NEW FAULT LINES IN ANTITRUST: THE RISING THREAT OF GROWING DIVERGENCE TO IP-CENTRIC BUSINESS PRACTICES

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I. INTRODUCTION

The proliferation of antitrust regimes, often with divergent rules and practices, the growth of international business transactions affecting competition in multiple jurisdictions, and the push for greater national or multilateral protectionism is leading to new fault lines in antitrust. The results of the current divisive opinions regarding the "proper" enforcement of antitrust law are likely to become ever more apparent as antitrust enforcement agencies increasingly respond to the call for early and pro-active intervention and ramp up globally to address real or perceived antitrust threats caused by the emergence of new, often IP or platform-based, technologies and business models and grapple with novel and complex antitrust issues associated with those new economic phenomena.

However, while the potential for divergent antitrust enforcement and outcomes increases, the existing international mechanisms to address such incongruence of antitrust practices are generally consensus-based and typically lack strong legal authority in domestic law. Accordingly, the question arises whether the conventional mechanisms intended to lessen the frictions between antitrust regimes are fit for purpose or require reconsideration. This paper discusses these trends and argues that IP-centric business transactions are among the most likely candidates to feel the negative consequences associated with divergent antitrust intervention. This is a worrying prospect as innovative, IP-intense business models are also particularly likely to bring about significant welfare gains.

II. PROLIFERATION OF ANTITRUST REGIMES AND THE THREAT OF INCREASING DIVERGENCE

Antitrust rules have now become almost universal; over 100 countries have rules in place and many agencies are increasingly well resourced and active. The globalization of antitrust has been driven by the recognition that enhanced firm rivalry leads to greater productivity and promotes growth and innovation.[2] Countries and international organizations, such as UNCTAD, nowadays consider that antitrust rules are an essential part of a country's industrial toolkit, in particular by preventing rent-seeking by private actors and that antitrust agencies can play a vital role in advocating the reform of economically harmful government laws and practices.

2 Stephen Nickell, "Competition and Corporate Performance," (1996) Journal of Political Economy, pp. 724-746; World Bank Group, "A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth," (2017).

As a result, antitrust enforcement is no longer the preserve of agencies (and courts) in developed western economies. Globally, companies are increasingly aware of the need to pay heed to the actions of antitrust agencies in, among others, Brazil, China, India, Japan, and Korea and, in some cases, in the Middle East and Africa. In many instances, cases brought in these jurisdictions can have equally severe ramifications for companies' operations internationally as cases brought by more established agencies in Europe and North America.

Not surprisingly then, antitrust enforcement is not only widespread, but also increasingly cross-border in nature. For example, between 2010 and 2017, the European Commission ("Commission") cooperated with competition agencies outside of the EU in 65 percent of all cartel cases and in 54 percent of complex merger cases.[3]

One remarkable fact is that antitrust regimes generally adhere to common overarching principles and goals, especially substantively, as the rules are typically built on well-established economic theories. However, looking beneath the surface, there is still considerable diversity, both analytically and procedurally. This is notwithstanding the significant efforts by the antitrust community to arrive at greater uniformity, in particular through the work of the Organisation for Economic Co-operation and Development ("OECD") and the International Competition Network ("ICN").

We are not opposed to diverging antitrust enforcement standards. Indeed, divergence is not in and of itself harmful – and may even be welfare enhancing – as each country's antitrust rules must mesh with the local laws, customs, and practices if they are to be implemented and enforced effectively. However, divergent antitrust standards become harmful if they undermine the economic (welfare) gains that arise from effective, economically rational, and consistent enforcement.

In sum, divergence in antitrust enforcement has been a constant facet of antitrust, but friction between antitrust regimes arising from diverging practices and outcomes risks becoming more notable and prevalent due to the rapid expansion of antitrust enforcement globally and the different levels of enforcement standards among antitrust agencies. Paradoxically then, while it can be assumed that the proliferation of antitrust regimes has resulted in very significant welfare gains over time, that same spread of regimes also enhances the risks of "system clashes," incorrect outcomes, and welfare-destructing over-enforcement.

III. DIVERGENCE IS NOT A NEW PHENOMENON

Divergence is not a new phenomenon both internationally and regionally. For example, the U.S. and Europe have long adopted different approaches to assessing the competition risks associated with unilateral conduct.[4] The treatment of exclusionary conduct is far stricter in the EU than under the U.S. antitrust rules and the Commission often intervenes to ensure a "level playing field." In contrast, U.S. agencies are more inclined to wait for the market to self-correct. This is evident from the different approaches to the *Google Search* investigations. The FTC closed its investigation, whereas the Commission concluded that Google had abused its dominant position in search by illegally favoring its own comparison-shopping service.[5]

Historically, there have also been notable differences in the treatment of mergers with, for example, the U.S. criticizing the EU approach to conglomerate mergers "as inconsistent with the central tenet of U.S. antitrust policy – that the antitrust laws 'protect competition, not competitors.'"[6]

3 Speech by Johannes Laitenberger, European Commission, Fordham Antitrust Law and Policy Conference "Developments in EU competition control in the global and digital age," (September 6, 2018).

4 Speech by William E. Kovacic, FTC, Bates White Fifth Annual Antitrust Conference, "Competition policy in the European Union and the United States: convergence or divergence in the future treatment of dominant firms?," (June 2, 2008).

5 U.S. Federal Trade Commission Decision and Order in the matter of *Motorola Mobility LLC and Google Inc.*, Docket No. C-4410, July 23, 2013; Case AT.39740 *Google Search (Shopping)*, Decision, June 27, 2017.

6 William Kolasky, "Conglomerate mergers and range effects: It's A Long Way from Chicago To Brussels," (2001) George Mason Law Review, pp. 533-550.

The issue of convergence (and divergence) between EU and U.S. antitrust regimes has been regularly highlighted by senior officials from the different agencies.[7] Generally however, over the past twenty years, there has been a consistent trend towards greater convergence, especially with the EU's shift from a formalistic approach to enforcement towards an effects-based analysis with its focus on protecting competition and promoting consumer welfare.[8]

Sokol has, however, pointed out that "one area of increasing divergence across the Atlantic is in markets characterized by high technology and dynamic innovation … Europe seems to be the more aggressive enforcer in areas where the stakes are high, the issues complex, the likelihood of mistaken enforcement may be high, and the industrial policy broadly defined may be influencing European competition policy."[9] The risk of divergence between the EU and the U.S. on antitrust is only likely to increase further if calls in Europe for industrial policy considerations to have an explicit role in merger analysis leads to substantive changes to the EU merger rules.[10]

There are also periodically major differences coming to the fore even within well-established and generally internally closely aligned regimes such as the EU. For example, at least initially, agencies in the EU took diverging approaches to rate parity ("MFN") clauses applied by online booking platforms, in particular Booking.com. The Bundeskartellamt ("FCO") found that such clauses, i.e. wide and narrow price parity clauses, were anti-competitive whereas concerns raised by the French, Italian, and Swedish competition authorities were addressed through commitments, leaving narrow price parity clauses intact.[11]

There are also particular challenges when it comes to issues of due process. It is hard to dispute the proposition that different legal traditions may entail different processes and that despite those differences, antitrust agencies may still arrive at equivalent end results, albeit through different ways and means. However, this obviously does not mean that the lack of safeguarding of essential procedural rights of parties subject to an antitrust investigation should be allowed to stand, because the outcome "might still be correct."

There are – unfortunately – still too many examples of procedures in various jurisdictions that have failed to follow any reasonably conceivable minimum standard of due process. Specifically, parties under investigation in some jurisdictions may not be provided with sufficient information on the nature of the alleged infringement, the theory of harm and the underlying evidence to be in a position to properly defend their position. This is often compounded by a lack of opportunity to make effective representations before the competition agency. Other concerns that are often cited are insufficient protection afforded to confidential business information and a perceived lack of impartiality or integrity in the system of enforcement.[12]

7 Speech by Maureen Ohlhausen, FTC, Georgetown Global Antitrust Symposium Dinner, "U.S. – E.U. Convergence; Can We Bridge the Atlantic?," (September 19, 2016); Speech by Mario Monti, European Commission, General Counsel Roundtable American Bar Association "Antitrust in the US and Europe: A History of Convergence," (November 14, 2001); Speech by Margrethe Vestager, European Commission, Press Event, Washington D.C., "Competition Enforcement in the EU and US," (September 19, 2016).

8 This is also true for the analysis of non-horizontal mergers. However, a marked difference between the U.S. and the EU remains the treatment of intra-brand restrictions of competition, in particular resale price maintenance, which in Europe remains subject to a pseudo *per se* illegality standard.

9 Daniel Sokol, "Troubled waters between US and European antitrust," (2017) Michigan Law Review, p. 964.

10 For example, nineteen EU Member States issued a joint statement in December 2018 calling for the "identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis." Joint statement, 6th Ministerial Meeting, December 18, 2018.

11 Bundeskartellamt, Case B9-121/13, *Most-favoured-nation clauses at Booking.com* (2015); Décision n° 15-D-06 du 21 avril 2015 sur les pratiques mises en œuvre par les sociétés Booking.com B.V., Booking.com France SAS et Booking.com Customer Service France SAS dans le secteur de la réservation hôtelière en ligne; L'autorità garante della concorrenza e del mercato nella sua adunanza del 21 aprile 2015; Konkurrensverket Decision of 15 April 2015; ref.no. 596/2013.

12 Philip Lowe, Mel Marquis & Giorgio Monti, "Effective and legitimate enforcement of competition law," European Competition Law Annual (2016), [forthcoming].

There have been particular criticisms directed at Asian antitrust regimes due to their apparent lack of due process safeguards.[13] For example, in testimony before a U.S. House of Representatives Committee in 2016, former FTC Commissioner Ohlhausen indicated that deficiencies with the Chinese procedural rules include insufficient transparency, failure to provide a meaningful opportunity for defense, and limitations on the ability to be represented by counsel.[14] There has also been criticism directed at the lack of due process in procedures before the Korean Fair Trade Commission ("KFTC")[15] and the Taiwan Fair Trade Commission ("TFTC").[16]

Concerns about divergent (and deficient) approaches to due process are likely to remain acute, as more agencies investigate complex cross-border behavior, but lack the resources and capacity to manage such cases effectively and fairly. As discussed further below, a new approach to address a number of these concerns was proposed last summer by Assistant Attorney General Makan Delrahim ("AAG Delrahim").

IV. PARTICULAR RISK OF DIVERGENCE AFFECTING IP-CENTRIC BUSINESS PRACTICES

There has been a rapid expansion of antitrust enforcement in the field of intellectual property as those cases are often viewed as strategically significant given the critical role that intellectual property can play in technology markets. Agencies are also under significant and increasing pressure to demonstrate to their stakeholders and the public that the antitrust rules can address new and transformative technologies. This creates a heightened risk of incorrect outcomes and divergence, particularly as many agencies are still unfortunately ill equipped to successfully investigate complex and novel questions of antitrust.

Former Assistant Attorney General Renata B. Hesse herself remarked that "international differences are perhaps the greatest with conduct related to intellectual property."[17] She pointed out the growing trend at that time for newer competition agencies outside Europe to identify a wide range of circumstances under which they would impose liability for refusals to license intellectual property rights.

This insight is in line with research published last year by staff at the WTO regarding the application of competition policy to intellectual property by agencies in developed and key emerging jurisdictions which found that the focus of newer competition agencies was expanding to encompass new frontiers such as abuses of standards essential patents ("SEPs").[18]

The challenge for many agencies has been the lack of enforcement experience in this area, which cannot be simply overcome by issuing soft law instruments. Moreover, the WTO staff report highlighted the concern that "the proliferation of guidelines and policy initiatives … carries the potential for coordination failures and even outright conflicts."[19, 20]

Evidence of conflicts in the interplay between antitrust and intellectual property are already prevalent. For example, the Competition Commission of India ("CCI") ruled that Ericsson's licensing practices were incompatible with FRAND and constituted *prima facie* evidence of an abuse

13 Daniel Sokol, "Due process, transparency and procedural fairness in Asian antitrust," CPI, January 2015. U.S. Chamber of Commerce report on "Competing interests in China's competition law enforcement: China's anti-monopoly law application and the role of industrial policy," (2014).

14 See Hearing before the Committee on the Judiciary House of Representatives, June 7, 2016, in particular Oral Testimony of former Commissioner Maureen Ohlhausen, FTC, p.8 and Prepared Statement of the FTC before the U.S. House of Representatives Committee on the Judiciary Subcommittee on regulatory reform, commercial and antitrust law, "International antitrust enforcement: China and Beyond," Washington DC, June 7, 2016, p.12.

15 For example, Qualcomm has opposed the KFTC's decision finding that certain of the company's IPR licensing practices are contrary to Korean competition law on the grounds, among other things, that there has been a denial of procedural safeguards, including the right to have complete access to evidence and the right to cross examination at the hearing. See statement "Qualcomm responds to announcement by Korean Fair Trade Commission," December 28, 2016.

16 The authors understand that under existing procedures before the TFTC, an investigated party does not receive a detailed statement of facts and legal theories on the basis of which it is being accused of violating the Fair Trade Act until the Commission has already made a finding of violation and that the Commission will act as a judge from which there is no effective appeal.

17 Speech by Renata Hesse, DOJ, Global Antitrust Enforcement Symposium "Can there be a 'one-world approach' to competition law?," (June 23, 2016).

18 Robert Anderson et al., "Competition agency guidelines and policy initiatives regarding the application of competition law vis-à-vis intellectual property: An analysis of jurisdictional approaches and emerging directions," WTO Staff Working Paper ERSD-2018-02 p. 64.

19 *Id.* p. 65.

20 The WTO Staff Working Paper also called for a "modest degree of coordination with respect to competition policy-IP interface" and stressed that the need was particularly compelling (as compared to other aspects of competition policy) given the fungible nature of the underlying assets that are affected. *Id.* p. 65.

of a dominant position. However, the CCI decisions only provide a cursory analysis of the legal and economic issues involved. In addition, the agency took issue with the fact that the royalty was based on the sale price of the device notwithstanding that this is standard industry practice. The approach of the CCI was also at odds with the Delhi High Court rulings concerning the same parties and issues.[21]

China has also taken enforcement action against the licensing practices of standard essential patent holders. The National Development and Reform Commission ("NDRC") found that Qualcomm had engaged in abusive patent licensing practices and fined the company U.S.$ 975 million. The agency was, however, accused of combining competition policy with industrial policy by using its investigative power to give additional leverage to would-be Chinese licensees, affording them a competitive advantage in both domestic and global telecommunications markets.[22]

In addition, there has been a radical change in the views of the U.S. Department of Justice with regard to the application of antitrust law to intellectual property. AAG Delrahim has called for a "New Madison" approach to enforcement and argues, among other things, that "hold-up is fundamentally not an antitrust problem."[23] He has argued that antitrust law should not be used to police FRAND commitments and that a unilateral and unconditional refusal to license a patent should be considered *per se* legal. If the proposed approach is followed in the U.S., it cannot be excluded that this will lead to greater divergence between the U.S. agencies and agencies in other countries, including in Asia and, potentially, Europe.

Turning to mergers, it seems clear that antitrust agencies are increasingly carrying out complex reviews of IP-centric transactions, in an attempt to ensure that there remains strong competition in innovation post-merger. Dow's merger with DuPont and Bayer's acquisition of Monsanto both involved detailed assessments of the intellectual property aspects of the transactions. There was close coordination between the various agencies, intended to ensure a common approach to resolving competition issues and structuring remedies.[24]

However, there are recent examples of the diverging approaches to the same IP-centric transactions. The *Essilor-Luxottica* merger was cleared unconditionally in the EU and the U.S., but the Chinese authorities required the parties to offer a set of remedies, including offering trademark licenses on FRAND terms, in order to clear the transaction. There have also been concerns that China's State Administration for Market Regulation ("SAMR") may take into account broader industrial policy goals when reviewing mergers in strategic sectors given its failure to approve Qualcomm's acquisition of NXP.[25]

Problems also arise with regard to the implementation of remedies in antitrust cases involving intellectual property. In an increasingly complex global antitrust landscape, agencies with different substantive enforcement standards need to take into consideration the potential extraterritorial impact of proposed remedies if they are to avoid divergence and conflicts. The need for the remedies to be carefully constructed to ensure that they remain consistent with an "agency's international comity analysis" is specifically emphasized in the U.S. agencies' international enforcement and cooperation guidelines of 2017.[26]

21 J. Gregory Sidak, "FRAND in India, the Delhi High Court's emerging jurisprudence on royalties for standard-essential patents," (2015) Journal of Intellectual Property Law & Practice, pp. 609–618; Ameya Pant & Jain Dipesh, "Complexities surrounding SEP cases in India: An overview of decisions by the High Court and Competition Commission of India," (2018) Journal of Intellectual Property Law & Practice, pp. 132–142.

22 U.S. Chamber of Commerce, International Affairs, "Competing interests in China's competition law enforcement," (2014), p. 62.

23 Speech by Makan Delrahim, DOJ, University of Pennsylvania Law School Event, "The 'New Madison' approach to antitrust and intellectual property law," (March 16, 2018).

24 This does not mean, however, that the economic insights on which the decisions in these cases are based in Europe, are now equally well accepted in other jurisdictions.

25 See in this respect for example, "Qualcomm ends $44 billion NXP bid after failing to win China approval," Reuters, July 25, 2018.

26 Federal Trade Commission and Department of Justice, "Antitrust Guidelines for International Enforcement and Cooperation," (January 13, 2017), para. 47.

However, the KFTC took an approach that ignored principles of jurisdiction and comity when ordering global changes to Qualcomm's licensing and sales practices.[27] The KFTC considered that Qualcomm's conduct had not only affected "Korean enterprises and the Korea-registered patents in the territory of Korea, but also in the remaining parts of the world …"[28] It concluded that "[i]t is reasonable not to limit the [remedial measures] and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anti-competitive effects influencing the Korean market."[29, 30]

V. INTERNATIONAL EFFORTS TO ACHIEVE GREATER UNIFORMITY

There have been numerous bilateral and multilateral efforts at capacity-building among agencies to reduce the risk of inconsistent and inappropriate outcomes, in particular as a result of the work of the OECD and the ICN. However, the greatest future challenge arises in respect of the actions of antitrust agencies in developing countries, as they typically lack sufficient enforcement experience to venture into international cooperation.[31]

The OECD and its Competition Committee has been particularly active in seeking to spread best practices through enhanced cooperation. Notably in 2014, it adopted a Recommendation that sought to promote further international cooperation.[32] The text makes a number of far-reaching recommendations including calling on governments to allow agencies to exchange confidential information without the prior consent of the providers of the information and to permit enhanced cooperation in the form of investigative assistance (e.g. assisting in obtaining information and executing searches on behalf of another agency). Such measures are intended to be accompanied by appropriate safeguards.

Strengthening international cooperation among antitrust agencies is also a central tenet of the ICN and, through the activities of its working groups, the organization has been instrumental in developing and sharing practical experience and knowledge of antitrust enforcement.[33] In particular, it has sought to enhance inter-agency cooperation by issuing reports, guidance, and recommendations on specific topics of direct relevance to cross-border enforcement.[34] The ICN has been successful in helping ensure that agencies understand each other as they carry out their responsibilities and that by "speaking a common antitrust language," they are better able to cooperate on individual matters.[35]

The International Chamber of Commerce ("ICC") has also provided concrete and practical guidance to the antitrust community by issuing best practices on effective procedural safeguards in competition proceedings ("ICC Best Practices").[36, 37] The ICC Best Practices set out a number of fundamental overarching principles in due process that should apply in antitrust proceedings and provide specific standards that antitrust agencies should adopt to ensure that their rules and procedures conform to due process norms.

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27 James Rill & John Taladay, "The KFTC's Extraterritorial Overreach," (November, 2017), Competition Policy International.

28 KFTC, Case No. 2015SiGam2118, at 139, unofficial translation.

29 *Id.*

30 The KFTC took a similarly broad extraterritorial approach to remedies when addressing perceived antitrust concerns arising from its acquisition of Nokia's device business. In order to obtain approval from the KFTC, Microsoft gave commitments in respect of licensing practices concerning its global smartphone patent portfolio. See John Jurata & Inessa Owens, "A new trade war: applying domestic antitrust laws to foreign patents," (2015) Geo. Mason Law. Rev., Vol.22:5, p.1127.

31 UNCTAD Secretariat, "Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures," paper presented at The Intergovernmental Group of Experts on Competition Law and Policy, Geneva, July 5-7, 2017, p.3.

32 OECD Recommendation concerning international co-operation on competition investigations and proceedings (2014); Antonio Capobianco & Aranka Nagy, "Developments in international enforcement co-operation in competition field," (October, 2016) Journal of European Competition Law & Practice.

33 "The International Competition Network at Ten, Origins, Accomplishments and Aspirations," (2011) edited by P. Lugard, Intersentia.

34 For example, ICN Recommended practices for merger notification and review procedures and Practical guide to international enforcement cooperation in mergers (2015).

35 Alden Abbot, blog entry, "The International Competition Network at Seventeen," (March 28, 2018), available at https://truthonthemarket.com.

36 ICC Commission on Competition, "Effective procedural safeguards in competition law enforcement proceedings," (225/765), published on July 7, 2017.

37 Due process and the ICC Best practices were also discussed by P. Lugard in "IP and Antitrust: the importance of due process and the ICC Best Practices," CPI Antitrust Chronicle, November 2017.

More recently, AAG Delrahim proposed the establishment of a Multilateral framework on procedures in competition law investigation and enforcement ("MFP"). The goal of the MFP is to promote global due process and improve cooperation among antitrust agencies.[38] It aims to establish minimal, widely accepted procedural norms such as non-discrimination, transparency, timely resolution, confidentiality, etc. These goals are derived from principles found in existing international texts promulgated by organizations such as the OECD and the ICN as well as in the competition chapters of certain free trade agreements ("FTA") (e.g. Korea-U.S. FTA).

The MFP is not intended to be a binding international agreement in the traditional sense, but it is proposed that agencies that sign up to the framework will nonetheless be subject to an adherence and review mechanism, namely in the form of dialogue, agency self-reporting on adherence, and periodic assessments of the functioning of the framework.[39]

Concerns have been raised that the proposal bypasses and undermines the work of international organizations with Commissioner Vestager stressing that "we need to do it through organizations like the OECD and the ICN."[40] Such criticism is not surprising given the EU's own origins and its strong support for formal multilateral structures, but both the head of the FCO in Germany and the Brazilian competition agency have also stressed the importance of working through the ICN.[41] The main obvious limitation of these approaches is the lack of any mechanism that binds the agencies or requires them to adhere to the agreed policies or best practices. Indeed, while highly authoritative, OECD recommendations generally require further implementation in OECD Member States. The organization's influence in non-OECD countries is also less prominent. Similarly, ICN work products are generally not-binding and the organization has largely been successful through non-binding, soft harmonization, and peer pressure among competition enforcement agencies. In addition, China's lack of participation in the ICN significantly limits the organization's ability to ensure a truly global take-up of its policies. Given the growing role of China in antitrust enforcement, this it is an important limitation.

VI. THE HIGH-WATER MARK OF ANTITRUST CONVERGENCE?

Over the last two-to-three decades, there has been a remarkable and significant degree of convergence in the area of antitrust enforcement and the dissemination of antitrust around the globe has undoubtedly brought significant welfare gains. However, the wide adoption of antitrust regimes as a preferred model for economic regulation also comes at a price: as a result of the multitude of agencies that may each claim jurisdiction over particular transactions, the potential for incorrect and inconsistent outcomes and "system clashes" increases. International, IP-centric, and, more generally, innovation-intense business transactions are the most likely recipients of the negative consequences of these frictions. Indeed, it is precisely these types of transactions that tend to raise complex and novel issues of law, fact, and economics, that may give rise to industrial policy and other concerns that go beyond strict competition-related considerations and that are likely to fuel the call for early and effective antitrust intervention.

It is clear that a number of competition enforcement agencies are not yet sufficiently attuned to each other and that there is a need for cooperation mechanisms that can effectively ensure a level of consistency in antitrust enforcement, both substantively and procedurally. However, it is in our view highly questionable whether the current, traditional cooperation mechanisms are in and of themselves sufficient to avoid major frictions between jurisdictions, especially in the current climate, where competition agencies are increasingly called upon to remedy the perceived evils of the new economy and where trust between nations is not at a high point.

Assuming that the traditional consensus-based cooperation mechanisms may be suboptimal in dealing with the challenges of international antitrust enforcement in the 2020s and beyond, the search for additional and alternative bilateral and multilateral mechanisms to ensure effective, coherent, and economically rational antitrust enforcement, is legitimate. It should be taken seriously and further explored.

38 Speech by Makan Delrahim, DOJ, University of Pennsylvania Law School Event, "The 'New Madison' approach to antitrust and intellectual property law," (March 16, 2018).

39 Comments by Roger Alford, DOJ, LeadershIP EU 2018 Annual Conference, "Designing a System to Secure the Fair Administration of Competition Laws," (November 13, 2018).

40 Speech by Margrethe Vestager, European Commission, Global Antitrust Enforcement Symposium, "Hitting the sweet spot in antitrust enforcement," (September 25, 2018).

41 "Brazilian competition agency says ICN is best forum for U.S.-led global antitrust initiative," MLex, January 4, 2019; "U.S.-led antitrust initiative should come under International Competition Court, Germany's Mundt says," MLex, November 19, 2018.

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