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.

CPI ANTITRUST CHRONICLE OCTOBER 2022

Visit www.competitionpolicyinternational.com for access to these articles and more!

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

By John M. Taladay & Christine Ryu-Naya

International cooperation on competition issues among agencies and governments can be great for consumers and companies alike, avoiding a host of inefficient and potentially conflicting outcomes. But while cooperation in competition enforcement has a lengthy and venerated history, the prospect of such cooperation in competition policy design and legal implementation is a newer concept that presents a host of new risks and questions that are worth examining. One such risk is an overlapping web of not-quite-aligned approaches by competition cooks that each add their local flavors to the stew and create the very pitfalls that international cooperation is supposed to avoid, i.e. inefficiency and conflict. What can we learn from our collective experience with international cooperation, and where are the potential pitfalls on the road ahead?

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.

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.