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## **Converging International Competition Enforcement in the Technology Industry**

**Ketan Ahuja**  
**Harvard Kennedy School**

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# Converging International Competition Enforcement in the Technology Industry

## Abstract

Questions around how to address competition problems in the technology industry have risen to the top of the agenda for competition agencies, regulators and legislators in recent years. Calls to act are louder than ever in all major jurisdictions. A proliferation of cases and proposed regulations risks generating substantial divergence between jurisdictions on common problems, which may impede effective enforcement. This report explores how to stimulate greater convergence between jurisdictions on competition problems posed by technology platforms.

## Ketan Ahuja

MPP Program (Expected Graduation: 2022)

Client: Michal Halperin, Former Director of Israel Competition Authority

Faculty Advisor & Policy Analysis Exercise Seminar Leader: John Haigh

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## 1. Executive summary

Questions around how to address competition problems in the technology industry have risen to the top of the agenda for competition agencies, regulators and legislators in recent years. Calls to act are louder than ever in all major jurisdictions. Competition agency leadership in the US, Europe and most other jurisdictions are in substantial alignment on the need to address technology platforms.

And yet how exactly would be best to do so is not clear. Experimentation has proved to be competition agencies' friend: agencies and academics have proposed a host of approaches and solutions, some evolutions of existing precedent, and others quite revolutionary. Franklin Delano Roosevelt's comments on economic policy during the great depression apply equally to modern competition policy against technology platforms:

"It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something.

While experimentation allows the competition policy community to come up with solutions, it also raises a real risk of divergence and fragmentation between countries in this essential area of economic regulation. The competition policy community does not yet have all the answers to questions involving technology platforms, and there is not yet a standardized playbook. A proliferation of cases and proposed regulations risks generating substantial divergence between jurisdictions on common problems, which may impede effective enforcement and hurt businesses and consumers.

We must therefore act, but we should act together where we can. Convergence is an important goal of competition policy, and it is easier to procure in the early stages of enforcement actions or policy initiatives. Efforts to converge competition policy should be mindful of the history and institutional structure of the international competition system: it respects the sovereignty of national regulators and operates largely through dialogue, consensus-driven best practices and collaboration. These 'soft' convergence methods have proved most effective in competition policy in the past.

Within this system, this paper explores how to draw together the US and European competition policy regimes on technology platform issues, to ensure they evolve together and retain their close alignment. It suggests five recommendations:

### **1. *Issue joint merger guidelines on technology platform enforcement***

Guidelines around case analysis and enforcement priorities have substantial impact on the state of the law. Courts and litigants defer to soundly written guidelines, and guidelines could be written to capture emerging consensus, particularly around merger enforcement where there is strong agreement on enforcement priorities.

Joint guidelines could take shape as formal merger guidelines (with more procedural hurdles), or less formal joint statements of enforcement priorities in the technology sector.

### **2. *Coordinate market investigations, enforcement actions, and remedies***

Authorities from around the world could coordinate more on investigations, enforcement actions and remedies. Recent enforcement sagas demonstrate interesting examples of this

coordination, for example around platforms such as Booking.com. Coordinated investigations have proved to be effective in creating 'default' remedies that other regulators and enforcers are likely to adopt more easily, promoting convergence. Coordinated investigations also save crucial agency resources and lead to better reasoning and remedies.

### **3. *Allow competition agencies to share evidence more easily***

Sharing information between competition agencies is governed by national law, and some agencies face onerous restrictions on their ability to share information collected through investigations with other agencies. OECD recommendations suggest that agencies should be able to share information unilaterally without needing the consent of the party that provided the information. Jurisdictions that have not already done so should speedily implement these recommendations to facilitate international cooperation.

### **4. *Create annual consensus reports on the state of digital regulation***

Many commentators have concluded that new regulatory tools will be needed to pursue effective competition policy around big technology platforms. Most major jurisdictions are considering new regulation on big tech. Their proposals differ, in some cases quite substantially, and there is value in allowing different jurisdictions to experiment with different approaches.

This recommendation suggests that the OECD, ICN or some other respected international commentator should create annual consensus reports on the state of digital regulation. These reports would aim to capture any emerging consensus around digital regulation and would offer templates to regulators looking to adopt that consensus into domestic law. The hope would be that these reports, refreshed annually, would serve as a first point of call to regulators looking to introduce new rules and would help converge digital regulation over time.

### **5. *Exchange staff between agencies regularly***

In competition enforcement, personnel are policy. Issues can be very complex, particularly for novel topics, and one of the easiest ways to share approaches is by bringing an outside expert to weigh in. Staff exchanges can also break patterns of groupthink and improve decision-making by offering the host regulator access to unique information. The know-how on how to address particular big tech practices moves best through people.

Systematizing and scaling staff exchanges could therefore be an effective way to converge competition policy. Operational challenges in running these exchanges effectively are serious but not insurmountable: secondments must be integrated into the career paths of top performers and host agencies must rely on secondees to do real work, contribute to the secondee's costs and be permitted to cut short non-performing secondments. Agencies will likely require additional human capital resources to make secondments work systematically.

## 2. Introduction

2021 saw the global competition policy community sharply step up its efforts to enforce against big tech.<sup>1</sup> Of course, scrutiny of competition among tech platforms has been around for a long time: the European Commission opened its first investigation into Google in 2010 and enforcement efforts against Microsoft dominated the competition world at the turn of the millennium. But last year felt different as agencies around the world filed new cases, legislators began seriously debating new powers and competition policy against big tech became a regular feature in front-page news.

This apparent alignment of the international competition policy community is welcome. Five years ago, a schism over big tech seemed just as likely, with the European Commission issuing large fines but the US agencies and political apparatus largely viewing big tech as procompetitive forces for disruptive innovation. President Obama adopted this view in an interview with Kara Swisher in 2017:

“In defense of Google and Facebook, sometimes the European response here is more commercially driven than anything else. As I’ve said, there are some countries like Germany, given its history with the Stasi, that are very sensitive to these issues. But sometimes their vendors — their service providers who, you know, can’t compete with ours — are essentially trying to set up some roadblocks for our companies to operate effectively... We have owned the Internet. Our companies have created it, expanded it, perfected it in ways that they can’t compete. And oftentimes what is portrayed as high-minded positions on issues sometimes is just designed to carve out some of their commercial interests.”<sup>2</sup>

Competition policy has faced these international schisms in the past: efforts to align international enforcement have been a delicate give-and-take negotiation over the past seven decades, permeated by earthquakes that destroy international goodwill. Two earthquakes are instructive.

In the 1970s and 1980s fledgling competition regimes in Europe and other developed democracies outside the US began to assert more boldly their primacy and independence within their jurisdictions. These efforts followed decades of failed attempts to delegate international competition policy to international trade organizations.

American enforcers had also become more aggressive in pursuing violations of US antitrust law by companies based outside the US. Under a longstanding principle of antitrust law countries can enforce against practices that affect their domestic economy, even if those practices take place abroad. This leads to extraterritorial enforcement of antitrust law. As the economy started to globalize, extraterritorial enforcement became more common, and states perceived US enforcers as overreaching in their international efforts.

In response to failed harmonization and US extraterritorial enforcement, competition regimes outside the US stepped up their enforcement efforts and passed blocking statutes to protect their companies

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<sup>1</sup> “2021: The Year The Antitrust World Bore Down On Big Tech - Law360,” accessed February 25, 2022, <https://www.law360.com/articles/1403213/2021-the-year-the-antitrust-world-bore-down-on-big-tech>.

<sup>2</sup> Kara Swisher, “White House. Red Chair. Obama Meets Swisher.,” Vox, February 15, 2015, <https://www.vox.com/2015/2/15/11559056/white-house-red-chair-obama-meets-swisher>.

from US enforcers.<sup>3</sup> This episode demonstrates that competition policy is too politically sensitive to delegate substantially, either to an international body, or to a foreign enforcer that aims to enforce substantial edicts in another's territory. It also demonstrates that nations must take responsibility for effectively controlling competition policy violations within their jurisdictions: their failure to do so means the impact of these violations will spill over into other countries in a globalized world and create international tensions.

A second major earthquake from diverging antitrust systems arose in 2001: the European Commission decided to block the merger between GE and Honeywell. The US Department of Justice had approved the merger between these two American companies fairly easily. By 2001, European enforcers had become sophisticated, confident, and more vigorous in merger control than American enforcers and judges who had developed a more *laissez-faire* approach.

The US had championed competition policy around the world and provided substantial assistance to international jurisdictions that set up new regimes. It had not seemed likely that these regimes would bring divergence in approaches, contrasting decisions and conflict. The European Commission blocking the merger of two American companies had never really seemed to be on the cards. With the GE-Honeywell merger the European regime that the US had nurtured turned against the Americans.

GE-Honeywell created substantial ill will and conflict between the US and European competition communities. But after the dust had settled, they realized it was time to work together and create more opportunities for dialogue, exchange of ideas as equals, and convergence. This environment speeded initiatives leading to the birth of the International Competition Network (ICN) in 2001, to renewed dialogue within the OECD's competition committee, and to the agencies in Europe and the US committing themselves to regular and intensive dialogue on theories of harm and enforcement practices.

At the time of the formation of the ICN, few were optimistic about the chance that this dialogue would lead to real impact on convergence. But modern commentators and enforcers consider it to have succeeded far beyond initial expectations. This soft approach has not brought harmonization, and enforcers still do occasionally disagree on the same case. But most enforcers now follow the same process for reviewing a merger, use similar theories of harm and cooperate extensively in uncovering and investigating harmful practices. GE-Honeywell's lesson for us is about the power of dialogue, cooperation and international institutions in driving convergence, and the importance of proactively working together to remain on the same page before challenging cases arise.

This paper mainly addresses convergence between the US and European competition policy regimes. Many countries outside the US operate sophisticated competition policy regimes, including Australia, Israel, Japan, the UK and others. Their efforts in big tech are also notable. While big tech platforms raise many policy issues, such as those that relate to privacy and freedom of speech, this paper focuses on competition issues that aim to improve market functioning.

This paper also refers to 'big tech' without defining it. Technology platforms Meta, Alphabet, Amazon, Apple and Microsoft ('MAAAM') have been the focus of discussions in competition policy, but our discussion is relevant to many other digital platforms (such as booking.com, Spotify, Airbnb and others).

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<sup>3</sup> See, for example, the UK's Protection of Trading Interests Act, 1980, and similar initiatives in Australia.

### 3. Why Now?

In 2019, the US enforcement agencies began to step up enforcement against big tech, driven by big tech's growing power, better understanding of competition problems technology platforms pose and growing concern over big tech among the American voting public. Leadership in the DOJ expressed an intention to investigate technology platforms and the FTC created a task force on technology markets.<sup>4</sup> In late 2020, the FTC and DOJ launched actions against Facebook and Google, to complement other initiatives by state Attorneys General and private parties. Changes to the US approach accelerated in 2021 with the appointment of Lina Khan and Jonathan Kantor to the FTC and DOJ, and with the Biden administration's broader focus on competition policy.

The European approach has also started to change: after much effort to apply the existing competition regime to technology platforms, the Europeans have concluded that new tools are needed. It has become clear that huge fines take too long to issue and cannot correct a market structure that has tipped towards a particular platform. In 2019 the European Commission began developing new regulations, which are expected to pass in 2022 as the Digital Markets Act and Digital Services Act. Germany has also created new regulatory powers and the UK is debating a new regime for technology platforms.

Competition policy communities are not homogenous and reasonable people may differ on enforcement questions surrounding big tech. But there is a sense that a consensus is starting to emerge between enforcers in the US and Europe. This emerging consensus understands that some action needs to be taken to constrain technology platforms, markets are unlikely to correct themselves in the medium-term, and there is a need for new tools to accompany traditional enforcement approaches in big tech. This creates an opportunity for meaningful convergence.

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<sup>4</sup> "FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets," Federal Trade Commission, February 26, 2019, <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>. "Assistant Attorney General Makan Delrahim Delivers Remarks for the Antitrust New Frontiers Conference," June 11, 2019, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers>.

#### 4. What are the advantages of convergence?

Convergence in competition enforcement on technology platforms brings many advantages. Technology platforms pose challenges that are common across countries, to a much greater extent than in other industries. Owing to economies of scale, network effects, and globalized internet markets, the same large technology platforms hold leading positions in many markets across the world. Marginal differences in market share for a particular platform in different jurisdictions should not lead to meaningfully different competition assessments. Big tech platforms typically operate in very similar ways in all major economies, and their users interact with them in the same ways.

This is much truer for technology platforms than in other industries. Outside of large technology platforms countries have very different industrial structures. They may have different firms with very different regional market shares. Cultural norms may differ alongside industrial practices. This paper therefore limits its analysis to convergence on technology platforms and respects the current balance of 'managed autonomy' that exists for competition policy more broadly.

Jurisdictions working together to solve common problems will likely create better solutions. Convergence harnesses the power of dialogue and cooperation to improve existing imperfect approaches. Different regulators have a proclivity to use different tools or remedies as a first resort and in many instances the strength or weakness of a tool can only emerge after a thorough investigation of its benefits. Convergence allows regulators to harness each other's inclinations towards certain approaches.

A converged approach also helps agencies defend against regulatory capture of legislators, courts and politicians. Converged solutions seem more defensible against accusations of local regulatory capture as many competition agencies approve of a particular way of analyzing an issue. An expectation of convergence can allow the agencies to strengthen their position against legislators and politicians that are generally considered to be more susceptible to capture and influence.

Even where differences reflect legitimate alternative approaches to solving hard problems, divergence can open the door for political and industrial policy concerns. An international norm that each country can approach enforcing against tech platforms as it chooses can leave the competition system subject to hijacking by political interests that seek to use it for industrial policy or other concerns. Norms around convergence would subject attempts to diverge to greater scrutiny. An international consensus is more likely to resist political objections and judicial review.

Convergence allows competition enforcers to make the best use of limited resources. Enforcers frequently find themselves vastly outgunned by technology platforms. They typically only have a small fraction of the resources that a tech platform may marshal in any case. Nobody benefits where enforcers in different jurisdictions have to repeat the same analyses in similar cases. Convergence can help enforcers conduct cases more efficiently with lower administrative burdens and working internationally can level the playing field between enforcers and technology platforms. Agencies are currently facing an overflow of cases: they do not have the resources to review all mergers that merit review, let alone pursue other meritorious cases. More efficient work practices could help them investigate more meritorious cases.

Convergence helps the many small agencies that exist in jurisdictions around the world. Enforcers in the US, the European Union and some other national jurisdictions have ability to pursue their own agendas, and large enough markets to consider a local approach. But smaller jurisdictions typically do not have the expertise or capacity to carve their own path on questions relating to technology platforms. Their markets may also be too small to effectively enforce against big technology platforms without aligning with a larger jurisdiction. Divergence raises the risk that these smaller regulators will not act and may thereby stymie comprehensive enforcement globally. Convergence provides clarity for smaller jurisdictions with less sophisticated competition regulators. It substantially raises the chance that small agencies will act, and their actions will reinforce those of larger agencies.

The business community also benefits from a converged approach. Common, well-designed rules would allow businesses to operate in substantially the same way around the world. This can promote competition by reducing international regulatory barriers. It can also reduce costs for platforms and the many companies they work with and improve the experience for users and businesses that may interface with platforms internationally.

Fragmentation of the internet benefits nobody. More so than in any other area of competition policy, internet platforms present common challenges and substantial benefits from collaboration across different competition policy regimes. Efforts to converge should be designed to make the most of the many synergies that enforcers and the business community would see from a common approach.

## 5. What are the challenges in creating convergence?

Convergence faces serious obstacles. These obstacles limit the scope and manner of convergence that is achievable. Meaningful convergence is nonetheless possible within the current international competition enforcement framework. Evolution, not revolution is required, and the challenges of convergence shape the sorts of solutions competition practitioners should look for.

Among the most substantial obstacles is that different jurisdictions have different institutional frameworks and cultural approaches to competition policy. The European Commission, for example, can issue its own rulings following an administrative investigation process, while US enforcers must convince a court that its interpretation of a case reflects valid antitrust law. Both courts and agencies remain essential to the enforcement of competition law in the US and the EU, but this institutional difference shifts the locus of power in competition policy more towards the courts in the US than in the EU. Shifting practices within the agencies can therefore do more to promote convergence within Europe than in the US, which complicates the degree to which interagency dialogue can drive convergence.

More significant than the institutional framework for convergence is the difference in enforcement cultures between the US and the EU. Two examples illustrate how this difference is entrenched and substantially influences competition policy in divergent ways:

1. European cultural norms accept a strong regulatory role for the state. Competition practitioners may anecdotally speak of competition 'regulation' in Europe, and they are more likely to acknowledge a symbiosis between regulation and enforcement activities. By contrast, American cultural norms are less sympathetic to 'regulation'. Americans prefer instead to speak of competition 'enforcement'. This leads European regulators to be more disposed to regulation of digital markets than American regulators, and for political will towards regulation to be easier to muster in Europe.

This cultural component of competition policy has also shaped court decisions. In the US, the Supreme Court has held that a detailed regulatory scheme addressing a certain industry ordinarily suggests that industry may be immune from US antitrust law through the doctrine of implied immunity.<sup>5</sup> This may derive from a cultural inclination to see regulation and antitrust as alternatives rather than symbiotic.

2. US cultural norms emphasize commercial freedom to a greater degree than in Europe. Claims that the state should not interfere with free enterprise have vast staying power in the US political system. Accordingly, the US courts have held since the early years of the Sherman Act that there is no duty to deal with trading partners under US antitrust law.<sup>6</sup> This finding has substantially limited the development of US doctrine on essential facilities and refusals to deal.<sup>7</sup> These theories of harm are commonly used in European enforcement cases against technology

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<sup>5</sup> See, e.g., *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U. S. 659 (1975). See also *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) and *Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157, 127 S.Ct. 2383 (2007)

<sup>6</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>7</sup> *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) and prior case history on the essential facilities doctrine.

platforms, and commentators predict they may need to be revived for US enforcers to effectively enforce against technology platforms.<sup>8</sup>

It is also not entirely clear what direction competition enforcement against technology platforms will take in the US. Attitudes have shifted substantially over the last five years and the current heads of the Federal Trade Commission and Department of Justice seem largely aligned with leading European enforcers in their attitudes and enforcement priorities. But power to shape competition policy is widely distributed in the US and US courts may need to overturn precedents to change competition enforcement on big tech, and their appetite to do so is unclear.

Broader political sentiment in the US remains hard to predict, despite recent apparent pro-enforcement coalitions. Political sentiment often defines the center of gravity in antitrust enforcement efforts. Trends in politics therefore matter significantly for efforts to converge enforcement against technology firms. Antipathy towards Big Tech currently pays political dividends and attracts bipartisan coalitions.<sup>9</sup> At the same time, multiple interest groups militate against enforcement, and a skepticism towards government action in markets maintains a strong hold in the US.

This complex political sentiment around enforcement threatens convergence in two ways. First, the current alignment of opinion in the US towards enforcement that substantially mirrors European initiatives feels somewhat brittle. Nobody can predict whether the current alignment will last beyond the next election, and circumstantial changes in US political dynamics might lead to adjustments in US enforcement priorities. The uncertain direction of and decentralized power within the US system makes the route to convergence unpredictable.

Second, effective competition policy against technology platforms is widely considered to require new legislation or regulatory frameworks. Mercurial political dynamics and the general difficulty in passing legislation in the US make it difficult to predict whether Congress will be able to act effectively to pass new competition regulation. Competition rulemaking actions are anticipated from the Federal Trade Commission, following President Biden's Executive Order on Competition, but it remains unclear what scope the Federal Trade Commission may have to issue administrative rules on competition using its powers under section 5 of the Federal Trade Commission Act.<sup>10</sup> Any rulemaking initiatives are expected to be challenged in an unfavorable judiciary that appears willing to consider mandating a retrenchment of administrative rulemaking powers in other areas.

Competition policy and industrial policy are related in the political arena, even if industrial policy holds little sway in administrative agencies. Fundamental industrial policy concerns between the US and the EU differ in ways that could lead their interests to diverge. Technology platforms are largely American national champions, which means that certain very invasive structural remedies are only politically palatable when taken by American enforcers and the US Congress. Norms of collegiality between US and

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<sup>8</sup> Nikolas Guggenberger, *Essential Platforms*, 24 *STAN. TECHNOLOGY L. REV.* 237 (2021).

<sup>9</sup> Note, for example, the bipartisan support for confirming Lina Khan to the Federal Trade Commission (<https://www.nortonrosefulbright.com/en/knowledge/publications/95b7a0a2/us-senate-confirms-lina-khan-as-ftc-commissioner>) and bipartisan collaboration on technology regulation (Dave Lee and Kiran Stacey, "US Senate Committee Advances Bill to Tame Big Tech's Power," *Financial Times*, January 20, 2022, <https://www.ft.com/content/069ab0bc-5407-4bc6-82bc-c2473dcb1c75>).

<sup>10</sup> "Executive Order on Promoting Competition in the American Economy," The White House, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

EU antitrust enforcers would likely not survive an attempt by European enforcers to break up American technology platforms. When contemplating lesser remedies, European enforcers for now seem able to escape charges that they are simply pursuing American companies, but these complaints may resurface if political sentiment changes. That said, technology platforms frequently vigorously contest the EU's jurisdiction over their mergers, as in *Facebook-Giphy* and *Illumina-Grail*.<sup>11</sup>

A change in the foreign policy landscape may also lead political sentiment around technology regulation to diverge between the US and the EU. In particular, technology platforms are seen as essential to American strategic competition with China, and should these concerns become more prominent they may militate against convergent competition enforcement. European political communities will be less sensible to these concerns as Europe is not home to big technology platforms, and Europe's political system is less threatened by China's rise. The technology platforms certainly seem adept at exploiting these concerns to defend themselves from intervention.<sup>12</sup>

The history of attempts to converge competition enforcement also makes it clear that convergence can only go so far. Periodic attempts to use tools of international economic law to impose mandatory harmonization regimes on national competition policies have had limited impact. Competition policy is too politically sensitive, and too closely intertwined with a country's industrial development and economic culture to be harmonized through hard law. At the same time, international harmonization is merely desirable, not necessary for the market to function as is the case with international trade regulation. Attempts to converge must be sensitive to countries' needs to maintain their own sovereignty.

In some cases, countries may have legitimate reasons for divergence. For some big tech platforms, the main competition issues raised are essentially the same in all jurisdictions as their market position and methods of operating are standardized internationally. This is likely the case with, for example, Facebook and Google, which have similar market shares and practices in many countries. Other platforms may meaningfully differ in their presence in different countries. Amazon, for example, looms much larger in the US than in Italy, as Italian consumers have proved to be more lukewarm about ecommerce.

Finally, convergence on competition policy must not lead to a 'race to the bottom'. Convergence is only valuable to the extent that it promotes effective regulation, and convergence over low standards and minimal enforcement would not be worth pursuing. The need for reasonably vigorous competition enforcement also complicates efforts to promote convergence.

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<sup>11</sup> "UK's CMA 'broke International Law' over Giphy, Says Facebook," accessed March 1, 2022, [https://www.theregister.com/2022/02/15/cma\\_facebook\\_giphy/](https://www.theregister.com/2022/02/15/cma_facebook_giphy/). Slaughter, May-Philippe Chappatte, and Josephine Rabinowitz, "Illumina/Grail: All Eyes on the General Court," Lexology, February 4, 2022, <https://www.lexology.com/library/detail.aspx?g=56947276-b8c8-428f-8608-d767a398a624>.

<sup>12</sup> Kiran Stacey and Caitlin Gilbert, "Big Tech Increases Funding to US Foreign Policy Think-Tanks," *Financial Times*, February 1, 2022, <https://www.ft.com/content/4e4ca1d2-2d80-4662-86d0-067a10aad50b>.

## 6. History of Convergence in Competition Policy

Competition law has developed largely through the national legislation and policy initiatives (and in the EU, through delegation of powers to the European Union in the European Union's foundational treaties). There have nevertheless been periodic initiatives to harmonize competition laws across countries since the end of the second world war, particularly as they relate to international trade. These attempts at harmonization through hard law have largely failed. In their place, competition enforcers have developed a series of international networks and convening bodies to share information and promote international dialogue. These 'soft law' bodies have been remarkably successful at driving convergence in competition law generally and have exceeded initial expectations.

### *Efforts to harmonize international law*

In 1948, the proposed Charter of the International Trade Organization (ITO) included a wide range of provisions aimed at regulating competition that may impact international trade, that were broadly congruous with antitrust law in the US under the Sherman Act at the time. The ITO Charter and these provisions never took effect: the US Senate failed to ratify the Charter owing to its broad interference with US economic regulation. Subsequent international negotiations removed these proposals from consideration and the only part of the proposals that eventually took effect related to trade dumping. All attempts to harmonize countries' competition laws through international treaty have failed.<sup>13</sup>

### *Soft Convergence*

Since 1961, the OECD has maintained a committee to advance multilateral discussion on competition policy issues. The basic stance of this committee has been to respect national autonomy over laws regulating competition, and to attempt to structure and convene international dialogues to coordinate national policy. Aside from convenings and roundtables, the OECD's Competition Committee has with increasing frequency issued 'Recommendations on Best Practices' that offer national competition enforcers non-binding guidelines. These Recommendations have often instigated substantial change in national competition policy regimes and helped procure convergence on a number of topics.<sup>14</sup>

In 2001, the US Department of Justice, European Commission and competition agencies of twelve other countries formed the International Competition Network (ICN) to coordinate the activities of competition agencies internationally. The ICN arose out of failed efforts to harmonize competition law and generate convergence through other fora of international economic policy, in particular the World Trade Organization. It aimed to provide a forum for debate that would enhance international engagement through collaboration, non-binding guidelines, and multilateral working groups.

The ICN sets its agenda through a Steering Group of eighteen representatives of member state competition agencies: these representatives determine key topics for investigation, and the ICN establishes Working Groups around these topics, composed largely of officials from member agencies. Where working groups can agree, they issue documents summarizing Guiding Principles and Recommended Practices for agency work in an area. Member state agencies are then free to adopt

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<sup>13</sup> Junji Nakagawa, *International Harmonization of Economic Regulation*, International Economic Law Series (Oxford: Oxford University Press, 2011), Chapter 7, <https://doi.org/10.1093/acprof:oso/9780199604661.001.0001>.

<sup>14</sup> "Recommendations and Best Practices on Competition Law and Policy - OECD," accessed February 6, 2022, <https://www.oecd.org/daf/competition/recommendations.htm>.

these analyses within the structure of their national systems. The ICN also promotes discussion and knowledge sharing through webinars, meetings and its annual conference.

The European Union formed the European Competition Network (ECN) in 2004 to foster close cooperation between the European Commission and EU member state competition authorities in case management and analysis. The ECN has no power to adopt legally binding rules for member states, but does help coordinate case logistics, remedies and information sharing. European competition authorities therefore inform each other through the ECN of their planned investigations, enforcement actions and remedies. The ECN has also developed a set of working groups and conferences, and regularly publishes reports on best practices to help promote convergence. The ECN exists purely to help foster convergence among enforcers of EU competition law.<sup>15</sup> Alongside ‘soft’ convergence practices, ‘hard’ rules for case allocation, management, and referral of challenging issues to the European Commission make the ECN particularly effective for converging agency practices within the European system.

Numerous other bodies have considered international convergence of competition laws, including the World Trade Organization, the World Bank, and the United Nations Conference on Trade and Development, among others. These organizations typically address competition enforcement within the purview of their primary domain of expertise (for example, the intersection of competition policy and trade for the WTO, or capacity building for competition authorities in developing countries for the World Bank and UNCTAD). These institutions have less impact on convergence of competition law and are not of central concern to competition enforcement agencies.

#### *Bilateral Cooperation Agreements Between Agencies*

Countries and their competition agencies are free to conclude bilateral and multilateral Agreements and Memoranda of Understanding on competition policy. These agreements ordinarily address the logistical and case management components of international competition proceedings, such as sharing information, providing assistance, notifying each other of proceedings and provision of comity. Multilateral agreements on these topics are very rare: the overwhelming majority of agreements have been bilateral. The OECD database that tracks these agreements records 206 agreements or memoranda in force, but their effect on driving substantive competition law convergence has been minimal.<sup>16</sup>

#### *Extraterritoriality*

While not strictly speaking an initiative towards convergence, competition law can sometimes apply extraterritorially. This has historically promoted international convergence in cases as enforcement from an agency in one state can be targeted at companies in another state without changing the enforcement practices of the second state’s competition agency. The US may, for example, bring a case against a European company on the basis of that European company’s activities in US markets, without regard to how European competition enforcers might view the European company’s activity.

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<sup>15</sup> European Commission, “European Competition Network (ECN) - Concurrences,” accessed February 6, 2022, <https://www.concurrences.com/en/dictionary/european-competition-network-ecn-en>.

<sup>16</sup> “OECD Inventory of International Co-Operation Agreements on Competition - OECD,” accessed February 6, 2022, <https://www.oecd.org/competition/inventory-competition-agreements.htm>.

US, EU and most other competition authorities regulate commercial activities that take place internationally if they have an *effect* in the market within the competition authority's jurisdiction.<sup>17</sup> This means that enforcers frequently enforce against conduct that takes place beyond their borders, leading to fines and remedies for international companies. Remedies imposed by one jurisdiction may lead to convergence through this extraterritorial application of competition law, as the remedy may alter the way a company does business across the world.

This is particularly so in merger cases: where one competition authority blocks a merger, it may mean that the merger cannot take place in other jurisdictions as well.<sup>18</sup> Sometimes aspects of the merger that offend a particular national agency can be severed from the overall agreement, for example through commitments of the merging parties not to buy the target's business in a particular country. In this case, blocking the merger may only have national effects. In other cases, a national competition authority must block a merger globally to prevent the merger from having anticompetitive effects in its jurisdiction. This may procure international convergence as one country's merger policy may lead to common effects in global markets.

This mechanism for convergence applies less to cases involving behavioral remedies than cases with structural remedies (as is the case for most enforcement against big technology platforms to date). Where national business lines of a company cannot be severed from each other, structural remedies frequently take effect globally. Behavioral remedies that mandate a company change certain practices by contrast may sometimes apply only within the jurisdictions that adopt them, as companies can frequently change their practices within their national divisions.

Aggressive extraterritorial application of competition law is also politically highly controversial, and backlash can lead to a fragmentation of competition law systems, rather than convergence. Aggressive US enforcement against international companies in the 1960s and 1970s demonstrates this dynamic: it led to multiple blocking statutes in other countries that attempted to stymie enforcement of US antitrust decisions.<sup>19</sup> These blocking statutes typically targeted decisions in which the international competition enforcement regime might have led to a different outcome than the US regime. For example, the UK Protection of Trading Interests Act (1980) blocked enforcement of US decisions that imposed a penalty of treble damages on UK companies. US antitrust law commonly imposes treble damages penalties both to deter anticompetitive conduct and to incentivize private enforcement of competition cases. Private enforcement of competition law is much less prevalent in the UK (where most enforcement takes place on the initiative of enforcers), and treble damages claims are foreign to the UK adjudication system.

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<sup>17</sup> See eg *United States v. Aluminum Co. of Am.*, 148 F. 2d 416, 444 (2d Cir. 1945) (*Alcoa*).

<sup>18</sup> Jurisdiction in merger cases is typically governed by turnover thresholds within a particular market, rather than the effects doctrine.

<sup>19</sup> See the Protection of Trading Interests Act 1980.

## 7. Current status of Convergence

Convergence of competition policy therefore occurs in a complex environment. Competition policy has proved too politically sensitive for countries to regulate internationally by treaty, and even in federalist or supranational economic systems such as the United States and the European Union, state and national regulators retain a strong role in shaping enforcement.

Throughout its history, convergence efforts have involved a delicate negotiation between securing effective enforcement and respecting national sovereignty. Don't converge enough, and enforcers risk splintering the international economy and undermining the effectiveness of competition policy.<sup>20</sup> Interfere too much with a sovereign nation's ability to regulate its own economy, and the international competition policy community risks a destabilizing political backlash that threatens trust and collaboration.<sup>21</sup>

Despite this political sensitivity, there are clear benefits to addressing competition policy issues within the competition enforcement system rather than within the political system. Competition enforcement involves a careful balancing exercise of the harms and benefits of certain actions. Political solutions involve satisfying interest groups with blunt instruments and issues rise and fall in salience.

The international architecture around cooperation reflects this history: it centers around dialogue, cooperation, and consensus forged through rigorous analysis. It respects national sovereignty and the different structure of national legal systems but aims to draw countries closer together over time in their enforcement culture, enforcement priorities, theories of harm and remedies. Current efforts towards convergence take place within this structure.

### *Cooperation between Agencies*

More than at any time in recent memory there is a shared appetite in enforcement agencies to address big technology platforms on both sides of the Atlantic. The American approach started to change during the middle of the Trump administration, when US enforcers started to bring more cases around practices and theories of harm that mirrored recent European initiatives.

There currently appears to be close cooperation and goodwill between US and European enforcement agencies, which has increased significantly recently.<sup>22</sup> Agencies watch each other closely and adopt similar remedies and theories of harm. Timing and sequencing of cases in merger control suggests that agencies learn from each other regarding their enforcement priorities and allow the regulator closest to the transaction to object first. This coordination may help create a stronger case, and diffuse political objections to interference by foreign regulators.

*Illumina-Grail* and *Arm-NVIDIA* demonstrate this. In *Illumina-Grail* the FTC sued to block the merger between two American companies in March 2021, based on theories of harm around nascent

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<sup>20</sup> See, for example, the GE-Honeywell merger.

<sup>21</sup> See, for example, the UK's Protection of Trading Interests Act 1980, passed to protect against extraterritorial enforcement of US antitrust law, and the disruption of US-EU relations following the *GE-Honeywell* merger.

<sup>22</sup> OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement <http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm>

competition. Illumina and Grail are in a vertical relationship and nascent competition theories of harm are relatively untested in US courts, so commentators consider this a challenging test case for the FTC's new more aggressive merger control policy. The European Commission opened its own investigation into the case in April 2021, following the US announcement. In doing so it adopted a new policy to claim jurisdiction over the case (which had a limited connection to the EU as Grail was still a nascent competitor). The FTC's decision in March might have given the European Commission political coverage to open its investigation in April into a merger between two American companies on this basis.

Arm is a British national champion (though owned by a Japanese conglomerate). In *Arm-NVIDIA* the UK's Competition and Markets Authority opened an investigation into NVIDIA's acquisition of Arm in August 2021, with the European Commission following in October and the FTC in December. This sequencing suggests that regulators may be willing to wait for the jurisdiction in which a merger transaction is most politically sensitive to go first in challenging the merger.

Enforcers in cases other than merger control have also begun to rely on theories of harm developed through enforcement in other jurisdictions. This suggests that international enforcers are watching each other closely in big tech and are willing to use each other's efforts to build theories of harm and inform their case strategies. European enforcers, for example, targeted most favored nation clauses used in online platforms (Platform MFNs) in some of their earliest enforcement investigations against technology platforms.<sup>23</sup> US enforcers were initially skeptical of this theory of harm,<sup>24</sup> but have come to adopt it in recent proceedings.<sup>25</sup>

At times, competition authorities have gone further than discussing problems, adopting each other's theories of harm and coordinating sequencing of cases. In 2015, the French, Italian and Swedish Competition authorities came to a joint decision accepting commitments by Booking.com offered during an investigation.<sup>26</sup> The French and German Competition Authorities have conducted joint market studies around data and algorithms.<sup>27</sup> Certain competition authorities such as the Australian and New Zealand authorities are known to exchange senior staff on a regular basis.<sup>28</sup> These initiatives towards closer collaboration are interesting but have largely involved smaller agencies in closely related economies.

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<sup>23</sup> See, for example, proceedings by European enforcers against Booking.com.

<sup>24</sup> Jonathan B. Baker & Fiona Scott Morton, "Antitrust Enforcement Against Platform MFNs," accessed February 8, 2022, <https://www.yalelawjournal.org/feature/antitrust-enforcement-against-platform-mfns>.

<sup>25</sup> See, for example, the District of Columbia's ongoing lawsuit against Amazon: David McCabe, Karen Weise, and Cecilia Kang, "D.C. Accuses Amazon of Controlling Online Prices," *The New York Times*, May 25, 2021, sec. Business, <https://www.nytimes.com/2021/05/25/business/amazon-dc-lawsuit.html>.

<sup>26</sup> Christophe MODAFFERI, "The French, Italian and Swedish Competition Authorities Accept the Commitments Offered by Booking.Com," Text, ECN Brief - European Commission, July 1, 2015, <https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/french-italian-and-swedish-competition-authorities-accept-commitments-offered-bookingcom>.

<sup>27</sup> "Bundeskartellamt - Homepage - The French Autorité de La Concurrence and the German Bundeskartellamt Present Their Joint Study on Algorithms and Competition," accessed February 8, 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/06\\_11\\_2019\\_Algorithms\\_and\\_Competition.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/06_11_2019_Algorithms_and_Competition.html).

<sup>28</sup> See Article 5 of the Cooperation Agreement between the ACCC and the NZCC (2007) "Cooperation Agreement between the ACCC & the NZCC.Pdf," accessed February 8, 2022, <https://www.accc.gov.au/system/files/Cooperation%20agreement%20between%20the%20ACCC%20%26%20the%20NZCC.pdf>.

## *Coordination Through International Bodies*

Competition policy issues in big tech have dominated agendas at the OECD and the ICN for several years. Efforts towards convergence take place using familiar tools such as working groups, discussions and conferences, leading to standards and best practices where participants reach agreement. The OECD, ICN and their member agencies acknowledge the need for the OECD and ICN to serve as a hub for cooperation and knowledge sharing on the digital economy.<sup>29</sup>

The OECD and ICN's work on the digital economy demonstrates the lack of consensus on how to address competition issues in the digital economy. Despite convening substantial discussions on technology competition through its various working groups, the OECD has not issued any best practices or recommendations related to analysis of technology platforms.<sup>30</sup> The ICN has produced three recent reports (based on surveys of its members) on dominance, conglomerate mergers, and big data and cartels that demonstrate the multiplicity of approaches and lack of consensus on these topics.<sup>31</sup> The ICN has also launched its Intersection Project that investigates how competition, privacy and consumer protection all shape enforcement and regulatory interests in the digital economy.

The OECD and ICN's work so far demonstrates the benefits and limitations of their convergence efforts in this space. Agencies have tried to address technology platform competition in a wide variety of ways and as yet there is little clear consensus. Recommendations and Best Practices are much easier to develop where theories of harm are clear and standard practices are emerging. Leading European and US enforcers will continue to develop these practices through case law, and other enforcers will pay close attention to their efforts. Convening by the OECD and ICN will facilitate discussion but can only go so far in driving convergence on genuinely new and challenging problems.

This suggests that part of the challenge in generating a consensus is that as yet there is not a clear best way to analyze different business practices that take place within different ecosystem and platform relationships. Enforcers need better tools which can take a long time to develop. The theory and method for assessing two sided markets has been developed over twenty years, and courts still disagree on how to apply it.<sup>32</sup> For many of the challenges in technology platform cases, we are in the early stages of this journey. There is, for example, no clear standard approach to handle zero-price markets, and agencies often rely on existing horizontal and vertical analyses when addressing ecosystem relationships.

This comes across in recent novel cases: Google's decision to merge with Fitbit made many in the competition community uncomfortable, and yet challenging it would have involved making new law in the courts using underdeveloped theories of harm. It was therefore not clear what remedies agencies could impose. The merger represented a genuinely new question concerning how to regulate a conglomerate merger where a central concern was Google taking control of Fitbit's data. This ecosystem

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<sup>29</sup> OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement at paragraph 37. <http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm>

<sup>30</sup> "Recommendations and Best Practices," accessed February 6, 2022, <https://www.oecd.org/daf/competition/recommendations.htm>.

<sup>31</sup> "Document Library," accessed February 8, 2022, <https://www.internationalcompetitionnetwork.org/document-library/>.

<sup>32</sup> *Ohio v. American Express Co.*, 585 U.S. \_\_\_\_ (2018)

relationship and the central role of data distinguished this case from previous conglomerate mergers that would typically have escaped scrutiny. Existing court precedents do not prohibit this sort of a merger and existing analyses of the competition harm may not be sufficiently bulletproof to withstand an unfriendly court. There is no clear consensus over how to analyze these sorts of cases which makes convergence difficult. Conversely there is a need for the international community to work together in developing remedies and analytical approaches to avoid divergent paths as these cases become more common.

### *Direction of Travel*

The direction of travel is starting to become clear in Europe. In agencies and courts, this involves adapting precedents to the challenges of the platform economy by putting more emphasis on potential competition and dynamic benefits and correcting what is seen as historic underenforcement. European cases are able to make use of existing precedents in unilateral conduct cases that Europe has maintained in recent decades. These include, for example, theories of harm around essential facilities and refusals to deal that can be tweaked to address platform self-preferencing. After the court battles around the European Commission's existing decisions against big tech companies have resolved, a standard form of analysis will begin to emerge that can be used to address various new practices. Evolution of existing precedents rather than root and branch reform is possible in the EU.

Legislators in Europe seem to be willing to move legislation forward with resolve. There is a recognition that traditional antitrust cannot solve all problems arising from big technology platforms and regulation will be required. Difficulties that agencies have in bringing cases against tech platforms seem to inform these new regulations. Germany's new rules (introduced in January 2021) demonstrate this point. The German Bundestag noted that traditional antitrust had not 'allowed regulators and courts to move fast enough to block alleged abuses of market power' in digital markets.<sup>33</sup> It therefore created a new regime for companies that are important for 'competition across markets' (geared towards multisided platforms). It articulated a set of prohibited conduct for these entities in an effort to tailor traditional antitrust remedies to technology platforms: this list includes self-preferencing, hindering interoperability, and data harms among others.<sup>34</sup> New legislative initiatives in the UK and EU demonstrate similar dynamics. This creates a certain agnosticism in Europe on whether to pursue reforms through case law or regulation, which does not exist in the US.

By contrast, in the US it remains to be seen how competition policy will change to meet the challenges in big tech. Since Biden's appointment of Lina Khan, Jonathan Kantor and Tim Wu to lead US competition policy, US enforcers are speaking with one voice and on substantially similar lines to European enforcers. But enforcers in the US are not able to speak for the direction of US competition policy as a whole: power in the American antitrust system resides in the courts to a much greater degree than in Europe. In the US, enforcers must seek the approval of the court for their decisions to take effect and courts will decide issues on the merits. In Europe enforcers typically take decisions through an administrative process, which the courts subject to more of an administrative-style review.

Courts in the US are seen as quite conservative on antitrust issues by international standards, and there are as yet no clear indications around which way they might rule on big tech cases. Recent cases suggest

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<sup>33</sup> "Germany's New Competition Rules for Tech Platforms," accessed March 1, 2022, <https://www.jonesday.com/en/insights/2021/01/germany-adopts-new-competition-rules>.

<sup>34</sup> Ibid.

that US courts may oppose more extensive US enforcement efforts: US courts have recently curtailed the FTC's authority to seek monetary restitution-based remedies for past violations of antitrust or consumer protection law,<sup>35</sup> and have demonstrated the procedural hurdles to enforcers bringing actions in this space.<sup>36</sup>

US courts' historic precedent is stacked against US enforcers on a number of key topics that make enforcement actions in big tech harder. While the EU has been able to bring a series of unilateral action cases against dominant companies in recent decades, case law in the US has made these cases particularly hard to bring. US courts have held that dominant companies have no duty to deal, which makes them highly skeptical of cases involving theories of harm around essential facilities or refusals to deal.<sup>37</sup> These theories of harm are considered key to enforcement efforts against big tech,<sup>38</sup> and (by contrast with the EU) their absence in the US makes an evolutionary path to enforcement using existing precedent harder to see.

US legislators are less clearly supportive of new legislation as a whole. While Congress is considering many new proposals and there exists a coalition of supportive legislators, the fate of new antitrust legislation in the US is uncertain. On the one hand, there is a clear dialogue between the administration, the agencies and the US Congress. This has produced numerous different bills to regulate big tech that appear reflective to a greater or lesser extent of agency efforts and legislative initiatives in Europe. These bills have received a degree of bipartisan support that is vanishingly rare in Washington today and a package of measures has advanced out of committee in the House at the start of this year.<sup>39</sup>

On the other hand, the sense of consensus that emerges broadly from political debate in Europe is absent in the US. US political dialogue incorporates a much broader spectrum of views on antitrust legislation. American free market ideology, concerns around supporting big tech national champions against European interference, and fears about Chinese superiority in technologies of the future continue to permeate discussions. Congress has demonstrated an appetite only for narrow legislation that addresses big tech platform power, and broader proposals for reform of the antitrust laws have not gained much traction.

While there is some bipartisan support for legislation on big tech, very different concerns motivate members of the regulatory coalition: while Democrats largely support vigorous antitrust action, Republicans' worries span many issues, including that big tech has too much power, and that tech platforms silence conservative voices and raise safety issues. Reforms may sit uneasily with conservative free market ideology which may suggest that legislation will not directly address the underpinnings of conservative judicial reasoning that has hampered vigorous antitrust enforcement in the US's recent

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<sup>35</sup> "Seventh Circuit Breaks Three Decades of Precedent," accessed February 9, 2022, <https://www.jonesday.com/en/insights/2019/10/seventh-circuit-curtailed-ftcs-authority-to-seek-re>. "AMG v. FTC: US Supreme Court Severely Limits FTC's Ability to Seek Monetary Relief | Cooley | Global Law Firm," accessed February 9, 2022, <https://www.cooley.com/news/insight/2021/2021-04-29-amg-v-ftc>.

<sup>36</sup> "FTC Gets a Second Shot at Antitrust Case Against Facebook," *The National Law Review*, accessed February 9, 2022, <https://www.natlawreview.com/article/ftc-gets-second-shot-antitrust-case-against-facebook>.

<sup>37</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919), *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

<sup>38</sup> Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECHNOLOGY L. REV. 237 (2021).

<sup>39</sup> Lauren Feiner, "House Committee Passes Sweeping Tech Antitrust Reforms, but Their Future Remains Murky," *CNBC*, June 24, 2021, <https://www.cnn.com/2021/06/24/house-committee-passes-broad-tech-antitrust-reforms.html>.

past. This diversity of interests makes the coalition supporting legislation brittle and raises the prospect that any legislation that may ultimately pass the US Congress will be a Pyrrhic victory.

The legislative timetable also makes legislation on big tech a challenge: these bills are only one of a number of Biden administration priorities, and the Congressional schedule may become compressed as the midterms approach. Antitrust legislation may take a backseat to voting rights legislation or broader economic policy if the administration is forced to make choices, particularly given that the bar to pass legislation is so high in the US.

Overall, while legislative proposals in the US suggest that the direction of competition policy in the US may become clear, changing political tides could easily tip the balance in any direction. While gradual progression of legislation over the next six months seems likely, the odds of any bill passing Congress are steep. Rising concern over China could derail a bill, while antipathy towards big tech and the results of campaign messaging in the upcoming primaries could speed its passage. Responsible legislators will appreciate that it is a mistake for the US to cede leadership to Europe on setting rules of the road for competition regulation. Lobbying and campaign contributions by big tech firms could draw away a few crucial votes from a fractious coalition or defang the most important proposals.

Progressive antitrust advocates (including the current Chair of the FTC) have suggested that the FTC might fill this void with competition regulation powers, but the prospect of this seems slim. These powers have never been used to regulate competition before and using them requires a broad reading of a small and poorly drafted part of a statute.<sup>40</sup> Any attempt to use them will be challenged in a generally conservative judiciary that has proved skeptical of delegations of powers to administrative agencies in the recent past.

### *Cultural Disposition Towards Enforcement*

Despite recent significant alignment between US and European enforcers, the background cultural disposition towards enforcement in their competition policy communities differs. European enforcers and judges always felt that the consumer welfare paradigm was not the be all and end all of competition law: the European treaties envisaged it having wider goals such as fairness and economic integration that have periodically featured in enforcers' statements and Commission and judicial decisions. Europeans tend to frame the application of antitrust remedies as an exercise in precision: their question is not more or less enforcement against technology platforms but enforcing in the right way. They consider their approach evolutionary and iterative.

By contrast, Chicago school ideas captured the American antitrust system to a much greater degree. The debate in the US has been in part a backlash to this set of ideas, both from economists that see antitrust within a primarily economic paradigm and from progressive neo-Brandesians who see antitrust in pursuit of a multiplicity of political goals. The mainstream of cultural attitudes towards enforcement in the US therefore incorporates a much greater range of cultural attitudes, defined somewhat by their affiliation with or opposition to free market ideology. This diversity of entrenched cultural views means that Americans do battle over antitrust to an extent not seen in Europe. As they get closer to the political arena, arguments over theories of harm in antitrust can sometimes appear to be battlefronts in a wider campaign between free market fundamentalists and advocates for a strong state.

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<sup>40</sup> See sections 5 and 6 of the Federal Trade Commission Act.

Their recent history around antitrust enforcement also exposes the US and Europe to a different sort of cultural disposition about antitrust's role in the economic recovery. Democrats in the US, scarred by the Chicago School's impact on competition enforcement and cognizant of the power of narratives around competition in the US psyche, have been able to position competition as essential to the country's recovery from the recent economic crises, and as the solution to ongoing inflation. Europeans, by contrast, have been less scarred by the retreat of antitrust enforcement. They speak more of the importance of building national champions and these arguments resonate strongly with political leaders in large member states including France and Germany.

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## 8. Recommendations to create convergence

Efforts to create convergence in big tech take place against this complex backdrop: learning from the history of international antitrust enforcement, convergence efforts should be ‘soft’, relying on sharing best practices, developing theories of harm through constructive dialogue, and adapting consensus to each state’s domestic institutional environment. ‘Hard’ coordination efforts that arise through harmonization of international law are less applicable to competition policy.

Within these parameters for ‘soft’ convergence, there are numerous opportunities to draw together US and European competition policy against big tech.

### *a. Issue joint merger guidelines for technology platforms*

Soft law instruments have substantial power in antitrust. Courts give substantial deference to guidelines, statements and enforcement priorities of agencies. They recognize that agencies are often much better positioned to understand and analyze market dynamics, and they defer to a well-thought-out analysis of a competition problem or enforcement issue.

A consensus is emerging within competition policy communities that enforcers must reform merger control, particularly in big tech cases. Over the last two decades, the super platforms (MAAAM) have acquired more than 400 companies, and until very recently not a single one of these acquisitions has been blocked. Some of these acquisitions have clearly augmented big tech’s market power: Facebook has acquired Instagram and WhatsApp, Google acquired YouTube, DoubleClick, Android and Waze, and Amazon has acquired Whole Foods.

These mergers have tested competition authorities with truly novel challenges to the structure of the competition regime. In recent decades, competition authorities have been increasingly reluctant to block mergers to the extent that they would only block horizontal mergers in markets with four or fewer competitors. Big tech’s mergers are conglomerate: they often occur in unrelated markets, but end up reinforcing a platform’s strategic power owing to the nature of a platform as an integrator of many services. They also test new theories of harm, such as killer acquisitions (when a company acquires and neutralizes a potential future competitor), and competition harms based around control over data.

The US agencies have declared an intention to develop new merger guidelines. The European authorities would do well to follow suit. It is clear that we do not yet have all the answers around how to address these mergers. Conglomerate or platform mergers will remain fiendishly tricky to analyze. We will need to develop new standards to assess mergers in zero price markets, mergers that center around data resources, mergers that strengthen platform ecosystems despite a lack of a horizontal relationship, mergers among early-stage startups where market definition is inherently uncertain, and a host of other issues.

Competition agencies should address these problems together: joint merger guidelines will push international agencies to come up with better solutions and will help to converge the law around merger enforcement over the coming decades.

Procedural considerations may prevent competition regimes from coordinating on issuing new merger guidelines. Replacing the European Commission’s guidelines would require unanimous consent from the

College of Commissioners, for example, which may be difficult to achieve on an internationally syndicated timeline. Other European member states or international enforcers may also struggle to align their timelines with those of the US.

If formal guidelines prove hard to coordinate, an alternative could be for international enforcers to coordinate on a statement of enforcement policy on technology platforms. These statements have been used periodically to express how enforcement agencies approach competition challenges in specific industries or verticals. A good example of such a statement would include the US DOJ and FTC's statement on enforcement policy in the healthcare industry in 1996.<sup>41</sup>

A statement of enforcement policy on the technology industry would involve fewer formalities than formal guidelines and would therefore be easier to coordinate across jurisdictions. It would also be easier to change as enforcement practices adapt to reflect a changing technology industry and updated knowledge. Such a statement could also be broader than mergers, encompassing how antitrust's other tools also apply to enforcement against technology platforms. This sort of statement would, however, be less influential as a soft law instrument in changing court views or enforcement practices.

*b. Coordinate market investigations, enforcement actions, and remedies*

Agencies can achieve a lot when they work together to jointly conduct investigations and enforcement actions. When a few competition agencies band together to investigate a problem, bring an action and adopt a mutually acceptable remedy, this creates a sense of consensus among the enforcement and business communities. Joint cases encourage other agencies to adopt a similar remedy in response to a similar practice.

The French, Italian and Swedish competition authority's joint investigation of Booking.com demonstrates how powerful this approach can be. In April 2015, these three agencies jointly accepted commitments from Booking.com to remove its most favored nation clauses from its contracts with hotels on its platform. From the start, the agencies conducted a joint investigation and analysis, which made them able to accept identical remedies in each case.

In June 2015, Booking.com extended this remedy to remove most favored nation clauses in its contracts with hotels across Europe. What started with these three agencies quickly became standard operating practice in one of Booking.com's most important regions. Competition authorities in many international jurisdictions adopted similar remedies by agreement with Booking.com, notably Russia, Korea, Japan, Hong Kong, and Israel. In this way, a few agencies banding together on a case can lead to a perceived default that raises standards across the world.

Joint actions don't happen frequently enough. It is much more common for one agency to piggyback off the success of another by letting that agency go first and copying its efforts. Piggybacking is valuable in letting agencies experiment and learn about particular practices. But coordinated remedies are often more important, particularly where certain practices and theories of harm are becoming better understood.

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<sup>41</sup> "Statements of Antitrust Enforcement Policy in Health Care," n.d., 144. Available at <https://www.justice.gov/atr/page/file/1197731/download>.

There are many issues in big tech that concern many agencies today. Agencies should face these problems together. As the former President of the Autorité de la Concurrence (the French Competition Authority), Isabelle de Silva, said:

“Cooperation is not an option, it is a necessity. Strong integration, which is one of the achievements of the ECN, will be a valuable asset in this strategic period”.<sup>42</sup>

*c. Allow competition agencies to share evidence more easily*

A challenge that competition enforcers face is that agencies can struggle to conduct joint investigations owing to difficulties sharing data collected from companies during investigations and enforcement proceedings. This challenge emerges clearly from our interviews. It is also reflected strongly in the OECD and ICN’s joint report on cooperation in competition enforcement in 2021,<sup>43</sup> which notes that legal barriers can exist to sharing confidential information with other agencies without a waiver. Even where legal barriers do not prohibit information sharing, the OECD & ICN joint report notes that sharing highly sensitive information generally requires a strong relationship of trust between authorities, which develops through habitual cooperation and dialogue.

Limits on sharing information put competition authorities at an asymmetric disadvantage. Technology platforms subject to antitrust proceedings often face the same issues in multiple jurisdictions. Their legal teams can share information freely and leverage each other’s analysis, document review, and other efforts. Restrictions on sharing information create frictions for convergence, lead to duplicated effort among resource starved agencies, and disadvantage authorities against the international law firms they face in enforcement proceedings.

Only transferring information with a consent waiver from the companies subject to enforcement proceedings also prejudices highly contentious proceedings. Companies are much more likely to consent to a transfer of information where they seek a rapid approval (this is often the case in merger control). Otherwise, companies can withhold their consent to a transfer to inhibit or slow down international investigations. An OECD & ICN joint survey in 2019 demonstrates that companies are prone to using this right: it suggests that companies will consent to information transfers 67% of the time in merger cases, but only 33% of the time in unilateral conduct cases.<sup>44</sup>

The OECD’s 2014 Recommendation on Information Exchange instructs countries to consider adopting legal provisions allowing competition authorities to exchange information without needing the consent of the source of the information.<sup>45</sup> Uptake of this recommendation seems limited with only seven competition authorities allowing for the free transfer of information without requiring the authority to procure a waiver from the source of the information.<sup>46</sup>

Of course, keeping information confidential in antitrust enforcement proceedings is essential to the structure of the antitrust enforcement system. Competition agencies can come across highly sensitive

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<sup>42</sup> <https://www.concurrences.com/en/review/issues/no-4-2021/interview/isabelle-de-silva-an-action-oriented-and-digital-mandate-en>

<sup>43</sup> “OECD/ICN Report on International Co-Operation in Competition Enforcement,” n.d., 314. At paragraph 23.

<sup>44</sup> “OECD/ICN Report on International Co-Operation in Competition Enforcement.” at paragraph 415.

<sup>45</sup> See Annex C: 2014 OECD Recommendation.

<sup>46</sup> “OECD/ICN Report on International Co-Operation in Competition Enforcement.” At paragraph 413.

information in enforcement proceedings: failure to protect this sensitive information can have severe negative impacts on markets, and on confidence in the antitrust system. That said, all modern competition authorities have robust protections for confidential information and are accustomed to handling it carefully. In any case, where multiple competition authorities investigate a case, they often come across the same information directly from the companies involved using their enforcement powers: preventing them from sharing information among themselves merely hinders collaboration without helping keep the information any more confidential.

Countries that have yet to do so should implement the OECD's recommendation on information sharing to allow competition authorities to exchange information freely among themselves, without requiring the consent of the source of the information. This will promote convergence, facilitate parallel enforcement proceedings in multiple jurisdictions, and avoid duplicating work in resource-starved enforcers.

*d. Create consensus templates on the state of digital regulation*

Regulation of digital markets is complex, and there is currently no clear set of best practices. Competition jurisdictions are experimenting with a variety of different approaches, and legislative proposals vary widely. Over time we will learn which tools and legislative instruments are more effective: legislators must be willing to adapt their laws to take up tools that have proven to be useful in other jurisdictions, prune ineffective or counterproductive regulations, and iterate on how to effectively regulate big tech.

The OECD or ICN should regularly survey and report on regulatory initiatives and consensus recommendations of leading competition jurisdictions. An annual 'state of digital regulation' report would surface new and interesting ideas and centralize sources of information on what regulations have worked well. It may be some time before jurisdictions can agree on how to regulate big tech: a report of this sort would allow the OECD or ICN to capture the points on which there is consensus. Reissuing this report annually will let the international competition community learn for each other's emerging experience.

Whenever a country considers new digital regulation, it will review what others have attempted. This exercise takes place in legislative committees and offices around the world prior to any new bill on competition. Centralizing this information through regular reporting at the OECD or ICN allows for a much more thorough analysis by international competition policy experts. It also ensures that legislative offices around the world will consider the same sources of information which helps promote convergence.

*e. Exchange staff between agencies regularly*

A regular staff secondment program between competition agencies could greatly promote convergence. Expertise in challenging problems moves best with people. For many of competition problems that arise in big tech cases, there are no manuals or standardized documents, and sharing approaches at annual conferences can only go so far. Seconding staff between agencies will allow agencies to understand how other jurisdictions tackle certain problems in big tech.

Staff exchanges between the New Zealand and Australian competition authorities (NZCC and ACCC) provide an interesting case study of how these collaborations can promote convergence. The Chair of

the NZCC and one other NZCC commissioner are typically appointed as Associate Commissioners of the ACCC (and vice versa), with full voting and decision-making rights on cases. These Associate Commissioners participate in cases with some cross border element. Although the decision-making processes of the NZCC and the ACCC are kept separate, these cross appointments substantially promote convergence between the two authorities.

At the staff level, there are frequent exchanges and cross appointments of economists. A number of senior economists split their time between both agencies, working three days per week at the ACCC and two days per week at the NZCC. Increased teleworking during the pandemic has facilitated this practice. Exchanges between economists are more regular and considered to be more useful than exchanges of legal staff, as legal staff face difficulties understanding a foreign legal system. That said, exchanges of legal staff do also take place.

At the junior level, the ACCC lets staff take short-term contracts with foreign competition agencies, typically by granting them one or two years of leave without pay. Demand for these contracts is high among staff, who typically spend them working with American or European agencies. Staff also participate in capacity building exchanges with regulators in South East Asia. These programs are seen to have been successful in shaping thinking and practices and may pave the way for a more formal secondment program.

The ACCC's collaboration with the NZCC demonstrates how staff exchanges can promote convergence. It takes place between two economies that are very integrated and culturally proximate, and not all aspects of their collaboration are appropriate for other agencies. But most agencies should be able to achieve certain aspects of their collaboration such as cross appointments of economists and regular exchanges of mid-level staff, particularly given teleworking capabilities.

Agencies must conduct staff exchanges carefully if they are to be successful. Staff secondments should be integrated into the career progression of top performers, so that they are seen as valuable by agency employees. To ensure that both the sending and receiving agency benefit, seconded staff should be integrated into case teams and take part in real work at the host agency, rather than treated as honored guests. This means that the host agency should pay for at least a portion of the seconded staff member's expenses, and the host agency should be able to send non-performing secondees back to their home agency. Secondments should be for long enough to ensure the secondee has time to pick up on the host country's expertise: somewhere between six months and two years is probably sufficient. Secondments should be prioritized for big tech investigations and in other areas where convergence is most needed.

Agencies are currently resource-constrained, and secondments can take away effective team members during very busy times. While secondments are likely to be valuable in the long run, they represent an investment in human capital that is unlikely to pay immediate dividends. Jurisdictions should ensure that agencies have the resources and staffing levels needed to operate effective secondment programs.

## 9. Conclusion & Recommendations

Powerful technology platforms present competition policy with its greatest challenge in a generation. A general consensus seems to be emerging that some action needs to be taken to protect competition in these essential markets. And yet there is no clear consensus on what actions to take, what remedies to impose, or how to structure new tools for a twenty-first century competition policy.

A playbook is starting to emerge piecemeal around different issues in various jurisdictions around the world, led by Europe and the US. But we are still in the very earliest stages of competition policy's battles with big tech, which will likely last for more than a decade. The time is ripe for jurisdictions around the world to thoughtfully draw together their approaches to handling these issues, within the limits of their jurisdiction and the structure of the international competition policy system.

The stakes are high: convergence promises better solutions, more effective and less costly regulation, and more virtuous, free and fair competition benefitting our economies and societies. Divergence risks a patchwork of regulatory regimes and initiatives, confusion for businesses and their customers, and needless frictions around international technology services.

This paper recommends the following steps to draw the US, European and global competition regimes closer together:

### 1. *Issue joint merger guidelines on technology platform enforcement*

Guidelines around case analysis and enforcement priorities have substantial impact. Courts and litigants defer to soundly written guidelines, and guidelines could be written to capture emerging consensus, particularly around merger enforcement where there is agreement on enforcement priorities.

Joint guidelines could take shape as formal merger guidelines (with more procedural hurdles), or less formal joint statements of enforcement priorities in the technology sector.

### 2. *Coordinate market investigations, enforcement actions, and remedies*

Authorities from around the world could coordinate more on investigations, enforcement actions and remedies. Recent enforcement sagas demonstrate interesting examples of this coordination, for example around platforms such as Booking.com. Coordinated investigations have proved to be effective in creating 'default' remedies that other regulators and enforcers are likely to adopt more easily, promoting convergence. Coordinated investigations also save crucial agency resources and lead to better reasoning and remedies.

### 3. *Allow competition agencies to share evidence more easily*

Sharing information between competition agencies is governed by national law, and some agencies face onerous restrictions on their ability to share information collected through investigations with other agencies. OECD recommendations suggest that agencies should be able to share information unilaterally without needing the consent of the party that provided

the information. Jurisdictions that have not already done so should speedily implement these recommendations to facilitate international cooperation.

#### **4. *Create annual consensus reports on the state of digital regulation***

Many commentators have concluded that new regulatory tools are needed. Most major jurisdictions are considering new regulation on big tech. Their proposals differ, in some cases quite substantially, and there is value in allowing different jurisdictions to experiment with different approaches.

This recommendation suggests that the OECD, ICN or some other respected international commentator should create annual consensus reports on the state of digital regulation. These reports would aim to capture any emerging consensus around digital regulation and would offer templates to regulators looking to adopt that consensus into domestic law. The hope would be that these reports, refreshed annually, would serve as a first point of call to regulators looking to introduce new rules and would help converge digital regulation over time.

#### **5. *Exchange staff between agencies regularly***

In competition enforcement, personnel are policy. Issues can be very complex, particularly for novel enforcement topics, and one of the easiest ways to share approaches is by bringing an outside expert to weigh in. Staff exchanges can also break patterns of groupthink and improve decision-making by offering the host regulator access to unique information. The know-how on how to address particular big tech practices moves best through people.

Systematizing and scaling staff exchanges could therefore be an effective way to converge competition policy. Operational challenges in running these exchanges effectively are serious but not insurmountable: secondments must be integrated into the career paths of top performers and host agencies must rely on secondees to do real work, contribute to the secondee's costs and be permitted to cut short non-performing secondments. Agencies will likely require additional human capital resources to make secondments work systematically.

## **Appendix 1: Methodology**

This report is based on a number of interviews conducted in January, February and March 2022 with leading competition policy enforcers, practitioners and academics from around the world. I conducted these interviews with my client, Michal Halperin, to get a sense for the current state of international collaboration on competition policy in cases involving technology platforms, and to understand the institutional and political dynamics that would support and constrain efforts to converge competition policy. These interviews were conducted off the record to promote a free exchange of views and interviewees are not named or attributed in this paper. I have augmented the material from these interviews with substantial desktop research, extensive discussions with my client, and my own experience. All views expressed in this paper remain my own.

## **Appendix 2: Acknowledgements**

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