IN COMITY WE TRUST: UTILIZING INTERNATIONAL COMITY TO STRENGTHEN INTERNATIONAL COOPERATION AND ENFORCEMENT CONVERGENCE IN MULTIJURISDICTIONAL MATTERS

BY JOHN PECMAN & ANTONIO DI DOMENICO[1]

1 John Pecman is a Senior Business Advisor at Fasken and Canada's former Commissioner of Competition. Antonio Di Domenico is a Partner and Co-Leader of Fasken's Competition, Marketing & Foreign Investment Group. The authors wish to acknowledge and thank Timothy Law for his research and editing assistance in the preparation of this article.

In Comity We Trust: Utilizing International Comity to Strengthen International Cooperation and Enforcement Convergence in Multijurisdictional Matters

By John Pecman & Antonio Di Domenico

Competition authorities across the world have taken increasingly divergent enforcement approaches, including in respect of the conduct of companies involved in the high technology and digital markets. New regulatory developments may further accentuate such divergence, increasing the risk of inefficient and conflicting regulatory efforts. With these trends, there is a greater need for competition authorities to advance international cooperation efforts and convergence on enforcement, particularly when enforcers with sufficient parallels in competition laws and enforcement principles are involved. This article proposes that the application of international comity principles would helpfully promote international cooperation and convergence on multijurisdictional enforcement, creating a "win-win" for competition authorities and the respondent businesses subject to competition scrutiny in the form of consistency, predictability and efficiency. In advancing this thesis, this article proposes five considerations where international comity can helpfully promote international cooperation and enforcement convergence in multijurisdictional matters.

I. INTRODUCTION

In late 2020, the United States appeared to reinvigorate its efforts in antitrust enforcement in the high technology industry, having recently launched two new lawsuits against Google and Facebook.[2] By contrast, the EU, having already established a long and difficult record of antitrust litigation with technology companies, shifted its focus by instituting an entirely new regime of antitrust regulations dedicated to policing anti-competitive behavior in the technology services sector. As noted in a tweet made by EU Commissioner Margrethe Vestager in December 2020, her description of the proposed digital regulations was telling of the EU's "go it alone" type attitude:

> It is one world. So #DigitalServiceAct & #DigitalMarketsAct will …[g]ive new do's & don't to gatekeepers of the digital part of our world - to ensure fair use of data, interoperability & no self-preferences.[3]

While Vestager's tweet attributes the EU's dynamism with providing positive extraterritorial effects through its two proposed regulations, the same claims may also provide precedent to real risks for inconsistent treatment and regulation of common digital markets across different jurisdictions. As strong independent enforcement efforts in the EU may be matched by conflicting and duplicative outcomes in other jurisdictions, this raises potential worries over procedural fairness and increased costs for both enforcement agencies and responding businesses alike. Such concerns are aptly reflected in the words of the OECD, which noted that:

> Globalisation, the increasing significance of emerging economies, the borderless nature of the growing digital economy, and the proliferation of competition regimes have caused a significant increase in the complexity of cross-border competition law enforcement co-operation. This results in a greater need to: avoid inconsistencies and duplication of effort among governments enforcing their competition laws, help multinational businesses comply cost effectively with the competition regimes of multiple jurisdictions, and improve the techniques and tools of competition authorities' co-operation.[4]

Accordingly, this article proposes that the application of international comity principles would be helpful to promote international cooperation and convergence on multijurisdictional enforcement, creating a "win-win" for competition authorities and the respondents subject to competition scrutiny in the form of consistency, predictability and efficiency. The article proposes five considerations where international comity can be helpful in advancing international cooperation and enforcement convergence in multijurisdictional matters.

2 Federal Trade Commission, "FTC Sues Facebook for Illegal Monopolization," (December 9, 2020) https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization; Department of Justice, "Justice Department Sues Monopolist Google For Violating Antitrust Laws," October 20, 2020 https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

3 Margarethe Vestager, Twitter, (December 15, 2020) https://twitter.com/vestager/status/1338869405329936385?lang=en.

4 OECD, International Cooperation In Competition, (November 3, 2020) https://www.oecd.org/competition/internationalco-operationandcompetition.htm.

II. THE GROWING DIVIDE IN ANTITRUST REGULATION OF THE HIGH TECHNOLOGY INDUSTRY & DIGITAL MARKETS

Divergent approaches to the high technology sector have been a feature of competition enforcement since the emergence and rise of the industry. Early examples were the parallel U.S. and European cases against IBM in the 1970s which resulted in conflicting outcomes. U.S. proceedings against IBM were discontinued in the early 1980s, while the European Commission pursued its investigation and reached a settlement with IBM in 1984.[5] A multi-jurisdictional conflict was also apparent in the different jurisdictional treatments of a landmark Microsoft software bundling case in the early 2000s.[6] The resulting U.S. behavioral order was "criticized as too lenient on Microsoft"[7] while the EU and South Korean resolutions imposed much harsher remedial measures in addition to fines in the millions of dollars.[8] More recently, the EU's multiple lawsuits against Google in regards to their comparison shopping service[9], Android devices[10], and online advertising services[11] have also contrasted the efforts of other agencies which have taken comparatively little enforcement action. As these actions were considered by some commentators as reflective of the EU competition regime's "low bar for anticompetitive effects" when compared to other jurisdictions such as the U.S.,[12] it further illustrates the problematic discordance in approaches which afflict domestic enforcement actions in the often multijurisdictional nature of the technology sector.

International rifts are also evident in the different approaches to merger reviews of technology companies. For example, in December 2020, the EU approved Google's plan to acquire Fitbit on commitments from Google to refrain from leveraging Fitbit's data.[13] The proposed transaction was simultaneously reviewed by many other antitrust agencies, resulting in varying outcomes: the South African authority adopted similar remedies to the EU[14]; however, the Australian Competition and Consumer Commission rejected similar behavioral commitments from Google stating that it was "not satisfied that a long term behavior undertaking of this type in such a complex and dynamic industry could be effectively monitored and enforced in Australia."[15]

The historical trend of divergence does not appear to be abating but increasing as a wave of new sweeping "pro-competition" regulatory reforms in digital markets have been recently announced in various jurisdictions across the globe. In the EU, two new proposed laws, the *Digital Markets Act* and the *Digital Services Act*, would allow the Commission to impose strict measures on large "gatekeeper" digital platforms; apply monetary, behavioral, or structural remedies for non-compliance; and initiate targeted market investigations to regularly update the obligations

5 See John E Lopatra, "*United States v IBM:* A Monument to Arrogance," Antitrust Law Journal, 68:145 at fn 4; Commission Decision of April 18, 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.849 IBM personal computer), 84/233/EEC https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31984D0233&from=EN.

6 James F. Ponsoldt & Christopher D. David, "A Comparison Between U.S. and E.U. Antitrust Treatment of Tying Claims Against Microsoft: When Should the bundling of Computer Software Be Permitted?," Northwestern Journal of International Law & Business, 27:421 (2007), pp. 421-422.

7 John P. Jennings, Comparing the US and EU Microsoft Antitrust Prosecutions: How Level Is The Playing Field?, Erasmus Law and Economics Review 2, no. 1 (March 2006): 71–85.

8 See Daniel J. Silverthorn, "Microsoft Tying Consumers' Hands – The Windows Vista Problem and the South Korean Solution," Michigan Telecommunications and Technology Law Review 13, no.2 (2007): 620-621.

9 European Commission, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service," (June 27, 2017) https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

10 European Commission, "Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine," (July 18, 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

11 European Commission, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising," (March 20, 2019) https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

12 Gregory J. Werden & Luke M. Froeb "Antitrust and Tech: Europe and the United States Differ, and It Matters" CPI Antitrust Chronicle, October 2019.

13 European Commission, "Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions," (December 17, 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

14 Competition Commission (South Africa), "Competition Commission conditionally approves the Google/Fitbit merger," (December 22, 2020) http://www.compcom.co.za/wp-content/uploads/2020/12/Competition-Commission-conditionally-approves-the-Google-Fitbit-merger.pdf.

15 Australian Competition & Consumer Commission, "ACCC rejects Google behavioural undertakings for Fitbit acquisition," (December 22, 2020) https://www.accc.gov.au/media-release/accc-rejects-google-behavioural-undertakings-for-fitbit-acquisition.

for such "gatekeepers."[16] In the UK, there are plans for a standalone digital regime within its existing competition laws that serve to regulate the alleged market power of specific technology firms and platforms.[17] Germany and France have also taken active steps to review and revise their own domestic competition laws in order to better regulate the digital market.[18] In Australia, following the completion of the Digital Platform Inquiry in 2019, the government has taken proactive steps in establishing a mandatory code of conduct for digital platforms and launching a further inquiry into the digital advertising market.[19] Japan has also recently enacted regulations requiring "Specified Digital Platform Providers" to improve transparency and fairness in trading on their digital platforms.[20] This emerging patchwork of digital regulation further amplifies existing incoherence and uneven application of competition regimes on the technology sector and digital markets across the globe.

III. INTERNATIONAL COMITY – A PATHWAY TO GREATER COOPERATION AND CONVERGENCE?

Despite the incohesive and fractured nature of global competition enforcement in the high technology sector, competition agencies have nonetheless developed a common understanding regarding the increasing need for international cooperation and convergence. Multilateral antitrust organizations such as the International Competition Network ("ICN") and the OECD Competition Policy Committee ("OECD") have made concerted efforts to promote global cooperation. Similarly, the G7 Competition Authorities expressed their commitment to cooperation following high level meetings in Paris on "Competition and the Digital Economy" stating that:

> In light of the global nature of the digital economy and the shared mission of sound application of the competition laws, international cooperation between competition enforcers and policymakers is crucial. There is a growing need for convergent competition enforcement and for effective answers to cross-border practices and multi-jurisdictional cases. International cooperation helps foster a coherent competition landscape, which is also of interest for business stakeholders. Competition enforcers therefore support continued cooperation and experience-sharing through existing fora and networks, as digital issues are already subject to work conducted by competition authorities at the multilateral level.[21]

On a general basis, non-binding and soft law approaches are the primary instruments used by competition enforcement agencies to advance international cooperation and convergence. These methods currently include bilateral and multilateral cooperation agreements usually in the form of MOUs; active participation in multilateral fora such as the ICN and the OECD; and use of Competition Policy chapters contained in international trade agreements.

Another important method of reducing conflicting approaches to cross-border conduct where more than one country seeks to apply its competition law is the principle of international comity. Specifically, the principle of comity "calls for one enforcer to defer to another's decisions, and not take parallel, potentially inconsistent decisions."[22] As early as the 1967 OECD Recommendation on Agency Cooperation, there has been

16 European Commission, "The Digital Markets Act: ensuring fair and open digital markets" https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en; European Commission, "The Digital Services Act: ensuring a safe and accountable online environment" https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en;

17 Competition and Markets Authority, "CMA advises government on new regulatory regime for tech giants," (December 8, 2020) https://www.gov.uk/government/news/cma-advises-government-on-new-regulatory-regime-for-tech-giants.

18 Silke Heinz, "Draft German competition rules on powerful digital gatekeepers," Kluwer Competition Law Blog, (December 11, 2020) http://competitionlawblog.kluwercompetitionlaw.com/2020/12/11/draft-german-competition-rules-on-powerful-digital-gatekeepers/; Autorité de la concurrence, "The Autorité de la concurrence's contribution to the debate on competition policy and digital challenges," (February 19, 2020) https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en_0.pdf.

19 Speech by Rod Sims, "The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses," (August 2020) https://www.accc.gov.au/speech/the-acccs-digital-platforms-inquiry-and-the-need-for-competition-consumer-protection-and-regulatory-responses.

20 Ministry of Economy, Trade and Industry (Japan), "Cabinet Decision on the Bill for the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms," (February 18, 2020) https://www.meti.go.jp/english/press/2020/0218_002.html.

21 Press Release "Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy" Paris, June 5, 2019," https://www.ftc.gov/system/files/attachments/press-releases/ftc-chairman-supports-common-understanding-g7-competition-authorities-competition-digital-economy/g7_common_understanding_7-5-19.pdf.

22 Antitrust Modernization Commission, "Report and Recommendations" (April 2007), pg.220 http://go into.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

a recognition for agencies, in accordance with the principle of comity, to exercise moderation and self-restraint in the interest of cooperation.[23] This theme of international comity has continued to be represented in more recent recommendations. For example, in a 2007 report prepared by the American Modernization Commission, they supported "prosecutorial or investigative restraint" by advocating for a lead jurisdiction most closely associated with the alleged anti-competitive conduct to take primary responsibility for enforcement.[24]

Despite the well-intentioned calls for policy makers and enforcement agencies to exercise restraint in the name of international cooperation and efficient enforcement efforts, there have been few examples of comity principles being exercised in the high technology and digital market sphere other than in the case of merger reviews. However, the potential benefits of international comity in promoting and facilitating cooperative multijurisdictional regulatory actions should not be ignored. A rare case of comity was used by the Canadian Competition Bureau ("CCB") in an abuse of dominance investigation in the above noted software bundling case concerning Microsoft, accepted an undertaking from Microsoft that any remedy from U.S. proceedings would also be applied to Canada. This approach allowed the CCB to have its concerns addressed without needlessly duplicating efforts and ensured that the CCB's enforcement action did not conflict with the enforcement action of a jurisdiction that had a significantly greater nexus.[25] Former CCB Commissioner, Sheridan Scott, noted that the CCB elected not to pursue a separate investigation in Microsoft after having concluded that "a global remedy was preferable to a patchwork quilt approach [and that] procedures in Canada would have likely resulted in a duplication of efforts, resources and remedies to achieve the same result."[26]

While the practical application of comity has thus far not been widespread, the underlying principles of comity continue to be a welcomed concept among competition authorities. As noted in the recent OECD/ICN Report on International Cooperation in Competition Enforcement published in January 2021, a vast majority of competition agencies voiced their support for greater multilateral cooperation, noting that this would not only benefit the agencies themselves, but also reduce the administrative burdens on business engaging with multiple authorities on the same matter.[27] The same agencies also agreed that while there are no specific legal provisions concerning the consideration of remedies applied by other jurisdictions, a vast majority already considered the remedies imposed by other authorities[28] and would "always seek to apply similar and non-contradictory remedies," and "consider remedies applied to similar cases…in order to further avoid divergent approaches to similar issues."[29] As the agencies noted their requests for "greater harmonisation and convergence in laws and practices" in the future, it would appear that international comity, if properly structured, administered and exercised, would be an apt and promising approach in pursuance of such a goal.[30]

23 Deborah Platt Majoras, "Convergence, Conflict, and Comity: The Search for Coherence in International Competition Policy" (Remarks at the Fordham Competition Law Institute 34th Annual Conference on International Antitrust Law & Policy, September 27, 2007) www.ftc.gov/sites/default/files/documents/public_statements/convergence-conflict-and-comity-search-coherence-international-competition-policy/070927fordham_0.pdf.

24 *Id.* pp. 220-221.

25 John Pecman & Duy Pham, The Next Frontier of International Cooperation in Competition Enforcement, Frèdèric Jenny - Standing Up for Convergence and Relevance in Antitrust, Liber Amicorum, Concurrences, Paris, 2019.

26 See Sheridan Scott, "Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World: To Defer or Not To Defer? Is that the question?" (Remarks at American Bar Association's Section of Antitrust Law 2006 Spring Meeting, March 29, 2006).

27 OECD & ICN, OECD/ICN Report On International Co-Operation in Competition Enforcement, p. 119, https://www.internationalcompetitionnetwork.org/portfolio/oecd-icn-report-on-international-co-operation-in-competition-enforcement-2021/.

28 *Id.* p. 147.

29 *Id.* p. 148.

30 *Id.* pp. 181-182.

IV. FIVE CONSIDERATIONS TO PROMOTE INTERNATIONAL COMITY IN MULTIJURISDICTIONAL MATTERS

As noted above, the spirit and principles underlying international comity appear to be generally welcomed by antitrust agencies and respondent businesses based on public statements issued by G7 competition authorities, the ICN, and OECD. Such sentiments are aptly summarized in a recent statement made by the Chief Economist of the UK's Competition and Markets Authority which, speaking on the regulation of digital markets, noted that "it's not in anyone's interest to have substantial regulatory divergence within Europe, so I think we all have an incentive to avoid that … and not just within Europe but also across the Atlantic [as well]."[31]

Accordingly, in aiming to foster a greater application of comity principles across the globe, the following are five considerations that will hopefully provoke further discussion regarding the benefits of international comity for agencies and respondent businesses.

A. Competition Agencies Should Publicly Commit to Comity, Where Possible

Competition agencies should publicly commit to actively pursuing comity principles in multijurisdictional matters in order to avoid inconsistent outcomes and, to the extent remedies are necessary, unnecessarily duplicative or inconsistent remedies. The commitment would likely be followed by agency guidelines for co-operation in international competition law enforcement, such as those published by the U.S. agencies in 2017.[32] These guidelines note that "(w)hen multiple authorities are investigating the same transaction or same conduct, the Agencies may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies" and "(i)n some circumstances, cooperation may result in one authority closing an investigation without remedies after taking another authority's remedies into account."[33] The competition agencies in Australia and Canada have also developed similar, albeit more limited, guidance on their use of comity.[34]

A commitment to comity would aid merger parties or respondents in, where necessary, systematically addressing agency concerns through the most least intrusive means necessary to address competition concerns. This would also create more certainty and confidence in the any multijurisdictional negotiation process. Agency best practices should expressly reference comity considerations in press releases and in published position statements for multijurisdictional matters.

31 Victoria Ibitoye, "Big Tech regulation efforts should aim for global convergence, CMA chief economist says," MLex Market Insight, January 28, 2021.

32 ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION Issued by the: U.S. DEPARTMENT OF JUSTICE and FEDERAL TRADE COMMISSION, January 13, 2017 https://www.justice.gov/atr/internationalguidelines/download.

33 *Id.* pp. 47-48.

34 The Australian Competition and Consumer Commission ("ACCC") applies comity in cases where it has concluded that: (i) the nexus to Australia of the competitive harm being investigated was not sufficient (including considerations of the level of involvement of Australian businesses); and (ii) possible enforcement actions by sister agencies would nevertheless result in the termination of the offending conduct and protection for Australian consumers. The Canadian Competition Bureau set out its approach to comity in merger cases in the "Information Bulletin on Merger Remedies in Canada" (Competition Bureau, "Information Bulletin on Merger Remedies in Canada" (September 22, 2006), www. competitionbureau.gc.ca/eic/site/cb- bc.nsf/eng/02170.html). The Bureau may apply comity and defer to another agency's merger remedies when the following conditions are met: (1) the assets that are subject to divestiture, or the conduct that must be carried out as part of a behavioural remedy, are primarily located in another jurisdiction; (2) the Bureau is confident that the foreign agency's remedy is effective and viable and that it will enforce the remedy; and (3) the Bureau is satisfied that the actions taken by the foreign agency are sufficient to resolve the competition issues in Canada. For international mergers, these conditions provide useful guidance for determining when a local remedy would be required or when another agency's measures would be enough. When considering comity in other areas of competition enforcement, the Bureau would apply the same general principles as it does for mergers. See Vicky Eatrides, "The Competition Bureau's Approach to International Cooperation and Comity" (Remarks at USC Gould's Center for Transnational Law and Business Inaugural Conference on Antitrust Enforcement in a Global Context: Extraterritoriality and Due Process January 23, 2017); OECD, "OECD Developments in international co-operation in competition cases since 2014: monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings, Note by the Secretariat," (June 4, 2019) http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2019)3&docLanguage=En; John Pecman and Duy Pham, The Next Frontier of International Cooperation in Competition Enforcement, Frèdèric Jenny - Standing Up for Convergence and Relevance in Antitrust, Liber Amicorum, Concurrences, Paris, 2019; Terry Calvani & Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, September 22, 2016) https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart- te.pdf.

B. Agencies Should be Prepared to Exercise Deference

In the context of multijurisdictional investigations where a remedy may be required and is entered into between a competition agency and a respondent, or where an agency concludes that no remedy is required, agencies should be prepared to exercise deference and avoid inconsistency, where possible, by taking into consideration the principle of imposing the least intrusive remedy necessary to address competition concerns. Furthermore, where a country utilizes regulation to regulate alleged anti-competitive conduct in digital markets and where the remedy has extra-territorial effects, a digital regulator should have regard to competition law enforcement comity principles in shaping a remedy, where a remedy is required, to avoid an inconsistent outcome.

Consider the following hypothetical example: Company Alpha, with a global social media application, is subject to a behavioral remedy in Country X in relation to Alpha-brand products sold on its social media platform for self-preferencing by a digital regulator. In Country Y, the alleged self-preferencing (discriminatory conduct) does not result is a substantial lessening of competition and the investigation is closed by the competition authority with no enforcement action. In this instance, Country X's digital regulator agrees to fashion a remedy against Alpha to minimize its impact on Country Y's market. In Country Z, the competition authority finds that Alpha's discriminatory self-preferencing has caused the exit of a competitor and finds there was a substantial lessening of competition. Country Z usually prefers to use structural remedies in these types of cases but in order to avoid inconsistent remedies against the company agrees to implement the same remedy as was imposed by the digital regulator in Country X.

In this case, the hypothetical example illustrates how comity and deference can be used by the three countries to minimize conflicts where remedies were imposed, or where no enforcement action was taken.

C. OECD Should Strengthen International Comity Recommendations

Further to the OECD's 2014 Challenges of International Co-operation in Competition Law Enforcement report and recommendations,[35] which was recently reinforced by the OECD Secretariat[36], the OECD should strengthen the international comity recommendations including:

a) developing international standards for formal comity, along with clarifying agency comity obligations;

b) allowing (or encouraging) competition agencies to choose decisions of other agencies in the investigation of cross-border cases which could include giving deference to one "lead authority"; and

c) reaching a multi-lateral agreement for comity and deference standards based on jurisdictions opting into the agreement.[37]

35 OECD, Challenges of International Co-operation in Competition Law Enforcement 2014, https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm.

36 OECD Developments in international co-operation in competition cases since 2014: monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings, Note by the Secretariat June 4, 2019 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2019)3&docLanguage=En.

37 OECD, Challenges of International Co-operation in Competition Law Enforcement 2014, Pg.53 https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm.

D. Building on the ICN Framework for Competition Agency Procedures

The ICN should consider taking-up the OECD international comity recommendations by building on its successful ICN Framework for Competition Agency Procedures ("CAP").[38] With over 70 competition agencies choosing to join, the CAP includes a number of procedural fairness protections, including transparency, impartiality and independent reviews. It also includes notice to respondents of agency investigations, timely agency resolution, agency confidentiality, written decisions from agencies and access to information from agencies. Further, the CAP seeks to protect a respondent's right to defend and to be represented by counsel. Indeed, in the formation of CAP, it was contemplated that its implementation and operation "could lead participants to enhance the CAP working procedures or develop more robust implementation commitments."[39]

Global application of CAP would help ensure consistent, global application of procedural safeguards, giving domestic enforcement agencies and respondents greater confidence to defer to certain jurisdictions.

E. Consolidation Options for Respondents

If and when an International Comity Framework is established by a multi-lateral agreement(s), respondents to cross border investigations could have the option of requesting that agencies consolidate their merger reviews or "like" investigations, to be headed by a lead agency. By way of example, this approach could begin with the G7 competition agencies, with a focus on digital market cases. Other agencies could opt-in to the G7 comity agreement on case by case basis by agreement with the lead agency and the respondent. While there may be some need to account for unique or tailored outcomes in specific jurisdictions and substantive divergences in competition laws, a consolidation for respondents does offer predictability, consistency and fairness for competition agencies and respondents.

V. CONCLUSION

The prevalence of a fragmented global patchwork approach to regulating the high technology sector and digital markets serves to undermine confidence in competition agencies' commitment to international cooperation and procedural fairness. This raises real concerns of inconsistency and unnecessary duplication of enforcement efforts, both being considerations that serve to unnecessarily complicate matters for both antitrust agencies and respondent businesses alike. To counteract such risks, antitrust agencies should look to proactively embrace opportunities for greater international comity when working with other agencies. This would not only enhance enforcement efficacy and ensure efficient allocation of global enforcement resources,[40][41] but would also be welcome approach for merging parties and respondents involved in multijurisdictional enforcement in the form of consistency, predictability and efficiency.

38 ICN Framework for Competition Agency Procedures, 2019 https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/.

39 Paul O'Brien, ICN's Framework for Competition Agency Procedures, Part 2: What does the CAP mean for the ICN tomorrow? May 2019, CPI Competition Policy International https://www.competitionpolicyinternational.com/icns-framework-for-competition-agency-procedures-part-2-what-does-the-cap-mean-for-the-icn-tomorrow/.

40 Terry Calvani & Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, September 22, 2016) pg. 190 https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart- te.pdf.

41 Sheridan Scott, "A Canadian Perspective on the Role of Comity in Competition Law Enforcement in a Globalised World" (2012) 1 Competition LRep 103, pg. 113.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.