-protection.

9 OECD, Conference on Competition and the Digital Economy; Co-chairs' Summary, June 2019.

In 2021, the G7 under the UK presidency, with Australia and South Korea, issued a declaration stating that they shared policy objectives for competition in digital markets.[10] At a time of a wave of legislations to improve competition in digital markets, including in the EU,[11] the UK,[12] Germany,[13] Italy,[14] the U.S.,[15] and South Korea,[16] such a declaration was timely. They reiterated the need for international cooperation through regular dialog, exchange of information, and the alignment of international policy and enforcement approaches. In other words, the only concrete proposal was to pursue informal exchange between governments and competition authorities.

Moreover, as part of the UK presidency, the G7 competition authorities, joined by Australia, South Africa, South Korea, and India, issued a compendium of approaches to improving competition in digital markets.[17] The compendium stressed the importance of deepening international cooperation by continuing ongoing discussions and work and outlined some initiatives, such as the numerous OECD best practices roundtables dedicated to competition in digital markets.[18] Of particular importance, it referred to the current OECD work for legal models to support cooperation in the digital era. Again, the only concrete proposal was the pursuit of ongoing work.

In 2022, the G7 under the German presidency issued a declaration stressing the need to deepen international cooperation through international and multilateral fora regarding platform regulations and their implementation.[19] In this context, they will compile an overview of legislative approaches to competition, contestability, and fairness in digital markets to foster greater coordination. At a time when several of the above countries adopted and are starting the implementation of regulations to promote competition in digital markets, including in Germany,[20] South Korea,[21] and the EU,[22] the overview is relevant to ensure consistency among these countries. Moreover, G7 countries will support discussions in autumn 2022 related to enforcement and policy approaches to competition in digital markets. They also welcomed ongoing discussions among G7 competition authorities. In other words, the only concrete proposal was a compilation of an overview of legislative approaches. There are no proposals on how to foster enforcement and policy approaches.

In sum, there have been many calls for international cooperation without concrete policy proposals on how to achieve it.

III. BENEFITS AND COSTS OF INTERNATIONAL COOPERATION

International cooperation enables the achievement of various purposes, from ensuring a common understanding of a case to developing a common approach in competition decisions. However, competition authorities and businesses must balance the benefits and costs of

10 G7 Shared Policy Objectives for Competition in Digital Markets, December 15, 2021 (accessed August 22, 2022). https://www.gov.uk/government/publications/g7-shared-policy-objectives-for-competition-in-digital-markets.

11 Press release, European Commission, Europe fit for the Digital Age: Commission proposes new rules for digital platforms (December 15, 2020) (accessed August 22, 2022). https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347.

12 Competition and Markets Authority (CMA), A New Pro-Competition Regime for Digital Markets Advice of the Digital Markets Taskforce, December 2020.

13 Press release, Bundeskartellamt, Amendment of the German Act against Restraints of Competition (January 19, 2021) (accessed August 22, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html.

14 Zampa et al., *Italian Antitrust Authority's Proposed Reform of the National Antitrust Rulebook: What's in it for Digital Players?*, FRESHFIELDS BRUCKHAUS DERINGER LLP (March 29, 2021) (accessed August 22, 2022). https://technologyquotient.freshfields.com/post/102guan/italian-antitrust-authoritys-proposed-reform-of-the-national-antitrust-rulebook.

15 press release, Cicilline, Cicilline Statement on Big Tech Markup (June 24, 2021) (accessed August 22, 2022). https://cicilline.house.gov/press-release/cicilline-statement-on-big-tech-markup.

16 Choudhury, S.R, *South Korea Passes Bill Limiting Apple and Google Control Over App Store Payments*, CNBC (August 31, 2021) (accessed August 22, 2022). https://www.cnbc.com/2021/08/31/south-korea-first-country-to-curb-google-apples-in-app-billing-policies.html.

17 Compendium of Approaches to Improving Competition in Digital Markets, November 29, 2021.

18 OECD Handbook on Competition Policy in the Digital Age, 2022.

19 Ministerial Declaration G7 Digital Ministers' Meeting, *supra* note 2.

20 Germany has already started enforcing its updated competition law to digital markets against Alphabet (Google), Meta (Facebook), Apple, and Amazon. See the latest enforcement action against Amazon. Press release, Bundeskartellamt, Amazon Now Subject to Stricter Regulations – Bundeskartellamt Determines its Paramount Significance for Competition Across Markets (Section 19a GWB) (July 6, 2022) (accessed August 22, 2022). https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/06_07_2022_Amazon.html.

21 Reuters, *South Korea Approves Rules on App Store Law Targeting Apple, Google*, REUTERS (March 8, 2022) (accessed August 22, 2022). https://www.reuters.com/technology/skorea-approves-rules-app-store-law-targeting-apple-google-2022-03-08/.

22 In July 2022, the Parliament and the Council adopted the Digital Markets Act. The text now is waiting for signature of the act. European Parliament, 2020/0374(COD) Digital Markets Act (accessed August 22, 2022). https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/0374(COD)&l=en.

international cooperation. Indeed, cooperation involves costs as it requires a certain level of harmonization between countries to ensure convergence.[23]

On the benefits side, harmonization reduces legal uncertainty, transaction, and compliance costs and enables economies of scale. It internalizes interstate externalities that might create a rule from one country to another, thus preventing "a race to the bottom" to attract economic actors.

Moreover, enforcement cooperation enables competition authorities to develop stronger and better relationships with their counterparts, improve staff quality and enforcement practices, raise their international and domestic reputation, and improve knowledge of other legal systems and sectors.[24]

On the costs side, the process of harmonization in the short term might increase transaction costs due to the process of standardization, such as amending contracts. Moreover, harmonization implies that countries cannot satisfy their preferences with specific national laws. They thus cannot learn from the diversity of national laws, in which the learning process is helpful to design efficient rules. Lastly, various national laws make it more difficult for interest groups to seek more rent as they have to lobby in several jurisdictions.

Furthermore, enforcement cooperation entails some costs for competition enforcers. These include resource-related costs, time-related costs (e.g. delays in investigations), administrative and communication costs, language and time difference costs, costs related to the differences among legal systems and procedures, and risks of disclosure of confidential information.[25]

In the digital economy, the benefits of international cooperation likely outweigh the costs for three main reasons.

First, *the digital economy is often borderless*. Businesses apply the same practices globally. Cooperation allows businesses to save compliance costs and scale up cross-border. For example, competition authorities and legislators worldwide focus a lot on interoperability, namely the communication between products and services, to foster competition. The European Digital Markets Act (DMA) is the first legislation that mandates messaging services such as WhatsApp to be interoperable with rivals' equivalent services (Art. 7 DMA). As messaging services allow users to send messages worldwide, the DMA has *de facto* an impact worldwide. In this case, international cooperation ensures that other legislation or enforcement actions do not lead to opposite results that would raise compliance costs and prevent scale-up.

Second, *the digital economy often involves the same competition issues worldwide*. Competition enforcers face similar problems against firms that apply the same practices globally. The problems are different depending on the business models of each firm but are recurrent in multiple countries. Cooperation allows competition agencies to save enforcement costs and upscale their knowledge. For instance, Apple is facing several antitrust actions concerning its app store rules that prevent alternative payments, including in the UK,[26] the EU,[27] the Netherlands,[28] the U.S.,[29] South Korea,[30] and Australia.[31] However, existing remedies in the Netherlands and South Korea differ. The Dutch competition agency

23 Visscher, L., A Law and Economics View on Harmonization of Procedural Law, ROTTERDAM INSTITUTE OF LAW AND ECONOMICS (RILE) WORKING PAPER SERIES, NO. 2010/09, 2010. Wagner, H., *Economic Analysis of Cross-Border Legal Uncertainty–The Example of the European Union*, DISCUSSION PAPER NO. 371, FORTHCOMING IN: JAN SMITS (ED.), THE NEED FOR A EUROPEAN CONTRACT LAW. EMPIRICAL AND LEGAL PERSPECTIVES, GRONINGEN: EUROPA LAW PUBLISHING 2005, October 2004. Bergh, R. and Visscher, L., *The Principles of European Tort Law: The Right Path to Harmonisation?*, EUROPEAN REVIEW OF PRIVATE LAW 4-2006, 2006.

24 OECD and ICN, OECD/ICN Report on International Co-Operation in Competition Enforcement, 2021, p. 138.

25 *Ibid.* pp. 136-138.

26 Press release, CMA, CMA Investigates Apple Over Suspected Anti-Competitive Behaviour, (March 4, 2021) (accessed August 22, 2022). https://www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour.

27 Press release, European Commission, Antitrust: Commission Sends Statement of Objections to Apple on App Store Rules for Music Streaming Providers (April 30, 2021) (accessed August 22, 2022). https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061.

28 Press release, Authority for Consumers & Markets (ACM), ACM: Apple Changes Unfair Conditions, Allows Alternative Payments Methods in Dating Apps (June 11, 2022) (accessed August 22, 2022). https://www.acm.nl/en/publications/acm-apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps.

29 Nellis, S., *U.S. Judge Denies Apple's Request for Pause of 'Fortnite' Antitrust Orders*, Reuters (November 9, 2021) (accessed August 22, 2022). https://www.reuters.com/technology/us-judge-skeptical-apples-request-pause-fortnite-antitrust-orders-2021-11-09/.

30 Reuters, *South Korea to Probe App Store Operators Over Suspected In-App Payment Violations*, REUTERS (August 9, 2022) (accessed August 22, 2022). https://www.reuters.com/technology/skorea-probe-app-store-operators-over-suspected-in-app-payment-violations-2022-08-09/.

31 Press release, ACCC, *Dominance of Apple and Google's App Stores Impacting Competition and Consumers* (April 28, 2021) (accessed August 22, 2022). https://www.accc.gov.au/media-release/dominance-of-apple-and-google's-app-stores-impacting-competition-and-consumers.

prevented Apple from imposing on dating apps to create an alternative version of their apps to use third-party payments.[32] By contrast, the South Korean competition authority allowed it.[33] Both countries allow Apple to charge developers a commission fee to use alternative payments, whereas complainants seek to bypass Apple's commission fee for in-app purchases. In the EU, the Commission could impose a new requirement to prevent the commission fee. In that case, Apple would face three interpretations of the same rule mandating alternative payments that conflict with each other, leading to inconsistency. In that case, international cooperation ensures that competition authorities share knowledge to guarantee consistency.

Third, *the digital economy faces legislations that are still nascent*. Legislators worldwide are considering new legal instruments to deal with competition issues in the digital economy. Yet, only Germany, the EU, and South Korea have specific rules. Only Germany has started to enforce its new competition law to digital markets by designing firms falling within the scope of the law and by opening or expanding existing antitrust investigations. Cooperation allows enforcers to improve their knowledge of other nascent national laws and businesses to benefit from greater legal certainty on how they will deal with new competition issues. Moreover, as the legislative regimes are still young, the cost of harmonization is low compared to the benefits.

Of course, the benefits and costs and the effectiveness of international cooperation depend on the instruments for cooperation.

IV. RECOMMENDATIONS FOR INTERNATIONAL COOPERATION

Instruments for international cooperation already exist. These include: informal (e.g. information exchanges) and formal cooperation (e.g. information exchange with confidentiality waivers); formal agreements (e.g. Memorandums of understanding between competition authorities); regional enforcement cooperation (e.g. the European Competition Network); notification of planned or current investigations; comity that takes into account other jurisdictions' interests; assistance in investigations (e.g. to gather evidence in a different territory); enhanced cooperation (e.g. resource-sharing, work-sharing, including lead enforcement agency and joint investigative teams); and mutual recognition of decisions.[34]

However, international cooperation faces limitations due to resources, coordination, legal barriers, trust and reciprocity, and other practical issues such as language or time differences.[35] In particular, legal obstacles related to the exchange of confidential information, assistance in investigations, and enhanced cooperation might require changes in national laws that will likely take time.

The OECD is currently working on improving international cooperation following a 2019 survey from competition authorities worldwide in the context of a joint report by the OECD and ICN on international cooperation in competition enforcement. It will work on developing enforcement cooperation work-products and networks, providing policy and practical support to develop effective regional enforcement, improving transparency and trust, and removing legal barriers to cooperation. Despite respondents calling for future OECD work to focus on effective enforcement cooperation related to digital economy issues,[36] the OECD and ICN did not outline any specific areas of focus to address it.[37]

The digital economy raises specific issues for international cooperation due to the cross-border and cross-regulatory nature of competition issues, requiring new and complex digital skills and tools to analyze data and algorithms. It is worth noting that some traditional non-digital sectors, such as automotive or insurance, are likely to face similar issues due to the digitalization of the economy.[38] Yet, international cooperation will occur in these sectors only in cross-border cases or if the competition issues of a national actor are similar in different countries.

32 Press release, ACM, ACM: Developing a New App is an Unnecessary and Unreasonable Condition that Apple Imposes on Dating-App Providers (February 14, 2022) (accessed August 23, 2022). https://www.acm.nl/en/publications/acm-developing-new-app-unnecessary-and-unreasonable-condition-apple-imposes-dating-app-providers.

33 Apple, Distributing Apps Using a Third-Party Payment Provider in South Korea (accessed August 22, 2022). https://developer.apple.com/support/storekit-external-entitlement-kr/.

34 OECD and ICN, *supra* note 24, pp. 61-68.

35 *Ibid.* pp. 129-140.

36 *Ibid.* p. 186.

37 *Ibid.* pp 183-202.

38 Speech, European Commission, Speech by EVP Vestager at the Fordham's 49th Annual Conference on International Antitrust Law and Policy "Antitrust for the Digital Age" (September 16, 2022) (accessed September 19, 2022). https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5590.

Some authors have thus called for establishing new international bodies, such as a Global Digital and Data Regulator aiming to create a global regulatory framework for the internet and data, and a Global Competition Authority seeking to deal with global competition issues.[39] Yet, the latter necessitates high operational costs and a political will among countries to create new international bodies, which is highly unrealistic in the current geopolitical context.

However, some jurisdictions have created new domestic bodies to deal with the cross-regulatory nature of competition cases. The UK launched in 2020 the Digital Regulation Cooperation Forum (DRCF) between the competition, data protection, telecommunication, and financial authorities to ensure greater cooperation on digital issues by setting joint projects, approaches, and teams.[40] France created in 2020 the digital platform expertise pole ("*Pôle d'expertise de la Régulation Numérique* ("PEReN") in charge of helping state administrations, including the French competition authority, to tackle digital issues by supporting them with data science skills and tools.[41] Last, the DMA sets up a high-level group composed of the European bodies of the competition, data protection, consumer protection, telecommunication, and audiovisual media authorities, to provide advice and expertise to the Commission in the implementation of the DMA and to ensure a consistent regulatory approach across different legal regimes (Art. 40 DMA). At best, if successful, such cooperation models between different authorities should be elevated at the international level to solve cross-border and cross-regulatory issues. For instance, some competition, consumer protection, and data protection authorities have investigated WhatsApp's privacy change to share some data with Facebook without giving a choice to users in 2017 and 2021.[42] However, such international cooperation is likely to take several years as it is already difficult to coordinate between authorities at the national level.

While these domestic or supranational solutions are welcome to improve enforcement cooperation among various regulatory fields, they do not amount to international cooperation mechanisms. In particular, the digital economy raises specific issues related to the application of competition law, not so much associated with substantive or procedural laws. Therefore, recommendations to improve international cooperation on digital matters should focus on implementation and enforcement. In this context, the OECD and ICN should focus their work on the below three cost-effective solutions that enable effective international cooperation on digital issues at the least cost.

First, *the OECD, with the assistance of the ICN, should create a public database on past and ongoing competition cases in digital markets*. Competition authorities might not be aware of ongoing investigations in other jurisdictions. In this context, the OECD should create a public database on cases with a non-confidential summary, mentioning the alleged infringer and infringement to competition and the status of the case. The OECD is already familiar with such practices, as it has created a database on international cartels.[43] Therefore, the database would enable competition authorities to be aware of ongoing issues to timely and effectively coordinate their enforcement actions.

Second, *The ICN should develop guidance for the application of legislation dealing with digital issues*. Guidance is a flexible tool that can influence substantive or procedural laws. In this regard, such guidance enables interoperability among national laws while preserving the regulatory autonomy of each country. The implication is that the guidance on the assessment of competition issues neither forces a country with a different legal regime to change its law nor to adopt the rules from the most restrictive regime, as the guidance is interpretative rather than prescriptive. In other words, the guidance helps interpret an issue pursuant to the national legal regime without changing it. The ICN already works on this aspect. For example, a 2020 ICN survey report outlines that it is considering guidance on the assessment of dominance in digital markets.[44] Respondents to this survey also pointed out that guidance would be welcome to deal with other digital issues, including, among other things, market definition, theories of harm and conduct (including zero pricing), effects analysis, and remedies. In this context, the ICN guidance would enable competition authorities to understand better how to tackle digital issues consistently.

Third, *the ICN should support within its network the creation of a center of digital expertise*. Digital issues require complex digital skills and tools. Yet, competition authorities might not have the resources and tools to deal with that due to resource constraints. In this context, the ICN should create a center of digital expertise composed of the digital economy unit of each member. It would provide technical support by developing digital tools for ICN members in dealing with digital issues. It could even provide assistance for investigations and enhanced cooperation in the remit of existing international instruments. The center of expertise would thus offer the specific skills and tools to enforce digital issues efficiently and effectively.

39 Gawer, A., *Big Data: Bringing Competition Policy to the Digital Era*, OECD, December 16, 2016.

40 The Digital Regulation Cooperation Forum (accessed August 23, 2022). https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum.

41 Pôle d'expertise de la Régulation Numérique (accessed August 23, 2022). https://www.peren.gouv.fr/en/equipe/.

42 Carugati, C., The Antirust Privacy Dilemma, 2021.

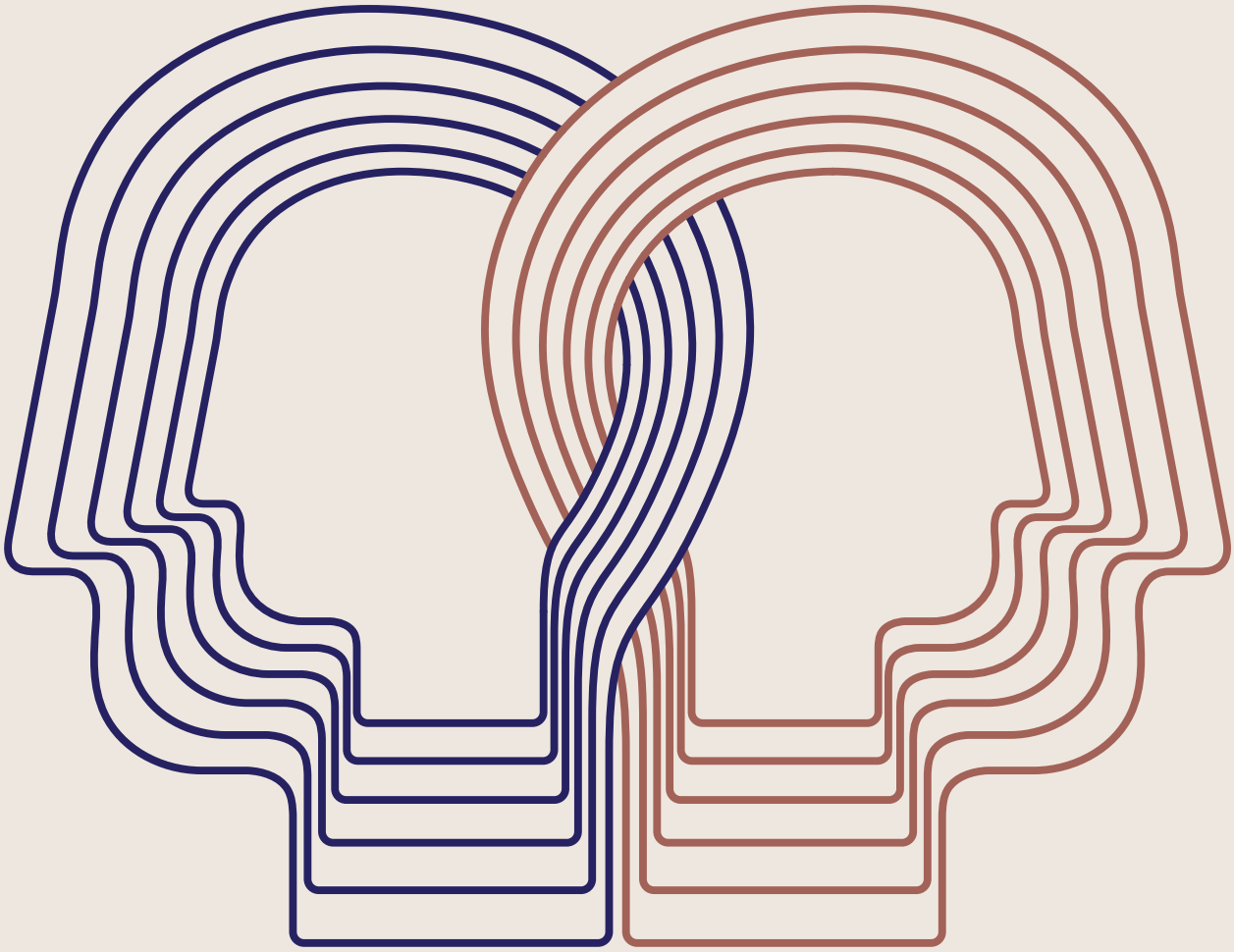
43 The OECD international cartels database (accessed August 23, 2022). https://qdd.oecd.org/subject.aspx?Subject=OECD_HIC.

44 ICN, Report on the Results of the ICN Survey on Dominance/Substantial Market Power in Digital Markets, 2020, pp. 31-34.

V. CONCLUSION

International cooperation is crucial to cross-border enforcement in the digital economy. After several years of calls to improve international cooperation, the G7 countries and international organizations, including the OECD and ICN, should now focus their work on concrete and actionable proposals to achieve it. This paper offers some realistic, cost-effective solutions in the context of existing international fora. The benefits stemming from implementing these recommendations would reduce enforcement and compliance costs for both competition authorities and businesses, while ensuring greater legal certainty.

DESIGNING A COOPERATION FRAMEWORK FOR REGULATING COMPETITION IN DIGITAL MARKETS – LESSONS FROM TRANSNATIONAL MERGER CONTROL



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I. INTRODUCTION

There is an increasing interest in regulating competition in digital markets, with amendments to some antitrust laws and new regulatory frameworks emerging in a number of jurisdictions. Some firms will face a kaleidoscope of rules and regulators controlling their conduct as agencies try and make markets work to achieve more competition and improve consumer welfare. It has been recognized by the G7 that some form of cooperation can serve to assist firms and regulators alike as they apply the new rules, in particular as the enforcers in these countries will be in the front line. What sort of cooperation framework might be adopted?

In the field of merger control, we see a successful global system by which transactions are notified in multiple jurisdictions, subjected to synchronized and broadly convergent regulatory scrutiny, and frequently addressed with multiple agencies agreeing on solutions and announcing these on the same day. What is it that has made cooperation in the field of mergers a success? And what can we learn from it when we move to facilitate cooperation in digital market regulation?

In this paper we claim that the voluntary multilateral analysis of discrete cases by multiple agencies is the most immediate and useful step to facilitate global coordination. The story of cooperation in merger control reveal agencies are able to coordinate both on how to address competition concerns and also learn from each other in shaping merger control in light of new developments. The mutual trust that is generated by working on single cases, we suggest, creates an environment that allows for wider strategic reflections as well as deeper collaboration than is possible under other institutional settings.

II. COOPERATION IN MERGER CONTROL – THE INGREDIENTS FOR SUCCESS

If we trace the history of international antitrust relations, the first significant moment of formal cooperation started with a bilateral agreement between the EU and the U.S., which was motivated principally by the arrival of the EU Merger Regulation.[2] The 1991 EU-U.S. agreement regarding the application of their competition laws provides a process by which coordination in enforcement is facilitated by ensuring that each party notifies the other well in advance "to enable the other Party's views to be taken into account."[3] The agreement recognizes that enforcement coordination is particularly useful when it can allow for a more efficient use of resources, improve the information available to reach a decision and thereby make law enforcement more effective. It is also recognized that cooperation can reduce costs incurred by persons subject to the enforcement activities of multiple agencies.[4] A significant number of mergers have been reviewed by the two agencies jointly. Even relatively early on during the dot com bubble for example, the two collaborated in exploring competition risks in emerging digital markets.[5] Frequently, agencies report that these interactions are "a model of international cooperation between the United States and the European Commission."[6]

Cooperation was stepped up in 2002 with a document setting out Best Practices on Cooperation in Merger Investigations.[7] This is much more salient than the much-discussed transatlantic spats in *Boeing/MDD* and *GE/Honeywell*, which remain isolated cases in a set of merger decisions where the agencies coordinate and agree on how to handle mergers. The Best Practices are a reaction to the divergences identified at the time and indicate a willingness to coordinate timetables, to extend coordination with other agencies that may be reviewing the same merger, to organize joint calls with parties, and to engage in joint discussions about market delineation, theories of harm and remedies.

The document reveals the mutual trust the two agencies place on each other's capacities and their commitment to reach convergent decisions whenever possible. This is evidenced by findings that contacts between the two occur virtually on a daily basis.[8] There is no commit-

2 R. Brandenburger "Transatlantic Antitrust: Past and Present" (2011) 2(1) Journal of European Competition Law and Practice 78.

3 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws [1995] OJ L95/47, Article II(3).

4 *Ibid.* Art IV.

5 Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws 1 January 2000 to 31 December 2000 (2002) 45 final.

6 U.S. Dept of Justice, "Justice Department Will Not Challenge Cisco's Acquisition of Tandberg" (29 March 2010).

7 This was updated in 2011 and is available here: https://competition-policy.ec.europa.eu/system/files/2021-06/US-EU_cooperation-in-mergers_best_practices_2011_en.pdf.

8 Report on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws 1 January 2001 to 31 December 2001, COM (2002) 505 final p.3.

ment to align in every instance but even tricky cases raising new issues like *Bayer/Monsanto* which was reviewed by fifteen different agencies, allowed for discussions on relevant markets and theories of harm. Cooperation also extends to supervising remedies, so in *ThermoFisher/Life Technologies* the FTC and EU also cooperated in approving GE Healthcare as the divestiture buyer on the same day.

A further feature of merger control that helps oil cooperation is that parties often waive confidentiality so as to allow in-depth inter-agency communication, facilitating all elements of analysis, from market definition to merger remedies. Parties also often anticipate competition concerns by offering divestitures early and contact the competition authorities in advance of notification. This reveals that a further ingredient to successful transnational cooperation is the involvement of the parties during the review process. A good example of this is the *InBev/SAB Miller* merger, which was notified in a large number of jurisdictions, the parties ready with proposed divestitures in those markets which raised competition concerns.

Cooperation on discrete cases is also supported by the Mergers Working Group instituted in 1999. Dialogue with the U.S. assisted the EU in drafting its remedies notice and the new test for the merger regulation in 2004, while in the recent revision of the U.S. Guidelines on Vertical Mergers one detects that lessons from the EU were drawn.

Moreover, global merger regulation is not frustrated by certain jurisdictions applying somewhat different standards of merger assessment. For example, in *InBev/SAB Miller* the remedies package in South Africa was more extensive because of the wider range of public interest grounds considered when clearing a merger, in particular concerns about the economic participation of historically disadvantaged persons. Insofar as these differences are known and applied in a consistent and transparent manner, competition agencies will know the limits of cooperation and work within these.

In addition, when divergences are identified, like in the assessment of mergers in the pharmaceutical sector, a new multilateral working group for this sector was formed in 2021 which includes the European Commission, the Canadian Competition Bureau, the Federal Trade Commission, and the UK Competition and Markets Authority. Its ambition is to build a new approach to pharmaceutical mergers.[9] This quick setup of a working group was only possible given the longstanding interactions among agencies across a wide range of merger decisions.

III. LESSONS FROM COOPERATION IN MERGER CONTROL

What we see in merger control then are repeated instances of collaboration in discrete cases, the incremental development of good practices to deepen collaboration, an atmosphere of mutual trust among agencies, a collaborative attitude from firms during the regulatory process, and a mechanism that tolerates some regulatory divergence. Can one reproduce the cooperation we see in merger control to antitrust more generally, and to the regulation of digital markets more specifically? At first sight, some barriers seem to exist.

The first is that mergers are compulsorily notified ex ante while anticompetitive conduct is identified ex post and prosecution is discretionary. This makes coordination less feasible because one cannot generate the same kind of frequent interaction. However, this might become less of an issue as more jurisdictions move to ex ante regulation, and the same firms may be designated for ex ante regulation in multiple jurisdictions. Even in the context of ex post enforcement, the first agency is expected to notify the others of its competition concerns, which may motivate similar enforcement efforts or start a discussion among agencies about the relevant markets being examined and the competition concerns. Moreover, merger control will continue to apply to transactions in digital markets, which can serve as a platform to identify competition concerns for the purposes of ex post enforcement as well. A working group to discuss mergers of firms whose business model is data driven can easily be created in light of the differences seen in the *Google/Fitbit* merger.[10] By widening cooperation in the analysis of mergers in digital markets, agencies will become aware of issues that are relevant also in antitrust and regulation: notions of market definition and market power as well as competition concerns identified in ex ante merger analysis are just as relevant when examining unilateral conduct.

Second, there is a punitive element in antitrust which will make parties less willing to waive confidentiality and collaborate with agencies. However, if large platforms are expected to provide a remedy to a competition or regulatory concern that is shared among a number of jurisdictions, then there can be incentives on the part of the firm to waive confidentiality at the stage of remedy implementation to secure a global package of remedies. Firms might prefer settlement on terms that are less disruptive to their business model than a long running battle that leads to divestitures. Agencies might likewise prefer a less than perfect remedy today than an optimal, court-sanctioned remedy decades later when market conditions have changed beyond recognition.

9 Federal Trade Commission, FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers (Press Release, 16 March 2021).

10 The merger was cleared by the European Commission, but it is subject to analysis as a completed merger in Australia.

Another fundamental issue is that there is likely to be more division about how to regulate unilateral conduct than there is in merger control. However, at the time of writing there is some convergence – the many expert reports that have been produced in many jurisdictions exhibit a shared understanding of how digital markets work and the market failures that need to be addressed. Agencies may differ when it comes to remedying market failures but there is more consensus on the competition concerns than in the past.

In sum, while the regulation of competition in digital markets does not have all the attributes which made cooperation in merger control the success story that it is today, there are signs that some G7 jurisdictions will prioritize antitrust and regulatory efforts in certain digital markets and if so, agreements to keep each other informed can stimulate coordination in investigations (think of coordinated dawn raids in cartel investigations), collaboration in identifying market failures and further cooperation in imposing remedies. Firms might prefer to engage in regulatory dialogue with multiple regulators as a means of avoiding lengthy legal processes if they challenge each agency in turn. Moreover, as we discuss below, cooperation in handling specific cases can yield a number of learning opportunities. However, before moving to consider this, we reflect on the possible role existing transnational institutions might play and why we favor the pragmatic collaboration just described.

IV. THE LIMITS OF EXISTING INSTITUTIONS

Transnational bodies like the International Competition Network ("ICN") or the Organization for Economic Cooperation and Development ("OECD") might be seen as natural orchestrators of global digital market regulation, but both have limits.

The ICN has some 140 members globally. This virtual network relies on Working Groups consisting of its members that operate produce recommendations on best practices. While these recommendations provide guidance to ICN members, they are free to implement or disregard recommendations as they see fit. The creation of a new Working Group – or subgroups – on digital markets may aid the deepening of cooperation. However, it is questionable whether this forum can achieve the depth of desired cooperation within this large group of countries. It is also doubtful whether all ICN members have digital regulation as a priority; conversely the ICN might need to extend its remit to include other regulatory bodies from all these jurisdictions to be fully effective.

The depth of cooperation through the ICN may be hindered by the nature of collaborative efforts and the products delivered by the ICN. As ICN members are free to implement or disregard any outcomes, it is questionable whether reliance on ICN recommendations leads to a higher level of convergence between competition policy and regulatory frameworks in digital markets without collaboration on the ground in discrete cases. There is a risk that any agreed substantive standard may be pitched at a high level of generality. Procedurally, membership of the ICN does not necessarily add much to facilitate case-by-case collaboration. Moreover, it has been argued that legal and practical barriers for cooperation are difficult to resolve through cooperation within the ICN itself.[11]

The deepening of cooperation between G7 members specifically is further limited by the global nature of the ICN. Firstly, Working Groups should be open to participation by all ICN members.[12] It is undesirable that G7 members form closed subgroups or working groups within the ICN which may lead to the exclusion of other global competition authorities. Alternatively, having G7 members set an agenda on digital markets within the ICN may lead to frictions with other ICN members which maintain different competition norms, have different interests or different access to resources as G7 members.[13] It may also lead to criticisms that it is again a small group of ICN members that dictates the discourse on how to proceed with novel and complex issues.[14]

In sum, while the ICN is a successful and dynamic transnational network, its membership is very extensive, and it is not clear that many competition authorities will prioritize enforcement in digital markets or introduce fresh regulations. Accordingly, while the ICN facilitates conversations about convergence, informed divergence, and cooperation in identifying best practices, it might be too large a forum to facilitate this type of discussion.

Similar observations can be made regarding collaboration through the OECD. While the OECD will continue to facilitate conversations, this forum is complementary to the daily work of enforcers. The OECD does provide the in-depth research and extensive dissemination of infor-

11 H. Abu Karky, "The Impact of the International Competition Network on Competition Advocacy and Global Competition Collaboration" (2019) 40 ECLR 10.

12 M. Coppola, E. Kraus, C. Lagdameo, P. O'Brien & R. Tritell, "(Nearly) A Century with the ICN," *Competition Policy International* (2020).

13 H.M. Hollman & W.E. Kovacic, "The International Competition Network: Its Past, Current and Future Role," (2011) 20 Minnesota Journal of International Law 274.

14 Abu Karky (above n 11) states that some agencies he sampled expressed the view that the ICN needs "fresh air." In some respects the Network appears to be directed by the same group of people and certain agencies and people with critical opinions on matters pertaining to its mandate and operation are not heard. It should be noted that the group of respondents to this research was relatively small (eighteen members), and that these respondents were often smaller countries with younger competition authorities. The results however remain important in showing the limits of global organizations coordinating many jurisdictions.

mation that will aid competition authorities in creating convergence in their Guidelines to competition assessments for digital markets. This may in turn minimize legal and practical barriers for cooperation. In 2022, the OECD has released a background paper on forms and methods for international cooperation in competition policy and beyond. This background paper also suggests the introduction of new multilateral (binding) agreements between parties to facilitate cooperation.[15] However, it recognizes that political will is a prerequisite for a binding agreement that could facilitate deeper levels of cooperation among members.

Moreover, any further-reaching form of cooperation requires that the differences in legal interpretations and legal constraints on information sharing are minimized. Multilateral agreements between the parties could allow for highly intense cooperation including the exchange of sensitive information and evidence (similar to the waiver of confidentiality in EU-U.S. cooperation on mergers) or even mutual recognition of (aspects of) competition law decisions. The European Competition Network ("ECN") is an example of far-reaching cooperation between the European Commission and the EU's National Competition Authorities.

The underlying ECN+ Directive confers powers on these competition authorities to facilitate cross-border cooperation and convergence on several issues related to competition law enforcement.[16] A multilateral agreement between G7 members could establish similar rules on collaboration and coherent enforcement. However, the collaboration achieved by the ECN required the development of a shared competition culture through many years of gradual converge, the alignment of substantive laws some fifteen years before the ECN+ Directive was proposed and a broadly comparable legal and institutional framework among the Member States. Can we really expect to see the depth of collaboration among EU agencies to emerge quickly at global level even if there is political will?

V. LEARNING BY DOING

Returning to our favored model of collaboration via regular bilateral and multilateral contacts based on live cases, this holds an additional advantage: agencies can benefit from the experience of others. There are three types of learning opportunities that our framework facilitates.

The first is that agencies can stimulate each other to consider similar types of conduct found problematic in one jurisdiction. For example, the Commission's three Google decisions have led U.S. Federal and State authorities to investigate similar conduct.[17] In their complaint vis-à-vis general search services, the DOJ notes similar concerns as expressed by the Commission in their Google Shopping and Google Android cases.[18] The case by the DOJ is building on findings of fact and evidence accrued by the Commission in a decade long investigation, potentially speeding up antitrust proceedings.

While the complaint by the DOJ follows the Commission's decisions relatively quickly, an example of belated repeated investigations can be found in the complaint by the state of California against Amazon. This complaint relates to Amazon's use of parity clauses to protect as part of a monopolization strategy. The European Commission has investigated Amazon's use of parity clauses in their role as a bookseller as early as 2017.[19] Enhanced cooperation between different G7 members may help the detection of anti-competitive conduct across jurisdictions. When competition law policy across jurisdictions becomes increasingly converged, this could lead to faster enforcement actions as it becomes more likely that behavior which is considered anti-competitive in one jurisdiction is also likely to be found anti-competitive in another. This is of course without prejudice to the ability of the competition authority to assess the facts in light of national circumstances.

Second, where competition policy between jurisdictions is divergent, there is room to learn from one another in how investigations are conducted. The recent complaints against Facebook by the *Bundeskartellamt* ("BKA") and the FTC for example reveal different ways of assessing market power. The FTC complaint introduces novel considerations on how social media markets should be defined. The FTC primarily relies on

15 OECD, Thinking out of the Competition Box: Enforcement Co-operation in Other Policy Areas, OECD Competition Policy Roundtable Background Note (2022).

16 Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive).

17 For a preliminary comparative assessment see Monti "Taming Digital Monopolies: A Comparative Account of the Evolution of Antitrust and Regulation in the European Union and the United States" (2022) 67(1) Antitrust Bulletin 40 and Monti and Ruiz Feases, "The case against Google: Has the U.S. department of justice become European?" (2021) Antitrust 26.

18 For instance, the positioning and representation of Google Shopping results, the use of anti-fragmentation and Mobile Application Distribution Agreements, as well as revenue sharing agreements to ensure *de facto* exclusivity of Google Search as the access point for internet for consumers. conduct; *United States v. Google LLC*, Case 1:20-cv-03010, filed 20 October 2020.

19 CASE AT.40153, E-book MFNs and related matters (Amazon), Commission Decision of 4 May 2017, *C(2017) 2876 final.*

Facebook's connection to a "social graph" to distinguish it from other forms of online networks and identify market power.[20] The BKA relied on alternative measures, considering the number of users, time spent on the platform and other indicia such as the strength of network effects. This competition authority was also more ambiguous towards whether other products such as YouTube, Snapchat or Twitter should be included in the relevant market.[21] The substance of the issue in the German case against Facebook also differed strongly. Where the FTC focused on monopolization in the market for social media, the German case intervened against excessive collection and combining of data.

Exchanging information and experiences on these different approaches to investigating competition law and harms may help to develop new insights and best practices. This could result in convergence over time. The question remains however whether each competition authority has the interest in pursuing certain cases or intervening against certain types of behavior. This depends on the objectives pursued by competition policy and the framing of the legal text.

Third, and more ambitiously, authorities can learn from the effects of regulation that each of them achieves with their intervention. Rather than counting judicial victories or measuring the degree of convergence, a helpful exercise would be for each authority to identify the impact that intervention has had on the market. If, as is foreseeable, there will remain some degree of divergence in how agencies select cases or apply remedies, this creates a setting where superior practices can emerge. This is something which is signaled as a task for the working group on pharmaceutical mergers where one of the points of cooperation is to explore what divestitures work and what makes for a successful divestiture buyer. This harnesses divergences that result from the application of different standards as a mechanism for identifying, ex post, what has worked best and encourages the refinement of national approaches in the light of lessons learned from ex post review.

VI. CONCLUSION

Too often talk of cooperation leads to lofty statements of ambition and vague discussions. The key point we make here is that nothing facilitates cooperation like agency officials working together and delving into the details of how markets are to be regulated by considering live cases. Coordination with other agencies in this process can enrich the regulatory process and dialogue with the regulated entities can reduce information asymmetries and lead to better informed intervention that balances the policy of opening markets with the economic freedom of the firms being regulated.

The way forward we suggest is to use existing communication channels that competition agencies have developed, including sector regulators when these enforce specific rules to regulate competition, and coordinate on cases. When there are overlapping investigations, agencies will have the incentive to collaborate closely to ensure a coherent response. As the set of comparable cases grows, this can be used to reflect on how to achieve greater convergence in analysis as well as learning among agencies: learning about standards for assessment and about what interventions produce superior market outcomes.

Thus, rather than creating a novel legal institution (either in the form of a multilateral treaty or another transnational organ) or extending the ICN to include digital regulators, it is argued that much progress can be achieved via a voluntary, multilateral engagement among agencies that prioritize digital market regulation. The successful modalities for cooperation, coordination and convergence that have been discovered in merger practice during the past thirty years can be replicated when multiple agencies confront the challenges of regulating competition in digital markets.

20 *FTC, v. Facebook Inc.*, Case No.: 1:20-cv-03590-JEB (doc 75-1), filed 19 August 2021.

21 B6-22/16, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, Decision by the Bundeskartellamt of 6 February 2019.

INTERNATIONAL CO-OPERATION FIXING PROBLEMS IN DIGITAL MARKETS

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A new sense of urgency and purpose has enlivened our international conversations about digital platforms. Is there a version of the future where competition among digital platforms is promoted alongside other values, such as privacy, consumer protection, fair trading, and informed consent? How do we preserve the competitive process, and identify conduct that interferes with it, while supporting those values? What would the rules that do it look like?

These questions shape conversations at the domestic, bilateral, and multilateral level and brighten the eyes of competition and consumer agencies as we use our established networks of cooperation and collaboration: networks such as the OECD, the G7, the International Consumer Protection Enforcement Network ("ICPEN") and the International Competition Network ("ICN"). In other words, the forums that hold space for our individual and collective experiences as competition and consumer protection authorities. It is in these places that we have sought to share and define the challenges and characteristics of digital markets, made a case for, or explained the implementation of novel rules and laws.

Indeed, multilateral institutions such as the ICN and the OECD play a very important role in facilitating international cooperation on digital competition issues. Over recent years ICN agencies have produced a substantial body of research regarding competition harms in digital markets. The Australian Competition & Consumer Commission ("ACCC") has paid close attention to and gained many insights from market studies and inquiries in other countries. The ACCC has also taken inspiration from regulatory approaches progressed in other jurisdictions in formulating our advice for Australian legislators.

For the ACCC, collaboration with our international counterparts is strongly linked to both our effectiveness as a regulator and to maintaining economic sovereignty in relation to digital markets. The global nature of digital platforms requires a coherent and mutually supportive response between agencies if we are each going to be effective in our own jurisdictions in delivering for consumers and competition. But beneath it all, what is driving us and our colleagues around the world to understand digital markets and explore the case for new rules in the form of ex ante regulation?

From the Australian perspective, as we progress our mandate, it is a simple and genuine desire to understand.[2] One of the great early minds of competition law and economics in our country, Professor Maureen Brunt, urges us to consider, "what is going on here?"[3]

Professor Blunt stressed the important role of economic analysis to distinguish between conduct that is part of the competitive process, and conduct that interferes with that process. Some new markets, like digital platforms, are extremely challenging and complex. This is primarily because of the characteristics and business models of large digital platforms.

Professor Maureen Brunt commented that,

> *For antitrust law to be relevant and socially useful it must have mixed economic and legal content with due attention given to each term…most obviously antitrust law is a type of regulatory law directed to achieving economic and associated social and political objectives.*
>
> *So the terms of the statute are to be interpreted in light of the overall policy objectives of that statute.*

Our antitrust law, the Competition and Consumer Act 2010, sets out a broad policy framework and the object of our Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

It is this broad policy framework, together with our forensic interest in understanding "what is going on here," that drives our desire to understand digital platforms' conduct and business strategies and it is also how we ensure the regulatory framework is relevant and socially useful. At the ACCC we understand that this approach is broadly consistent with that of other agencies that have a competition and consumer protection mandate.

2 These comments were first made by ACCC Chair, Gina Cass-Gottlieb, during the keynote address at the 49th Annual Conference on International Antitrust Law and Policy conference. Chair Cass-Gottlieb's full speech is available here: https://www.accc.gov.au/speech/keynote-remarks-to-international-antitrust-law-and-policy-conference.

3 Brunt, Maureen, Antitrust in the Courts: The Role of Economics and Economists, (1999) in Maureen Brunt, Economic Essays on Australian and New Zealand Competition Law, p. 354.

I. EXAMPLES OF INTERNATIONAL CO-OPERATION

There are a variety of concrete ways in which we co-operate with other competition and consumer authorities on digital platform issues. First, we regularly and frequently engage with other competition authorities to provide updates on our inquiries and to learn about their work. Secondly, we work together through international networks such as the OECD, ICN and ICPEN.

For example, the OECD's Competition Committee has held best practice roundtables on a host of digital topics such as competition economics of digital ecosystems and abuse of dominance in digital markets. These discussions have enabled sharing of relevant perspectives from agencies and policy makers, businesses, consumers, and academic experts. They have been valuable in helping to promote a deeper understanding of the policy challenges presented by the digital economy and ways to address them.

Thirdly, we have closely monitored key developments overseas, including enforcement cases, expert reports (such as the Report of the Digital Competition Expert Panel in the UK and the Stigler Committee on Digital Platforms in the U.S.), market studies conducted by competition authorities (such as the CMA, the ACM, and the Bundeskartellamt) and legislative reforms, such as the EU's Digital Markets Act, the Amendments to the Telecommunications Business Act in South Korea and reforms in Japan that seek to address potential abuse by digital businesses with superior bargaining positions.

II. CHALLENGES POSED BY DIGITAL MARKETS

In addition to conducting our own inquiries and reporting to Australian lawmakers, our international co-operation has been crucial in informing our views on competition issues arising in digital platform markets. Indeed, global co-operation has unearthed a variety of common concerns and led to an emerging consensus that digital platform markets pose unique challenges that need to be addressed.

Through our inquiries and with the help of work from others globally, we have come to the view that:

- There are some differences in assessing market power in digital platform markets
- Many digital platform markets are prone to the accumulation of substantial and entrenched market power
- There are limitations on the capacity of enforcement action under Australian competition law to address any negative consequences associated with market power in digital platform services, and
- Harms arising from digital platforms with market power are likely to be significant and long-lasting
- Consumers and fair trading may not be adequately protected under existing regulatory regimes.

We briefly discuss each of these in turn, below.

A. Some Differences in Assessing Market Power in Digital Platform Markets

While assessing market power in digital platform markets involves many of the same issues and inquiries as assessing market power in other markets, there are a few key differences.

First is identifying the competitive rivals to a digital platform. Most digital platforms are multi-sided. Identifying the competitive rivals involves assessing the alternatives available to users on multiple sides (e.g. consumers and advertisers), and the degree to which they are effective substitutes.

Second is the importance of potential competition. As discussed below, a number of the characteristics of digital platform markets make them prone to "tipping" where one or a very small number of large platforms supply the vast majority of the market. Once this occurs, the most significant competitive rivalry is likely to come from disruptive entry. That is, entry on a scale sufficient to displace the incumbent(s). As a result, a significant focus of the assessment of market power in many digital platform markets concerns the barriers to, and the likelihood of, disruptive entry.

Third is the importance and role of data. Access to, and use of, individual-level data is central to the business models of many digital platforms and can be a source of considerable competitive advantage.[4] A key issue for assessing the market power of digital platforms is the

4 ACCC, Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, 28 February 2022, pp 33-36.

likelihood of effective entry in the presence of these data advantages. The extent to which these data advantages are insurmountable is central to the degree and longevity of market power in digital platform markets.

B. Many Digital Platform Markets are Prone to the Accumulation of Substantial and Entrenched Market Power

Through our inquiries, we have found that many digital platform markets are prone to the accumulation of substantial market power, which, once attained, can readily become entrenched.

There are two reasons for this.

First, digital platform markets have a number of characteristics that make them prone to high degrees of market concentration and significant barriers to entry. These characteristics include:

(i) extreme economies of scale and sunk costs,
(ii) network effects (direct and indirect),
(iii) expansive ecosystems and advantages of scope,
(iv) consumer inertia, dark patterns, switching costs and defaults; and
(v) access to, and use of, vast amounts of individual-level and other high-quality data.

While these characteristics are not unique to digital platform markets, their strength and their presence in combination gives them greater significance in the assessment of market power.

Second is the strategic conduct of large digital platforms. Once a firm gains a position of substantial power in a digital platform market, it has a strong commercial incentive and ability to entrench and extend that market power. We have observed a range of conduct that has likely achieved these outcomes including systematic acquisitions of potential rivals and the use of strong market positions to favor their own operations in related markets (leveraging and self-preferencing).

C. Limitations on Enforcement Action under Competition Law to Address Consequences of Market Power in Digital Platform Services

While we consider that existing economic and legal analytical tools under competition law remain broadly applicable for digital markets and do not need to be adapted, we have identified several reasons why ex post enforcement and merger control may not be sufficient alone to fully address concerns arising in relation to digital platform services.

One of our key concerns is the timeliness, scale, and efficiency of enforcement action under competition law in these dynamic markets.

Investigations and court proceedings are lengthy and necessarily retrospective. This is a common experience among international regulators, with some cases taking years to be resolved and their ultimate outcomes seeming more relevant to history than to the operation of current digital markets.

Due to the dynamic nature of digital platform services, there is also risk that market power can be relatively quickly extended and/or entrenched while a case is being investigated and litigated and further harm may occur, with potentially irreversible consequences.

Moreover, as we are only able to litigate matters or conduct that fit within the specific provisions of competition law, cases typically focus on a very specific breach. This means enforcement action is unable to effectively address systematic harms and the breadth of problematic conduct that a digital platform with substantial market power can engage in, in an efficient and timely way. For example, behavioral remedies designed for individual breaches of competition law may not be sufficiently flexible to address persistent market-wide issues, they may have limitations in addressing structural problems (e.g. barriers to entry and expansion), or markets may have already "tipped" by the time the remedies are put in place.

Another challenge is the seeming inadequacy of court-imposed fines to address self-preferencing and other anti-competitive behavior of digital platforms. One-off penalties imposed by Courts in Australia may not reach the scale necessary to deter very large global digital platforms from engaging in similar conduct in the future.

D. Harms Arising from Digital Platforms with Market Power are likely to be Significant and Long-lasting

While consumers and businesses derive substantial benefits from the services provided by digital platforms, we are concerned that several markets already appear to have "tipped" in favor of one or two dominant firms and that the market power of certain large digital platforms is both becoming increasingly entrenched and expanding into related markets. This has significant consequences for actual and potential rivals, business users and consumers. In several key markets, the position of certain large digital platforms is such that they hold very powerful positions and increasingly act as "gatekeepers" between businesses and end-users (i.e. effectively regulating the terms on which businesses can reach Australian consumers). This position provides these platforms with immense influence on the terms of trade and competitive dynamics in these markets

Our inquiries have identified numerous harms to competition and consumers – many of which are likely to be significant and long-lasting – as a direct result of this increasingly entrenched and expanding market power.

Exclusionary conduct by large digital platforms has lessened competition in a number of markets. And subsequently, harms arise as a direct and/or indirect consequence of this reduced competition (such as higher prices, reduced innovation, and lower quality services).

The nature of competition in these markets also underlines the particular importance of protecting potential competition in digital platform and related markets (including, for example, addressing the impact of acquisitions of nascent competitors).

Therefore, we are concerned that the existing competition law provisions alone may be insufficient to address the potentially significant and long-lasting harms to consumers and competition, particularly where effective competition is no longer possible.[5]

E. Consumers and Fair Trading may not be Adequately Protected under Existing Regulatory Regimes

In addition to the harms to consumers from reduced competition, the ACCC is also increasingly concerned about harms associated with bargaining imbalances between "gatekeepers," consumers and business users, and the lack of sufficient consumer and business user protections. Some harms affect both consumers and business users (e.g. unfair terms of use or access, lock-in and ineffective dispute resolution), while others are particularly associated with consumers (e.g. excessive online tracking) or business users (e.g. unfair trading practices).[6]

Enforcement of consumer law also faces many similar challenges to those described above in relation to competition law. For example, investigations and proceedings are lengthy and necessarily retrospective, and we can only litigate matters or conduct that fit within the specific provisions of consumer law.

Moreover, the ACCC has identified specific types of conduct prevalent in the supply of digital platform services that are harmful to consumers but not expressly prohibited under Australian law (e.g. businesses making it extremely difficult or almost impossible for a consumer to cancel a service they no longer need or want).

Increasingly, there are concerns that consumers and fair trading may not be adequately protected under existing regulatory regimes. Indeed, in its 2019 Digital Platforms Inquiry, the ACCC has already made a number of recommendations to the Australian Government in this regard, in relation to unfair contract terms, unfair trading practices, internal dispute resolution and the establishment of an ombuds scheme to resolve complaints and disputes with digital platform providers.

III. EVOLVING THINKING ON NEED FOR UP-FRONT REGULATION FOR DESIGNATED FIRMS

A. International Developments and Co-operation

Thankfully, international co-operation has not only been beneficial in identifying the challenges posed by digital platform markets, but also in finding potential solutions. Both here in Australia and overseas, governments and competition agencies are reflecting on how best to address these challenges.

5 ACCC, Report on Search Defaults and Choice Screens, 28 October 2021, p 19. ACCC, Digital Advertising Services Inquiry Final Report, 28 September 2021, p 5, ACCC, Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022, p 62.

6 ACCC, Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, 28 February 2022, p 53-57.

A number of jurisdictions have recently agreed or are considering new competition regulations for large digital platforms. In particular, Germany has amended its competition law to introduce specific prohibitions for platforms of "paramount significance for competition across markets." The EU's Digital Markets Act is expected to enter into force in October 2022. The first "gatekeepers" are expected to be designated in 2023, with obligations applicable in early 2024. In the UK, the Government has proposed a new pro-competition regime for digital markets which would be administered by the Digital Markets Unit at the CMA. A draft bill is expected to be developed during the parliamentary year concluding April 2023, and introduced in the following parliamentary year.[7] The U.S. has similarly seen the introduction of several legislative proposals seeking to impose ex ante rules on certain very large platforms.[8]

As a concrete example of this co-operation, we participated as a guest authority in producing the G7's compendium of approaches to improving competition in digital markets. This has been a valuable output of the collaborative work of competition authorities that has helped to improve understanding of the approaches taken to address these issues in different jurisdictions. Moreover, we have been closely following global developments and regularly engaging with other authorities to understand their approaches. All of this has helped to inform our thinking as we consider the appropriate response for Australia.

B. Australian Perspective

In February 2022, the ACCC released a Discussion Paper seeking feedback regarding the issues and harms so far identified during our inquiries, whether Australian competition and consumer law is sufficient to address these issues/harms and if not, what potential regulatory tools could be utilized to address these issues/harms.[9]

Over recent months, we have been engaging with these issues and formed views which are expressed in our fifth interim report of the Digital Platform Services Inquiry which considers the need for regulatory reform in digital markets in Australia which has not yet been made public. In due course, we expect the government will make the report publicly available.

While we cannot provide further detail on the views we have formed prior to publication, we focus our comments here on some key issues we have taken into account in preparing our report. We hope to have the opportunity to share more detailed views once the report has been made public.

Just as in other jurisdictions, our February 2022 discussion paper anticipated that, should any new tools be recommended to the Australian Government, these would be designed to complement the existing competition and consumer law protection provisions in Australia, and that these existing provisions would continue to apply in respect of digital platforms.

Moreover, we have carefully considered the targeted approaches taken in other jurisdictions when proposing reform, which typically focus on designated digital platforms and/or their services, characterized by certain criteria.

While the thresholds or criteria for the application of these regimes are likely to vary between jurisdictions, some of the key factors include:

- Platforms' size and the importance of their services for consumers, business users and the broader economy (e.g. number of (business) users or revenue, market capitalization).
- Whether platforms function as a critical intermediary or unavoidable trading partner; specifically whether one set of users (e.g. businesses, advertisers) are heavily reliant on the platform to reach another set of users (e.g. customers, consumers). That is, whether platforms act as "gatekeepers" between two types of users.
- Whether there is a significant power imbalance between these platforms and their users which enables them to not only unilaterally set, amend, interpret, and enforce the terms and conditions of access to their services, but also more generally set the rules of the game regarding the functioning of products and services in which they are dominant.
- Whether platforms hold an entrenched or durable position, whereby they are unlikely to be challenged by any present or future rivals in the medium term through dynamic competition, due to high barriers to entry and expansion (arising as a result of high costs of entry, economies of scale, advantages of scope, network effects combined with zero-pricing, high levels of vertical integration and conglomerate effects). It is likely that these factors may have already reduced dynamic competition and innovation, and as a result these platforms may already have demonstrated persistent market power.

7 The draft bill is the Digital Markets, Competition and Consumer Bill.

8 Reuters, "House antitrust subcommittee unveils five big tech antitrust bills," 15 June 2021.

9 ACCC, Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022.

Our February 2022 discussion paper noted a range of possible options for reform, should it be necessary. Some approaches to structuring a new framework include obligations and prohibitions contained in legislation, codes of conduct, rule-making powers, measures to promote competition, and third-party access regimes. In the DMA, the EU has opted to include obligations and prohibitions in legislation which has often been described as "self-enforcing," while the UK has pursued codes of conduct (or conduct requirements), which arguably provide greater flexibility.

As we have engaged with other competition authorities on these issues, we have improved our understanding of these approaches and the environment in which they have been designed.

While there are good reasons for reforms to differ across jurisdictions given local market conditions and existing national frameworks, we consider that regulatory coherence, compatible regimes, and enforcement cooperation will be highly desirable to the extent it is possible. We are mindful that this can increase the effectiveness of regulation and enforcement of digital platforms, and also reduce the burden of compliance on the platforms and the consumers and businesses that engage with them.

IV. CONCLUSION

In addressing digital platform issues, competition and consumer authorities are engaging in unprecedented levels of co-operation to facilitate our shared understanding and to address these challenges individually and collectively. We aspire to some degree of consensus on the goals we are seeking to achieve and how we achieve them. This should enable more effective policy formulation and law reform.

International co-operation has been crucial in informing the ACCC's current thinking on the challenges posed by digital platform markets and is helping us form a view on whether Australian competition and consumer law is sufficient to address these challenges so we can provide well developed advice to Australian lawmakers.

As our experience in Australia evolves, we will continue to closely engage with international counterparts and we remain mindful of the benefits derived from international regulatory coherence and, above all, our shared sense of common purpose.

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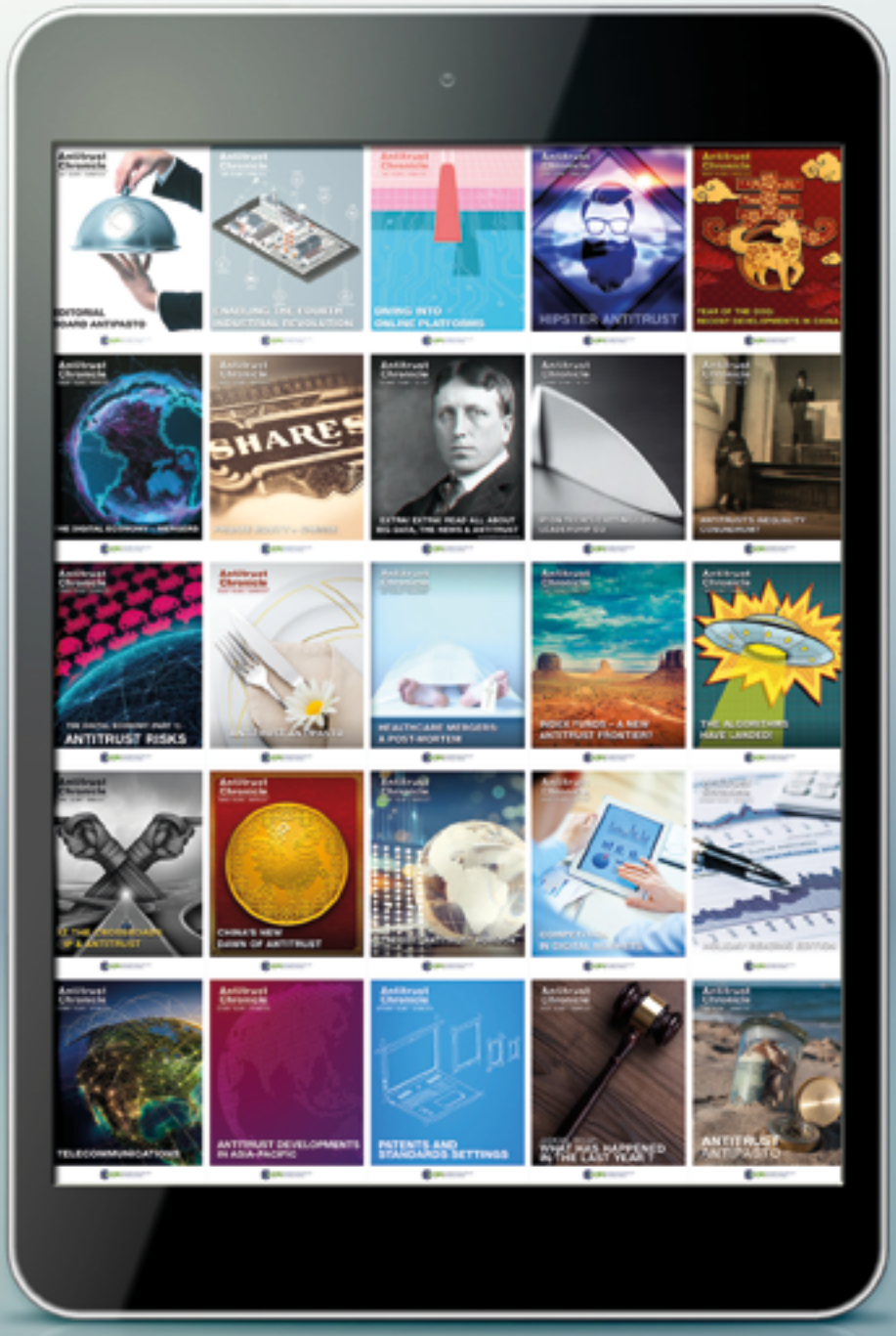


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