Extraterritoriality in EU Competition Law

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Abstract

This piece critically analyses extraterritorial application of competition law by the European Union. The EU is a key global player in competition law and policy. Its competition law is actively and assertively applied to foreign activities of foreign entities affecting EU market. In the recent decision in *Intel* the EU for the first time recognised extraterritoriality two steps removed ('extraterritoriality v2'), significantly broadening the reach of EU competition laws and setting an international precedent. Getting to this point was a gradual process. It reflected evolving circumstances, changing intra-EU dynamics and setbacks in striving for multilateral governance of international business practices. The EU embraced extraterritoriality out of necessity, not convenience. The rise of the doctrine marks the emergence of a multi-polar governance of transnational anticompetitive conduct, and of the European Union as a key global player in competition law and policy.

Introduction

The European Union (EU) in the recent *Intel* case[2] expanded the reach of its competition laws, a significant step in the slow expansion of its jurisdiction. This piece critically analyses how the EU gradually embraced the extraterritorial application of competition law. Moving beyond case law analysis, this phenomenon is examined in the contexts of intra-EU institutional

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[2] Case C-413/14 P, *Intel v Commission*.

interplay and changing broader circumstances, especially related to expanding globalization and a failure to develop a multilateral solution to the challenges posed by transnational anticompetitive conduct. While over time the EU increasingly asserted the use of extraterritoriality in competition law, it was a long process informed not by convenience, but necessity. The most recent developments in this regard recognise the very far reach of EU competition law, making the EU one of the most assertive enforcers and setting an important precedent for other jurisdictions.

Parts 1 and 2 provide a brief introduction to key concepts and a broader backdrop that is vital to understanding developments within the EU. Part 3 examines the relevant case law and policy pronouncements. It points to changing intra-EU dynamics and the approach of the EU courts, blending judicial economy with a pragmatism that recognises the limitations of international law. Part 4 explores the frictions that arise from extraterritoriality as well as the considerable efforts the EU has invested in seeking cooperative solutions rather than unilateral action. The conclusion brings these different perspectives together.

1. The what and why

It is worth examining here what extraterritoriality is, why it is needed, and why it is controversial. Functionally, extraterritorial jurisdiction (extraterritoriality) is needed to deal with cross-border phenomena which would otherwise escape scrutiny. Jurisdiction itself is a power or competence of a state to make, apply and enforce laws.[3] The key source of that state's power (i.e., its basis) is territory. It provides for the state's jurisdiction over persons, property and events within its borders. However, various phenomena extend beyond a single state. In many areas, including competition law, there are no global, multilateral rules in place. In effect, adherence to strict territoriality would allow transnational conduct no matter how damaging to the state to escape scrutiny. That is why there is a need for extraterritoriality, that is, for a state to be able to reach out beyond its territory. In the case of competition law, it is a matter of being able to deal with competitive harm—conduct by foreign entities that affects domestic consumers and producers, with such foreign entities often based and operating solely outside the affected forum.

By its very nature extraterritoriality constitutes unilateral action by the state against a foreign offender. Therefore, it is prone to causing controversies. This is especially so in policy areas

[3] Lassa Oppenheim, et al., *Oppenheim's International Law: Peace. Volume 1* (Longman 1992), 456.

where differences exist between national laws. Hence, it is unsurprising that tensions arose in competition law, especially since initially, after World War II, only a handful of countries had such legislation. Even in such cases, the substantive rules often differed significantly, allowing for conduct proscribed elsewhere. Thus, extraterritoriality in competition law can be seen as an encroachment on domestic policy choices, affecting another country's sovereignty. Moreover, competition legislation virtually everywhere focuses on harm in the forum's market. Conduct causing harm externally is not proscribed and may even be beneficial to states hosting firms engaging in anticompetitive conduct externally. Industrial policy may promote such conduct because it can facilitate exports and the transfer of wealth from harmed markets to the forum hosting violators.[4] As Lord Wilberforce masterfully put it 'it is axiomatic that in antitrust [that is, competition] matters the policy of one state may be to defend what is the policy of another state to attack'.[5]

Controversies surrounding extraterritoriality can be simplified into the two perspectives of the state which hosts an offender and the state harmed by anti-competitive conduct. The host state would challenge the other country's right to extraterritorial enforcement against a firm located within its territory. The harmed state would assert violation of its laws, and the harming of entities within its territory.

As already indicated, jurisdiction has different facets. The distinction between them is highly relevant. Prescriptive (otherwise: legislative, substantive or subject-matter) jurisdiction refers to a state's competence to make its laws applicable to certain activities or persons.[6] In the context of extraterritoriality that is the most relevant aspect. In fact, in most cases the terms 'extraterritoriality' or 'extraterritorial jurisdiction' are used to denote extraterritorial *prescriptive* jurisdiction. Two other relevant facets are adjudicative (judicial, curial, personal) and enforcement (executive) jurisdiction. The former relates to subjecting persons or things to adjudicative processes. The latter refers to inducing compliance or punishing non-compliance with applicable laws. It may involve performance of various acts of authority, inclusive of the use of force. Examples of such acts include physical searches of premises or seizures of assets. While extraterritoriality in the prescriptive and adjudicative sense may be acceptable,

[4] The continuing tolerance of export cartels (also in the EU) is the best example of such indulgence at the expense of others. Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15(1) JIEL 181 (2012), available at: https://ssrn.com/abstract=2012838.

[5] *Rio Tinto Zinc Corp. v Westinghouse Elec. Corp.*, [1978] A.C. 547, 617.

[6] Christopher Staker, 'Jurisdiction' in Malcolm David Evans (ed), International Law (OUP 2014), 312.

performance of acts of authority by one state within the territory of another—without consent—is prohibited under international law.[7]

2. The backdrop

As outlined above, the adherence to strict territoriality would permit unsatisfactory outcomes in transnational cases. Hence, a more flexible approach was needed. The key doctrinal steps in this regard were taken by the Permanent Court of International Justice in the famous *Lotus* case, in 1927, concerning collusion between ships of different states.[8] In particular, the Court clarified that international law does not provide any general prohibition against applying domestic laws beyond a state's territory.[9] It recognised that in many countries 'offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there'.[10] The Court then found that 'if … a guilty act committed … produces its effects ... in foreign territory, … there is no rule of international law prohibiting the [affected] State … from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.'[11] In effect, a new jurisdictional principle of objective territoriality was recognised. The adjective 'objective' refers to the fact that the *object* of the violation crosses the border, not the person responsible for it. The Court recognised that even the effects of a conduct can constitute sufficiently close connection for jurisdictional purposes. However, in *Lotus* the effects—the harm in question—were immediate and very tangible in nature (that is, a ships collision led to sinking of a ship and a death of eight people). The judgement was controversial with the Court itself being divided. Nevertheless, it has opened the door for extraterritoriality.

Against that backdrop the United States courts developed a far-reaching extraterritorial approach in competition law. In particular, they began asserting jurisdiction over foreign persons in relation to foreign conduct causing economic effects on the US market. The principle became known as the effects doctrine. It was established by means of case law, given that the

[7] Ibid, 331.
[8] *France v Turkey*, Ser. A, No. 10 (PCIJ 1927). For further analsysis see Armin von Bogdandy and Markus Rau, 'The Lotus' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, online ed. (OUP 2008).
[9] Ibid, 19.
[10] Ibid, 23.
[11] Ibid, 25.

original legislation[12] was mute on the question of its possible reach. It was first formulated in *Alcoa* in 1945.[13]

Alcoa concerned an international cartel of aluminium producers, involving British, Canadian, French, German and Swiss firms. When it came to the jurisdictional issue, the Court famously held that 'it is *settled law* … that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize [emphasis added].'[14] It found that anticompetitive agreements 'were unlawful, though made abroad, if they were intended to affect imports and did affect them',[15] thereby requiring intended effects on the US market for jurisdictional assertions. In this, the Court departed from an earlier line of US case law recognising extraterritorial jurisdiction when at least some of the conduct in question occurred on the US soil.[16] What distinguished the effects doctrine from the principle of objective territoriality, as formulated in *Lotus* (a case not referred to in *Alcoa* itself) was the nature of the effects. In *Alcoa* these were purely economic in nature.

The jurisdictional holding in *Alcoa* was ground-breaking, by no means 'settled law'. At the time no foreign government protested. This is understandable, given that much of the world was at war, but also due to *Alcoa*'s factual framework. Firstly, the Canadian entity involved was effectively a shell created to look after the foreign assets of Aluminium Company of America (Alcoa) and the actual connection with the US went far beyond the agreement's effects. Therefore, jurisdiction could have been asserted in more traditional ways. Secondly, Alcoa itself—at the time—was a much despised monopolist and one of the key targets of first the Roosevelt and then the Truman administrations' drive to de-monopolise and restructure the US economy.[17]

After *Alcoa* US courts eagerly embraced the effects doctrine. Its exact scope of application—the question of what is required to actually allow for extraterritorial application of US competition laws—was repeatedly tested in US courts (predominantly by private plaintiffs, motivated by the possibility of treble damages awards[18]). The doctrine was in need of at least

[12] The Sherman Act, 15 U.S.C. §§1-2.
[13] *United States v Aluminium Company of America (Alcoa)*, 148 F.2d 416 (2nd Cir. 1945).
[14] Ibid, 443.
[15] Ibid, 444.
[16] For example, *Thomsen v Cayser*, 243 U.S. 66 (1917); *United States v Pacific & Arctic Ry & Nav. Co.*, 228 U.S. 87 (1913); *United States v American Tobacco Co.*, 221 U.S. 106 (1911).
[17] For a broader political context see Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster 2019), 130-140.
[18] The Clayton Act §4, 15 U.S.C. §15.

some general qualifiers, or remits. If *any* effect on the US market could trigger US jurisdiction then, given the interconnectedness of the world economy, US antitrust laws would be nearly universally applicable at a time when few states had any such laws. Over time two jurisdictional tests emerged:

(1) in cases involving imports: the Supreme Court established that US competition laws apply extraterritorially when 'foreign conduct … was meant to produce and did in fact produce some substantial effect in the United States',[19] and

(2) in all other cases: US competition laws apply extraterritorially if the conduct in question has direct, substantial and reasonably foreseeable effects on US commerce. This jurisdictional test was introduced in very ambiguously worded legislation—the 1982 Foreign Trade Antitrust Improvements Act (FTAIA)[20]—which was introduced principally to limit exposure of US firms to private suits for damages brought in the US by foreign victims.[21]

As further cases began emerging, various governments began protesting against US jurisdictional assertions. Some countries (inclusive of Australia, France, Germany and the UK) went so far as to introduce so-called blocking legislation, aimed to obstruct the long reach of US antitrust laws.[22] It was only in the 1990s that the protests against the doctrine subsided, and a new status quo emerged, although the blocking statues have not been repealed.[23]

Largely in response to the tensions caused by such transnational cases, much effort has been invested in the last few decades in cooperation between competition agencies of different states. Formal and informal ties began emerging. They helped to foster awareness and understanding of existing substantive and procedural differences between jurisdictions and to

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[19] *Hartford Fire Insurance Co. v California*, 509 U.S. 764, 796 (1993).

[20] 15 U.S.C. § 6(a)– the FTAIA: Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
(1) such conduct has a direct, substantial, and reasonably foreseeable effect --
(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
Proviso: If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

[21] Eleanor M Fox and Daniel A Crane, Global Issues in Antitrust and Competition Law (Thomson/West 2010) 455.

[22] For analysis see Marek Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order', 37(1) World Competition 103 (2014), available at: https://ssrn.com/abstract=2399923.

[23] For analysis of foreign governments' protests by means of amicus curiae briefs submitted in US antitrust cases see Marek Martyniszyn, 'Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases', 61(4) Antitrust Bulletin 611 (2016), 626-632, available at https://ssrn.com/abstract=2871499.

build trust. Cooperation helped to depoliticise extraterritorial enforcement and make it seem more legitimate in the states whose firms were affected.

Moreover, with the passage of time, well over one hundred countries introduced competition legislation. In many competition law areas (both substantive and procedural), there has been significant convergence between systems. While divergence continues, it is narrower in scope and international consensus has emerged on important points, especially as to the harmful nature of private international cartels. Gradually, the effects doctrine became a synonym for extraterritoriality in competition law worldwide, being first accepted and then widely adopted, maturing into a norm. A majority of systems now provide for extraterritorial application of their domestic competition legislation on such a basis. The doctrine rests on the recognition of in-forum economic effects of foreign anticompetitive conduct as a sufficiently close connection for jurisdictional purposes. Framing of relevant provisions in competition laws of different countries unsurprisingly varies. Hence, while it is entirely correct to talk of 'the' effects doctrine, it is equality correct to refer to 'an' effects doctrine, depending on the context and reflecting the heterogeneity of existing approaches. Cases requiring reliance on the doctrine remain relatively rare as often some local conduct or presence of foreign perpetrators obviates the need to rely on it. Nonetheless, a range of both developed (Canada[24] and Japan[25]) and developing states (Brazil,[26] Chile,[27] China[28] and South Africa[29]) have successfully applied the doctrine, principally in relation to cartels.

In the mid-1940s, the U.S. began persistently relying on extraterritoriality to safeguard their market. European firms were often on the receiving end of such enforcement. With time the Old Continent realised the need to follow a similar path. This process was facilitated by growing condemnation of cartels—the usual target of extraterritorial enforcement—thanks to the spreading adoption of competition legislation internationally. The EU's adventure with extraterritoriality in competition law should be seen in this broader context.

[24] For example, *R v Mitsubishi Corp.* [2005] 40 C.P.R. (4th) 333 (Can).

[25] For example, JFTC, Cease-and-Desist Order and Surcharge Payment Order against Marine Hose Manufacturers (22 February 2008), at <http://www.jftc.go.jp/en/pressreleases/yearly-2008/feb/individual_000147.files/2008-Feb-22.pdf>. For analysis see Marek Martyniszyn, 'Japanese Approaches to Extraterritoriality in Competition Law', 66(3) ICLQ 747 (2017), available at: https://ssrn.com/abstract=3116898.

[26] For example, Administrative Proceeding n° 08012.004599/1999-18.

[27] For example, Supr. Ct. (24 September 2012), available at <https://www.fne.gob.cl/wp-content/uploads/2013/09/secs_xx_2013.pdf>.

[28] For example, NDRC Decision of 4 January 2013, the LCD Price-Fixing Cartel.

[29] For example, Order of the Competition Tribunal Confirming the Settlement Agreement of 4 November 2008, Competition Commission v American Natural Soda Ash Corp (Soda Ash), Case 49/CR/Apr00.

3. EU's embracing of extraterritoriality

The EU Treaties do not explicitly address the question of the scope of application of competition provisions. However, the European Commission eagerly internalised the jurisdictional approach spearheaded by the US, which the Commission relied on from the outset. Yet, for a long time the EU courts were hesitant to embrace the effects doctrine. For some time both institutions engaged in a jurisdictional cha-cha. The Commission was pushing two steps forward via its decisional practice and policy pronouncements, developing a strong pro-effects narrative, while the EU courts tended to pull a step back when required to engage with the matter. In effect, the EU was expanding the jurisdictional reach, yet at a slower pace than the Commission hoped. The courts were walking a fine line between protecting the EU market from transnational violations and deferring to the conservative views of public international law aficionados. Yet, cynics could argue that the courts were simply providing a smokescreen; their unwillingness to rule on the validity of the effects doctrine kept it in a grey zone of acceptability, enabling the Commission to continue relying on it. Not until 1988 did the Court of Justice hesitantly embrace the doctrine in *Wood Pulp*, paving the way for its current, assertive position in *Intel*. This 2017 case extended the reach of EU competition provisions to two steps removed from the EU's shores. With *Intel*, the EU moved into the vanguard of extraterritoriality in competition law.

3.1. Early experiences

The Commission applied EU competition laws extraterritorially from the beginning of its enforcement efforts in a series of negative clearance decisions under Regulation 17, which entered into force in 1962.[30] In fact, the very first decision adopted under the current Art. 101, in *Grosfillex*, in 1964, concerned an exclusive distributorship agreement between French and Swiss firms whereby the Swiss entity would be forbidden from re-exporting back to the EU. The clearance was granted as the Commission was satisfied that any re-exportation to the EU would be most unlikely due to double duties.[31] The case showed that the Commission believed it had jurisdiction over arrangements involving entities operating outside the EU in so far as they may affect competition within the EU. Similarly, in *Mertens* the Commission issued a clearance in relation to a distributorship agreement between US and Belgian firms, noting that

[30] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, 204–211.

[31] Commission Decision of 11 March 1964 (IV/A-00061 - Grosfillex-Fillistorf), 64/233/CEE, OJ 58, 9.4.1964, 915-916.

'the mere fact that the granting undertaking is located outside the common market does not preclude the application of Article [101] of the Treaty since the agreement has effects within the common market'.[32] While never challenged and validated by the courts, these decisions presented the Commission's view on the extraterritorial scope of application of EU competition provisions.

The Court's first pronouncement on the possible extraterritorial reach of EU competition provisions was delivered in *Béguelin*[33] within the scope of a preliminary ruling procedure and more as an obiter statement. The Court clarified that 'the fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of [Art 101] since the agreement is operative on the territory of the common market.'[34] Afterwards the Commission would cling to that sentence, despite it being more of an obiter observation than a proper consideration of the jurisdictional issue.

The Commission proceeded to signal its position more broadly. For example, in 1972 it was concerned about voluntary restraints agreements on behalf of Japanese firms, given that such measures would affect EU consumers and therefore fall within EU jurisdiction. It went so far as to issue a formal notice, expressly addressed to the Japanese firms—and, of course, all other foreign entities—informing them that being registered outside the EU would not hinder application of EU competition rules should their arrangements affect the EU market.[35] Later the Commission investigated a Franco-Japanese arrangement concerning importation of Japanese ball-bearings, which were to be sold in the EU at inflated prices at the request of French competitors. The Commission established a violation, with the decision being addressed to both French and Japanese firms.[36] However, no fines were imposed as the Franco-Japanese agreement was never implemented in the wake of the Commission notice.[37]

3.2. *Dyestuffs* and the first beats of jurisdictional cha-cha

[32] '… considérant que le seul fait que l'entreprise concédante est située en dehors du marché commun ne fait pas obstacle à l'application de l'article [101] du traité dès lors que l'accord a des effets à l'intérieur du marché commun.' Commission Decision of 1 June 1964 (IV-A/12.868), 64/344/CEE, OJ 92, 10.6.1964, 1426-27.
[33] Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949.
[34] Ibid, para 11.
[35] Bekanntmachung betreffend die Einfuhr japanischer Erzeugnisse in die Gemeinschaft, auf die der Vertrag von Rom anwendbar ist, OJ C111, 21 November 1972, 13. See also Bulletin of the European Communities, 5(10) 1972, 55-56.
[36] Commission Decision of 29 November 1974 relating to proceedings under Article 85 of the Treaty establishing the EEC (IV/27.095 - Franco-Japanese ball- bearings agreement), 74/634/EEC, OJ L343, 21.12.1974, 19-26.
[37] ECSC, EEC, EAEC, Fourth Report on Competition Policy (1974 Report), 50-51.

The first controversies about the extraterritorial application of EU competition laws arose with *Dyestuffs*, in which the Commission investigated and fined an aniline dye price-fixing cartel made up of entities from the EU, Switzerland and the UK.[38] The Commission held that the EU's anti-cartel provision, Art. 101, applies to any entities whose conduct affects EU markets, irrespective of their location.[39] The decision met not only with a challenge by the non-EU cartelists, but also with a formal protest from the British government.[40] The UK, a future EU member, argued that the effects doctrine was unsupported by international law and that application of EU Treaty provisions on such a basis would be unjustified.

In pleadings on appeal, the Commission changed its position. It argued it had jurisdiction on the basis of the territorial principle, due to the presence in the EU of foreign firms' subsidiaries. It argued that in this context, parent and subsidiary were one for the sake of attribution of actions and liability, thereby bringing non-EU parents within EU jurisdiction. Reliance on the effects doctrine became a secondary argument. Advocate General Mayras sided with the Commission, but was entirely unconvinced by its change of heart (that is, shifting away from the effects doctrine).[41] Having provided a comparative overview (noting that in Belgium, Germany, France, Switzerland and, of course, the US the effects doctrine was either explicitly provided for or implicitly followed[42]), AG Mayras encouraged the Court to adopt a qualified effects test. This test would recognise EU jurisdiction only when the underlying foreign conduct caused direct, substantial effects that were immediate and reasonably foreseeable (with showing of intent not being necessary).[43] Hence, he called for embracing the effects doctrine with notable qualifiers. Probably to position the doctrine as a natural extension to the principle of objective territoriality, AG Mayras underlined that in competition law economic effects are one of the constitutive elements, if not the essential element, of the offence.[44] This, in turn,

[38] European Commission, 69/243/EWG, Decision Relating to a Proceeding Under Article 85 of the EEC Treaty, IV/26 267- Dyestuffs, OJ L195, 11-17 (1969).

[39] 'Die Wettbewerbsregeln des Vertrages finden demnach Anwendung auf alle Wettbewerbsbeschränkungen, die die in Artikel 85 Absatz 1 bezeichneten Auswirkungen innerhalb des Gemeinsamen Marktes haben. Es kommt deshalb nicht darauf an, ob die Unternehmen, die derartige Wettbewerbsbeschränkungen verursachen, ihren Sitz innerhalb oder ausserhalb der Gemeinschaft haben.'

[40] Reprinted in Elihu Lauterpacht (ed), British Practice in International Law (BIICL 1967) 58-59.

[41] Case 48/69, Opinion of Mr Advocate General Mayras in case Imperial Chemical Industries Ltd. v Commission [1972] ECR 619. Original text in French. For English translation see 'Imperial Chemical Industries Ltd. v Commission of the European Communities, Opinion of Advocate-General Mayras delivered on 2 May 1972, Case 48/69', Competition Law in Western Europe and the USA (Kluwer Law International 1976, last updated January 1979, Supplement No. 13) (1988).

[42] Ibid, 176-82.

[43] Ibid, 190-2.

[44] Ibid, 192.

would mean that the effects doctrine is no more than an application of the principle of objective territoriality in the sphere of competition law, where only economic effects exist.

The Court followed the route freshly marked by the Commission. It found that non-EU parent companies availed of their power over subsidiaries to implement restrictive agreements. In the Court's view the lack of real autonomy of the subsidiaries allowed to attribute their conduct to parent companies, thereby bringing the latter within the scope of EU jurisdiction.[45] This approach became known as a single economic unit doctrine (SEUD). It enabled the Court not to pronounce on, or even discuss, the effects doctrine. The Court might 'have taken an easy way out',[46] while preventing foreign violators from escaping sanctions for their anticipative conduct and showing that corporate structures will not shield them from liability.[47] The finding may also need to be seen in a broader context. At the time, in the late 1960s, the EU was a much less consolidated, less powerful entity vis-à-vis its member states. Some of the arguments made against embracing the effects doctrine related to the impossibility of exercising competences not explicitly provided for the EU in the Treaties. Formulation of SEUD allowed the Court to sidestep such EU-specific, internal concerns. While not going too far, SEUD proved helpful for the Commission, which has availed of it in a number of cases.[48] Apart from bringing a foreign parent into EU prescriptive jurisdiction, SEUD came with a valuable although unintended side effect of providing for enforcement jurisdiction over foreign parents, facilitating, for example, execution of fines.

In more general terms, Court's issue avoidance in *Dyestuffs,* that is—not pronouncing on the effects doctrine—effectively allowed the Commission to continue developing and relying on a pro-effects narrative. For example, in the 2nd Report on Competition Policy, of 1973, a mention of *Dyestuffs* is followed by a verbatim quote from the earlier *Béguelin* case, only marginally touching on the extraterritorial question.[49] In its 6th Report on Competition Policy, of 1976, the Commission referred to the 2nd Report, noting that both itself and the Court considered that 'the Community had power to act against a non-Community undertaking … wherever the

[45] Case 48/69, *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)*, [1972] ECR 619, paras 125-142.

[46] Noel L Allen, 'The Development of European Economic Community Antitrust Jurisdiction Over Alien Undertakings', Legal Issues of European Integration 35, 58 (1974).

[47] However, even that step did not escape criticism. It was argued that the notion of a unity of a group of companies may be recognised only after jurisdiction over the entities involved has been established. As Schenck noted, the EU was 'putting the cart of prescriptive authority before the horse of jurisdiction.' Daniel W Schenck, 'Jurisdiction over the Foreign Multinational in the EEC: Lifting the Veil on the Economic Entity Theory', 11 University of Pennsylvania Journal of International Business Law 495, 509 (1989).

[48] For example, in Case 6/72, Europemballage Corp and Continental Can Co. Inc. v Commission [1973] ECR 215 and Cases 6-7/73, Commercial Solvents v Commission, [1974] ECR 223.

[49] ECSC, EEC, EAEC, Second on Competition Policy (1972 Report), 30-1.

effects of the restrictive practice were felt within the common market',[50] directly referring to the effects doctrine and clearly overstretching the Court's position. In 1981 the Commission, referring to *Grosfillex*, considered itself one of the first competition agencies to have relied on the effects test, while—at the same time—acknowledging that all such transnational cases involved either foreign firms with EU subsidiaries or some participants located within the EU.[51] It observed that itself and the Court developed SEUD 'alongside the effects theory', yet again imputing the latter views which it has not expressed beyond a single sentence in *Béguelin.*[52] The Competition Commissioner, speaking at the American Bar Association's antitrust event in Washington in 1981, underscored that the Commission relies on the effects doctrine 'expressed in a great number of … decisions and … *confirmed by many judgements of the Court of Justice* [emphasis added]*'*. In doing so the Commission 'acts in line with the practice of most free market countries and also … in accordance with international law.' He also referred approvingly to the jurisdictional test of the US FTAIA, requiring direct and substantial effects on the domestic market to allow for jurisdictional assertions.[53]

As already indicated, it was not just a matter of making pronouncements and arguably misrepresenting the Court's position. The Commission repeatedly relied on the effects approach. For example, in 1977, it fined firms partaking in a concerted practise relating to vegetable parchments. One of the sanctioned firms was Finnish. Finland was not in the EU at the time. The decision made no mention of any EU subsidiaries of that entity, hence the Commission must have relied on the effects approach.[54] Similarly, in 1978, the Commission fined a number of white lead producers, inclusive of a UK firm, for their concerted practices.[55] The UK entity argued that, given that the conduct in question took place prior to the UK's accession into the EU, the EU competition rules were not applicable to it. The Commission rejected this claim, referring to the Court's holding in *Béguelin*, and the UK firm was fined.*[56]* Similarly, in *Aluminium imports*[57] the Commission investigated an arrangement between

[50] ECSC, EEC, EAEC, Sixth on Competition Policy (1976 Report), 37.
[51] The European Commission, Eleventh on Competition Policy (1981 Report), 35.
[52] Ibid, 36.
[53] Frans Andriessen, 'Antitrust in the International Sphere; Antitrust- an Endangered Species?' (Address at the American Bar Association's National Institute on Antitrust, Washington, 6 November 1981).
[54] Commission Decision of 23 December 1977 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.176 - Vegetable parchment), 8/252/EEC, OJ L70, 13/3/1978, 54-68.
[55] Commission Decision of 12 December 1978 on a proceeding under Article 85 of the EEC Treaty (IV/29.535 - white lead), 79/90/EEC, OJ L 21, 30.1.1979, 16-24.
[56] Ibid, para 32.
[57] European Commission, 85/206/EEC, Decision of 19 December 1984, IV/26.870- Aluminium Imports from Eastern Europe (Aluminium imports), OJ L 92, 1 (1985).

Western European firms and state trading enterprises from the Eastern European communist bloc, aimed at restraining aluminium imports to the EU. Here again jurisdiction over foreign entities without subsidiaries in the EU (both from the Soviet bloc and the UK, pre-accession to the EU) was established on the basis of the effects doctrine. The decision referred yet again to *Béguelin* and noted that the principal effects of the agreements in question were felt on the EU market.[58] However, the Commission found 'it would not be opportune to impose fines',[59] probably due to the peculiar, state-related status of the Eastern European entities. The decision was not appealed. Overall, the Commission was able to get away with pursuing the effects doctrine so long as its decisions were not challenged.

3.3. *Wood Pulp* and the Court's inability to avoid the matter

The next major challenge to the Commission's extraterritorial assertions post-*Dyestuffs*, followed its investigation of a large price-fixing scheme among wood pulp producers. The cartel involved over 40 members from the EU and Canada, Finland, Sweden and the US (including two trade associations based outside the EU). The Commission found they engaged in concerted practices, fixing prices of sales to buyers in the EU, and it imposed substantial fines.[60] One of the fined entities was a US trade association, which served as an informational clearing house for its members, without producing or selling the products in question. Some foreign entities had EU subsidiaries, falling under EU jurisdiction under SEUD. However, some non-EU cartel members did not have any such establishments and they would have escaped liability. For these members the Commission relied on the effects doctrine, noting that 'the effect of the agreements … within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.'[61] Thereby, the Commission echoed the jurisdictional test enacted in the US FTAIA and proposed by AG Mayras in *Dyestuffs*.

Cartelists headquartered outside the EU challenged EU jurisdiction. In this they were supported by the UK, which disapproved of the Commission's approach. The case was pending on the court's docket for nearly four years, pointing to the Court's uneasiness. However, the Court could no longer avoid the issue.

[58] Ibid, 14.3, 14.6 and 14.8.
[59] 1984 Report, 59.
[60] European Commission, 85/202/EEC, Decision Relating to a Proceeding Under Article 85 of the EEC Treaty, IV/29.725- Wood Pulp, OJ L85, 1-52 (1984), 83.
[61] Ibid, 79.

In his advisory opinion the AG Darmon called for embracing of the qualified effects test, as formulated by AG Mayras in *Dyestuffs*.[62] His analysis established that the test conformed with international law.[63] In his view the EU also had jurisdiction over the US trade association, even though the price recommendations it issued were not strictly binding on its members.[64] The Court, however, again approached the matters differently. In particular, it found that by seeking orders from EU customers, foreign entities engaged in competition within the EU.[65] They have acted in concert with the effect of selling at coordinated prices in the EU.[66] More generally, the Court recognised that conduct prohibited under Art. 101 of the Treaty is 'made up of two elements, the formation of the agreement … and the implementation thereof' with the latter being the decisive factor.[67] Thereby in *Wood Pulp* the Court coined what came to be known as the 'implementation test'. In the case at hand, it held that the Commission did not err in its jurisdictional assertion. In fact, the Court considered jurisdiction being exerted in this case on the basis of the territoriality principle, clearly seeing the effects approach as a natural extension thereto.[68] However, the Court annulled the decision in relation to a US trade association after finding it did not play any separate role in the implementation of the agreements.[69]

Despite considering the case for nearly four years, the judgement was brief, with no specific references to the practice of other countries, the UK's disapproval or the AG's opinion—as if keeping it brief could make it more acceptable. While effectively embracing the effects test and allowing for extraterritorial application of EU competition law further afield, the Court did not clarify how to operationalise the implementation test. In particular, it did not explain how exactly the implementation test can be fulfilled, nor did it provide illustrative examples. From *Wood Pulp*'s factual setting it was clear that a direct sale to consumers in the EU meets the threshold. A refusal to deal with pre-existing trading partners or a conspiracy to limit sales on the EU market with a view to drive prices up, that is—some form of a deliberate withdrawal or omission would probably also satisfy it, but one could argue to the contrary. Moreover, the Court did not recognise any particular qualifiers. Would any 'implementation', any effects on the EU market suffice, even if a decisive majority of the effects were felt elsewhere? This

[62] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, Opinion of Mr Advocate General Darmon in case A Ahlström Osakeyhtiö and others v. Commission (Wood Pulp), [1988] ECR 5193, 53.
[63] Ibid, 27.
[64] Ibid, 63.
[65] Ibid, 12
[66] Ibid, 13
[67] Ibid, 16.
[68] Ibid, 18.
[69] Ibid, 24-8.

question was unaddressed. Finally, the Court did not elaborate on a possible need to balance the interests of other countries when asserting far-reaching jurisdiction in any such cases, although this need was being judicially recognised in the US at the time.[70]

Despite being excessively economical in its reasoning in *Wood Pulp*, the Court provided the Commission with the validation it had sought of its long-held jurisdictional approach, even if somewhat differently framed. Yet again, the Court's reticence left the Commission with a larger policy space, potentially allowing it to read into the Court's reasoning, as it has done in the past.

Post-*Wood Pulp* the Commission made good use of the implementation test, holding to account firms that might have escaped EU jurisdictional reach under SEUD. For example, the Commission explicitly relied on the test when dealing with a price-fixing cartel among PVC producers, inclusive of a Norwegian manufacturer with no subsidiaries in the EU.[71] Similarly, it did so when dealing with concerted practices among cartonboard supplies, some of who were non-EU firms implementing the agreement by selling directly to EU customers.[72] However, the Commission stopped short of further testing the permissible limits of exterritorial jurisdiction in the realm of scrutiny of multi-party conduct. Further push for its extension came via the rules on control of mergers.

3.4. Validating offshore mergers review

As in most modern competition systems, the EU seeks to review mergers *ex ante*, that is before they are concluded, so as to prevent creation or strengthening of dominant positions in the EU market. The merger control rules (i.e. the Old Merger Regulation) were originally enacted in 1989,[73] about 16 years after such proposals were first made in the EU. At the time, few jurisdictions provided for preventative merger control. The EU rules apply to transactions among firms achieving certain levels of turnover (i.e. sales) worldwide and within the EU so as to catch the larger fish. The smaller transactions fall under the purview of EU member states if their markets are affected, irrespective of the seat or the principal place of operations of the

[70] See, in particular, Timberlane Lumber Co. v Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1977) and Mannington Mills, Inc. v Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979).

[71] European Commission, 89/190/EEC, Decision of 21 December 1988 Relating to a Proceeding Pursuant to Article 85 of the EEC Treaty, IV/31.865- PVC, OJ L74, 1-20 (1989).

[72] European Commission, 94/601/EC, Decision of 13 July 1994 Relating to a Proceeding under Article 85 of the EC Treaty, IV/C/33.833- Cartonboard, OJ L 243, 1-78 (1994).

[73] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings (the Old Merger Regulation), OJ 1989 L 395, 1-12, corrigenda OJ 1990 L 257, 13.

parties involved.[74] Hence, the EU relies on a purely functional and 'necessarily arbitrary' test,[75] casting the net of the merger control system very widely. As the EU Competition Commissioner, on whose watch the rules were introduced, put it: 'the signal from Europe to the rest of the world is clear … Any concentration, wherever conceived or born … wherever located, must be notified if it meets the threshold requirements.'[76] This also means the review catches transactions with no effects on the EU market. For example, in 1993 the Commission cleared a transaction between four Japanese telecommunication providers. While the transaction met the notification thresholds, none of the parties was licenced to operate outside Japan and the Commission concluded the transaction had no effect in the EU.[77] Hence, this approach errs on the side of over-scrutinising. The EU claims power to review mergers somewhat excessively, effectively accepting that there may cases of overreach, in which parties will rightly challenge EU jurisdiction. The alternative would be to under-scrutinise, that is, to claim jurisdiction in fewer cases and accept that some offshore deals affecting the EU market will take place.

The jurisdictional limits of the EU merger review were tested and validated in *Gencor*.[78] The case focused on a proposed transaction between two groups of platinum and rhodium mines in South Africa (Gencor and Lonrho, a UK-registered entity). The deal was notified to and cleared by the South African competition authorities. Given the EU's formalistic approach to turnovers, it was also duly reported in the EU. Here, the Commission issued a prohibition decision after finding that the merger would have been anticompetitive from the EU's perspective by creating collective dominance on the relevant world markets.[79] This was done despite an earlier intervention by the South African government, which raised concerns about such a possibility and a possible jurisdictional clash.[80] Gencor, in turn, appealed the EU decision, arguing that the Commission lacked jurisdiction to review the transaction. The Court

[74] The 10th recital in the preamble of the Merger Regulation: 'A concentration with a Community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.' Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the Merger Regulation) OJ L 24, 1-22. The Old Merger Regulation followed the same approach.

[75] Leon Brittan, Competition Policy and Merger Control in the Single European Market (CUP 1991), 33.

[76] Idem, 43.

[77] European Commission, Decision of 30 June 1993 Declaring a Concentration to be Compatible with the Common Market according to Council Regulation (EEC) No 4064/89, IV/M.346 - JCSAT / SAJAC, OJ C219, 14.

[78] Case T-102/96, *Gencor Ltd v Commission* [1999] ECR II-753.

[79] European Commission, 97/26/EC, Decision Declaring a Concentration to be Incompatible with the Common Market and the Functioning of the EEA Agreement, IV/M.619- Gencor, OJ L11, 30-72 (1996). Note, *Gencor* was dealt with under the Old Merger Regulation.

[80] *Gencor* (n 78), 62.

of First Instance (CFI) without any deliberations on this point held that extraterritorial application of the Merger Regulation is justified under public international law when 'it is foreseeable that a proposed concentration will have an immediate and substantial effect' in the EU, and it found these criteria satisfied.[81] The fact that both parties carried out sales in the EU before the proposed transaction and would have continued to do so afterwards was undisputed.[82] Thereby, the CFI set a precedent and validated far-reaching EU jurisdiction in merger cases, allowing the Commission to deal with offshore mergers affecting EU market. It also usefully clarified that the EU jurisdiction and meeting of formalistic turnover thresholds under the Merger Regulation are two different matters. Doctrinally, it compartmentalised jurisdictional tests—with the implementation test remaining the rule in conduct cases and the new qualified effects test being applicable in merger control.

A more recent example of a far-reaching review of an offshore takeover concerned a proposed iron ore production joint venture in Australia between BHP Billiton and Rio Tinto, announced in 2009. The European Commission started analysing the proposal despite both entities having relatively small sales to EU consumers, with key customers being Asian steel mills.[83] However, in light of the competition concerns raised by the EU, the parties abandoned the transaction and no formal decision was issued.[84]

3.5. Assertive courts and the leap into extraterritoriality two steps removed

Post-*Gencor* the Commission continued with its progressive jurisdictional assertions, although—unlike in the past—these were being pragmatically squared within the earlier recognised notions. For example, in *Gas Insulated Switchgear*, a case involving a cartel between EU and Japanese firms, the Commission fined both EU and Japanese members, who—per the cartel agreement—agreed to abstain from the EU market. While they made no sales into the EU, the Commission held the view that their abstention was part of the single and continuous infringement.[85] While it has not been challenged, it clearly was a novel approach

[81] Ibid, 90-100.
[82] Ibid, 87.
[83] European Commission, IP/10/45, Commission opens formal proceedings concerning iron ore production joint venture between BHP Billiton and Rio Tint (25 January 2010).
[84] For the case analysis see Jean-François Bellis, 'The iron ore production joint venture between Rio Tinto and BHP Billiton: The European angle of a multinational antitrust review' in, Emerging Issues in Sustainable Development (Springer 2016).
[85] European Commission, Decision of 24 January 2007, Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, Case COMP/F/38.899 - Gas Insulated Switchgear (2012).

to asserting jurisdiction over foreign entities agreeing to abstain from the EU market and an example of quietly pushing for more expansive extraterritorial reach.

However, when possible the Commission was relying on both previously recognised tests, erring on the side of caution. In particular, in *LCD* it fined members of a world-wide cartel among producers of liquid crystal display (LCD) panels (the main component of TV, laptop and monitor screens).[86] The cartel involved Korean and Taiwanese firms, operating in Asia. To assert jurisdiction the Commission relied on the *Woodpulp* implementation test, arguing that even if Europe was not singled out by the cartelists' strategy, the agreement's implementation took place in the EU by means of direct sales.[87] The Commission also went on to show that the conduct had foreseeable, immediate and substantial effects in the EU, meeting the test introduced in *Gencor*.[88] Initially one of the cartelists challenged the decision on jurisdictional grounds,[89] however it later dropped the case, depriving the EU courts of an opportunity to rule on the matter.

These different strands of cases on extraterritoriality were brought together and the law was significantly developed in *Intel*.[90] In particular, it was recognised that the implementation and qualified effects tests are alternative ways of establishing jurisdiction. In relation to the former, it was finally clarified that a negative act (refraining from doing something) constitutes implementation. *Intel* also pushed the reach of EU laws significantly further, by recognising EU jurisdiction in a factual scenario two steps removed from EU shores, as outlined below. With it, the EU became one of the most assertive extraterritorial enforcers, no longer hesitant in its approach. It also demonstrates continued flexibility in adapting to whatever corporate schemes violators may envisage to avoid liability in the EU. *Intel* was also the first proper EU case concerning extraterritoriality in the context of abuse of dominance.[91]

Intel, a US computer chip maker, was fined for incentivising (by means of conditional rebates) computer manufacturers (such as Acer, HP and Lenovo) to make all or almost all laptops with

[86] European Commission, Decision of 8 December 2010 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, COMP/39.309- LCD- Liquid Crystal Displays (2010), 314-9.
[87] Ibid, 236-7.
[88] Ibid, 238.
[89] Case T-94/11, *AU Optronics v Commission*, OJ C120, 14.
[90] *Intel v Commission* (n 2).
[91] The Commission's jurisdiction over Gazprom (in relation to investigation of its possible abuse of dominance in the EU), in an investigation launched in 2012, was also initially questioned. The case was settled by means of commitments. However, the initial jurisdictional protest was most likely groundless given Gazprom's presence and its business conduct in the EU. Hence, *Intel* remains the first proper unilateral conduct case. For more about *Gazprom* see Marek Martyniszyn, 'On extraterritoriality and the Gazprom case', 36(7) ECLR 291 (2015), available at: https://ssrn.com/abstract=2636215.

Intel chips (that is, central processing units, CPUs). This was done against the backdrop of pre-existing contracts between computer manufacturers and AMD, Intel's only significant competitor and another US chip maker. Similar rebates were provided to a leading retail group for stocking products with Intel's chips. This was a strategy to foreclose AMD, which would limit consumer choice and diminish incentives to innovate.[92]

Intel appealed, arguing, among other points, that the Commission incorrectly established jurisdiction over Chinese Lenovo and Taiwanese Acer. It underlined that neither of the firms, nor Intel, purchased any chips in the EU. All the relevant transactions took place outside it—either in China or Taiwan. In Intel's view the fact that some number of laptops (apparently not particularly large) with its chips were later sold—by third parties (that is, Lenovo and Acer)—in the EU was irrelevant in the context of its agreements implementation and their effects. Hence, the EU jurisdictional tests were not met.[93]

The General Court clarified that the implementation and qualified effects tests are not cumulative, but rather alternative approaches to jurisdiction, indicating they can be applied across areas of competition law (be it agreements, dominance or mergers).[94] In relation to the qualified effects test, the Court underlined that, contrary to Intel's assertions, showing of actual effects is not needed.[95] The Court found that the qualified effects test had been met by incentivising laptop producers not to sell laptops with competing chips anywhere in the world, inclusive of the EU.[96] It also found the practice at issue was indeed implemented in the EU, pointing out that a direct sale is just one means of doing so. In this case, implementation consisted of a granting of a financial incentive to non-EU producers with a view to have them postpone launch in the EU of products with competing inputs (chips).[97] Effectively, the General Court, for the first time, recognised EU extraterritorial jurisdiction despite the underlying conduct being two steps removed from the EU market. In particular, there were no direct sales by Intel (nor some direct withdrawal of sales to the EU on their part). Instead, an independent non-EU third party was incentivised by Intel to commit relevant acts (postponement of new products). In other words, extraterritorial jurisdiction arises when a violator makes another

[92] European Commission, Decision of 13 May 2009 Relating to a Proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, COMP/C-3/37.990- Intel (2009).
[93] *Case T-286/09, Intel Corp v Commission*, paras 221-228.
[94] Ibid, 236, 244.
[95] Ibid, 251.
[96] Ibid, 250 et seq.
[97] Ibid, 303-7.

party change its course of conduct with a view to foreclosing competition, causing harm in the EU.

Intel appealed. AG Wahl considered the appeal well-founded on the jurisdictional grounds. In his view, given this was a unilateral conduct case, the Commission should have showed that Intel's conduct was implemented in the EU, not the conduct of a third party (Lenovo). For him, the Commission's approach, embraced by the General Court, was going too far, opening doors to exorbitant jurisdictional assertions.[98] In terms of the qualified effects test, AG Wahl pointed out that the Court should not have relied on the notion of single and continuous infringement for jurisdictional purposes.[99] He argued that the Court should not have focussed on Lenovo's course of conduct, instead it should have investigated whether Intel's agreements had the required qualified (i.e. immediate, substantial and foreseeable) effects on the EU.[100] That question, in AG Wahl's view, was left unanswered.

On appeal, the Court of Justice upheld the jurisdictional analysis of the General Court, engaging with the jurisdictional issues rather briefly. The implementation and qualified effects tests remain valid alternatives for establishing jurisdiction, the Court found.[101] In the Court's view Intel's agreements with Lenovo, leading to postponement of finished product availability in the EU, were correctly taken into account as part of an overall strategy to foreclose Intel's competitor in the EU and elsewhere.[102] Holding otherwise would have led to fragmentation of the conduct in question, enabling some of it to escape scrutiny in the EU.[103] The Union's highest Court therefore recognised a significantly broader jurisdictional reach of EU competition provisions. It remains an open question whether the Court would have formulated a similar view but for the existence of Intel's overall foreclosure strategy.

In effect, extraterritoriality two steps removed is the new EU rule (extraterritoriality v2). That is a precedent for the international community at large, going beyond approaches practised to date. Yet, there is nothing intrinsically problematic with it that would cause friction. The territory remains the necessary connecting factor and the harm being addressed remains the harm in the EU market. The EU is neither usurping the role of the world's competition enforcer, nor is it undermining policies of other states (as indicated by the lack of any formal

[98] In AG Wahl's view under such an approach 'almost any conduct – no matter how remotely related to the EU territory– could be construed as falling under the Commission's jurisdiction'. Case C-413/14 P, Opinion of Advocate General Wahl in case Intel v Commission, 312.
[99] Ibid, 319-20.
[100] Ibid, 322.
[101] *Intel v Commission* (n 2), 45.
[102] Ibid, 56.
[103] Ibid, 57.

governmental protests in *Intel*). It is a logical move forward on the sliding scale of options. While significant, it is more of an adjustment than a framing of some novel jurisdictional perspective. Its exact remits will undoubtedly be tested in future cases. Progressives will welcome it as it can limit the scope for transnational anticompetitive conduct going unpunished. The Commission is likely to build on it, should opportunities arise with case-specific circumstances in the future. Unlike in the past, the EU courts seem more assertive on jurisdictional issues, potentially more supportive of such developments.

4. Frictions and cooperative approaches

The EU's embracing of extraterritoriality has had a number of knock-on effects, which will be examined in more detail in this section. First, the evolution of the EU's approach signifies the emergence of a bipolar and, later, when other jurisdictions followed this path, multipolar system of judicial oversight of anticompetitive conduct. The pre-existing hegemon—the US—had to adapt to a new reality. US firms needed to learn to comply with competition legislation of multiple foreign states, in whose markets they were active, with whatever different, divergent norms applied. Second, extraterritoriality was and remains the second best tool for the EU. By design, the EU is a cooperative creature, typically consensus driven. Reliance on extraterritoriality as a unilateral, non-cooperative action is in many ways an alien mode of operating. While necessary to protect the EU markets, it has never been part of EU's DNA. This is, perhaps, also why the EU courts took so long to embrace extraterritoriality and the effects doctrine. While that ultimately happened, the EU's significant, but unsuccessful, efforts to develop a binding multilateral way of dealing with transnational anticompetitive conduct should not be overlooked. The EU also enjoyed various successes in fostering cooperative initiatives in this area of law, for example establishing bilateral ties by means of cooperation agreements.

4.1. Breaking the merger taboo

The US has never opposed the EU's incremental internalising of extraterritoriality. This is unsurprising given the US was laid the groundwork. However, given divergence in rules and their interpretations, tensions were unavoidable. While punishing cartel members for price fixing was politically less problematic, the introduction of the pre-emptive (*ex ante*) merger review was bound to and did create frictions.[104] This was well-understood in the EU. Lord

[104] For an outline of the EU merger review system see notes 73-77 above and accompanying text.

Brittan, the EU Competition Commissioner on whose watch the merger rules were introduced, predicted at the time that 'there may be conflicts of jurisdictions, for example with the United States'.[105] This awareness made the Commission call for a formal agreement with the US to deal with such problems,[106] showing the EU's cooperative and consensus-driven mode of operation.

The first contentious merger involved Boeing and McDonnell Douglas. Both US firms operated in the aerospace industry, dealing principally with commercial aircrafts and defence needs. Neither firm had assets or subsidiaries in the EU. At the time, the global market for large jet aircrafts was very concentrated: Boeing held over a 60% share, the European Airbus about 30% and McDonnell Douglas less than 10% of the market. While the deal was cleared in the US, the European Commission raised significant objections. This led to political outrage in the US. US President Clinton met with top US officials and economic advisers to discuss possible retaliatory measures in case of a prohibition decision, considering both unilateral sanctions and litigation within the framework of the World Trade Organisation.[107] US Vice President Gore threatened that the US 'will take whatever action is appropriate to assure justice and fairness'.[108] A trade war between the EU and the US seemed imminent. However, ultimately a compromise was found. Following consultations, under the EU-US Cooperation Agreement, the EU carved out defence matters from its analysis.[109] On top of that, the firms restructured the deal in a way that addressed the Commission's concerns, enabling it to approve the deal.[110]

The Boeing/McDonnell Douglas merger served as a wake-up call to US businesses and the legal community. The Commission nearly prohibited an offshore deal between two US firms that had been unconditionally cleared in the US, pointing to the need to understand and appreciate substantive differences between the two systems and, in more general terms, marking the end of US hegemony in this area of law.

Reinforcing the lessons from *Boeing/McDonnell Douglas*, at the turn of the new millennium the EU marked its position by blocking a transaction between General Electric and

[105] Brittan (n 75), 44.
[106] Idem, 44.
[107] S Pearlstein and A Swardson, 'U.S. Gets Tough to Ensure Boeing, McDonnell Merger', The Washington Post, 17 July 1997; Tom Buerkle, 'Clinton Warns EU Of Trade Conflict Over Boeing Deal', International Herald Tribune, 18 July 1997.
[108] Edmund L Andrews, 'Minister of Objection Nettles Washington', The New York Times, 21 May 1997.
[109] European Commission, IP/97/729, The Commission Clears the Merger between Boeing and McDonnell Douglas under Conditions and Obligations (30 July 1997).
[110] European Commission, 97/816/EC, Decision Declaring a Concentration to be Compatible with the Common Market and the Functioning of the EEA Agreement, IV/M.877- Boeing/McDonnell-Douglas, OJ L336, 16-47 (1997).

Honeywell,[111] which had been cleared by the US and Canadian competition authorities. This was no ordinary deal. The largest industrial merger in world history, it was valued at about $42 billion.[112] On appeal the prohibition was confirmed.[113] Briefly, the contentious issues for the EU concerned the global markets for jet engines and other avionic and non-avionic products. While the firms made a number of proposals on how to amend the transaction, these were considered insufficient by the Commission. *Boeing/McDonnell Douglas* hinted at what the *GE* case now made clear: the US was no longer the sole arbiter of global governance in the realm of competition law and policy.

The Commission's decision met with strong criticism in the US. Assistant Attorney General James was reported as saying that 'clear and longstanding US antitrust policy holds that the antitrust laws protect competition, not competitors'.[114] Treasury Secretary O'Neill accused the Commission of 'making judgments about business combinations of companies that are completely located outside their jurisdiction'.[115] Senator Rockefeller IV, the Chairman of the Senate Aviation Subcommittee, argued that the decision 'could have a chilling effect on future trans-Atlantic aviation and aerospace cooperation', while Senator Holling, the Chairman of the Senate Commerce Committee, accused the Commission of using protectionism at the expense of US companies.[116] Despite the rhetoric, it is important to note there was no trade war. Despite considerable outrage, it was clear the EU had legitimately flexed its extraterritorial powers in competition law and, given the EU's economic importance, they could not be ignored.

The *GE* case spawned the creation, in 2001, of the International Competition Network (ICN), a platform for engagement of competition agencies from different jurisdictions. Unsurprising its first initiative was the establishment of a Working Group on the Merger Control Process in the Multijurisdictional Context. The group was originally led by the US Department of Justice.[117]

However, since *General Electric/Honeywell*, no other merger created similar tensions vis-à-vis the US or any other jurisdictions. This can be explained in a fourfold way. First, EU's

[111] European Commission, 2004/134/EC, Decision Declaring a Concentration to be Incompatible with the Common Market and the Functioning of the EEA Agreement, COMP/M.2220- General Electric/Honeywell, OJ L48, 1-85 (2001).
[112] 'Welch squelched', The Economist, 21 June 2001; 'Engine failure', The Economist, 5 July 2001.
[113] Case T-210/01, General Electric Co. v Commission [1999] ECR II-753.
[114] John R. Wilke, 'U.S. Antitrust Chief Criticizes EU Decision To Reject Merger of GE and Honeywell', Wall Street Journal, 5 July 2001.
[115] Donald Lambro, 'O'Neill hits EU body for blocking GE merger', The Washington Times, 3 July 2001.
[116] Wilke (n 114).
[117] Deborah P Majoras, 'Merger Enforcement at the Antitrust Division' (Address at the Mergers and Acquisitions Forum, KPMG/Chicago Graduate School of Business, 27 September 2002).

jurisdictional approach to review mergers affecting the EU market was broadly accepted. Second, non-EU firms planning to merge recognised the need to comply with EU rules, pre-empting frictions. Third, when exercising its extraterritorial *prescriptive* jurisdiction, the EU continues with imposing only territorial, EU-focused remedies (hence, without asserting extraterritorial *enforcement* jurisdiction).[118] Fourth, the European Commission developed and continued with a cooperative approach of engaging with foreign counterparts in transnational merger cases. This is possible due to confidentiality waivers typically granted by the merging firms, which have an interest in speedily securing necessary clearances and in favourable, non-conflicting reviews by different agencies. In fact, the Commission cooperated with one or more non-EU competition agencies in roughly half of the more complex merger cases it reviewed (i.e., mergers cleared with remedies or requiring further scrutiny, in so-called phase 2).[119]

4.2. Pushing for cooperative solutions

Despite an increasingly assertive view on applying competition law extraterritorially, cooperation is at the heart of the EU's governance model. It therefore sought cooperative solutions to the challenges posed by transnational anticompetitive conduct. Such initiatives were being undertaken in different formats (bilateral and multilateral) with a view to develop both binding and voluntary instruments.

4.2.1. Failed hopes for the binding multilateral route

The EU's interest in developing a multilateral framework for competition law was not only principled but also pragmatic, reflecting the changed circumstances of the successful Uruguay trade negotiation round. The latter led to a significant elimination of public barriers to trade, putting private restraints, that is, anticompetitive conduct, in the limelight. The EU began pointing to the need to address the lacuna in competition law while the trade negotiations were ongoing.[120]

The first conceptual efforts to address possible international rules, in the 1990s, were academic and private in nature. In 1992-93 a group of twelve mostly German scholars[121] prepared what

[118] OECD, Working Party No. 3 on Co-operation and Enforcement: Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the European Union, DAF/COMP/WP3/WD(2017)35 (30 November 2017), 12.
[119] OECD, Working Party No. 3 on Co-operation and Enforcement: Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the European Union, DAF/COMP/WP3/WD(2017)35 (30 November 2017), 19.
[120] See, for example, The European Commission, XXIInd Report on Competition Policy 1992, 114.
[121] These were J Drexl (DE), W Fikentscher (DE), E Fox (US), A Fuchs (DE), A Heinemann (DE), U Immenga (DE), HP Kunz-Hallstein (DE), EU Petersmann (DE), WR Schluep (CH), A Shoda (JP), S Sołtysiński (PL), LA Sullivan (US).

came to be known as the Draft International Antitrust Code (DIAC).[122] The draft foresaw enactment of certain minimum standards into domestic law and creation of an international competition authority with quite extensive powers. It was meant to be adopted by means of a plurilateral agreement. DIAC was presented to Peter Sutherland, then the Director General of the General Agreement on Trade and Tariffs (GATT), the WTO's predecessor, with a view to stimulate discussion. It is noteworthy that Sutherland, prior to assuming his GATT role, served as the EU Competition Commissioner (1985-89), hence he understood the EU perspective on these matters. In general terms, this private initiative later informed more formal efforts within the EU.

The EU's first formal work towards a multilateral solution consisted of the appointment, in 1994, by Karel van Miert, EU Competition Commissioner, of a group of experts to consider the regulatory framework and to propose a way forward. The group was composed of six Commission staff and three external experts, two of who were co-drafters of DIAC. The group issued its report in 1995.[123] It considered the existing framework—circulation of information and nominal cooperation between competition agencies—as inadequate.[124] The development of bilateral ties was seen as 'essential but insufficient'.[125] The main recommendation was to create a plurilateral agreement on competition matters, initially between the main trading powers (hence, following a building block approach) with a dispute settlement system akin to the one provided for in the WTO framework.[126] While the report did not point to any particular forum, the possibility of concluding such an agreement in the WTO framework was explicitly mentioned.[127]

Building on the report, in 1996 the Commission called for the creation of a framework for competition rules within the newly established WTO.[128] It was not to be an international competition agency with its own enforcement powers, but a combination of binding commitments (to introduce domestic competition laws) and some intergovernmental

[122] See appended to Daniel J Gifford, 'The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry', 6 Minnesota Journal of Global Trade 1 (1997). For a reflection on DIAC and a critique by one of the drafters see Wolfgang Fikentscher, 'The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration', 72 Chicago-Kent Law Review 533 (1996).

[123] European Commission, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules. Report of the Group of Experts, COM(95) 359 final (12 July 1995).

[124] Ibid, 10.

[125] Ibid, 12.

[126] Ibid, 14.

[127] Ibid, 16.

[128] European Commission, Towards an International Framework of Competition Rules. Communication from the Commission to the Council, COM(96) 284 final (18 June 1996).

procedures (especially a compliance mechanism).[129] The Commission also proposed creation of a working group within the WTO to conduct necessary exploratory work.[130]

In 1996, under the leadership of Peter Sutherland, the former EU Competition Commissioner and the GATT Director General, the WTO established such a working group.[131] Frédéric Jenny, then the vice president of the French Competition Council was appointed its chair. Jenny was also one of the three external experts working on the EU's 1995 report. The EU made the first submission to the group, outlining the benefits of a potential international framework of competition rules and proposing the work programme.[132] The prospects were encouraging. In 1998 Commissioner Van Miert reported group's adoption of a work plan and asked whether the international community 'should not consider next year, opening negotiations on global competition rules within the WTO.'[133]

Despite a positive start and intensive work by the working group, including 246 formal contributions over the years, the idea did not galvanise sufficient support among the WTO members. While initially placed on the WTO agenda (for the Doha ministerial conference in 2001), the idea was opposed by the US and a group of developing countries—for different reasons.[134] This subsequently led to the working group being disbanded in 2004,[135] representing a failure of the EU's hopes for a multilateral framework for competition law within the WTO. Since then, no effort has been made to revive it. The route towards a binding multilateral solution was abandoned, underscoring the necessary recourse to extraterritoriality as a means of dealing with transnational anticompetitive conduct. Hence, the embracing of extraterritoriality by the EU was its BATNA.[136]

The WTO efforts aside, the EU eagerly embraced a US proposal, made in Autumn 2000, to set up an international virtual network of competition agencies—the International Competition Network (ICN). Initially, 14 jurisdictions joined this initiative (inclusive of the EU and four of its Member States). It was meant to be a platform for voluntary cooperation. The ICN was not

[129] Ibid, 10 et seq.
[130] Ibid, 14.
[131] Singapore Ministerial Declaration, WT/MIN(96)/DEC (13 December 1996), available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>, point 20.
[132] WTO Working Group on the Interaction between Trade and Competition Policy, Communication from the European Community and its Member States, WT/WGTCP/W/1 (11 June 1997).
[133] Karel Van Miert, 'Globalization of Competition: The Need for Global Governance' (Speech at the Vrije Universiteit Brussel, 25 March 1998).
[134] See discussion in Imelda Maher, 'Transnational Legal Authority in Competition Law and Governance: Territoriality, Commonality and Networks' in Günther Handl, et al. (eds), Beyond Territoriality: Transnational Legal Authority in an Age of Globalization (BRILL 2012).
[135] Decision Adopted by the General Council on 1 August 2004, WT/l/579.
[136] In negotiation theory BATNA stands for best alternative to a negotiated agreement.

empowered to adopt rules. It was conceived as a consensus-focused, project-oriented platform allowing enforcers to tease out systemic differences and identify best practices, thus facilitating convergence and strengthening cooperation. Some in the Commission saw it as 'a valuable instrument that will bear fruit in the short to medium term', complementing bilateral cooperation and the long term work on intergovernmental fora, potentially leading to a formal regime within the WTO.[137] While the WTO efforts failed, the ICN proved very successful. It currently brings together over 100 competition agencies from all over the world. Over the years it has delivered numerous practical outputs and facilitated many interactions among enforcers.[138] The EU continues to actively contribute to and engage in its framework.

4.2.2. Fostering (some) bilateral ties

In addition to multilateral efforts, the EU invested in bilateral cooperation. In particular, over time it concluded bilateral cooperation agreements with 11 jurisdictions.[139] Most of these constitute so-called 1st generation agreements, which aim to preempt any potential frictions relating to extraterritorial application of domestic rules and to facilitate engagement between parties. The agreements provide notification procedures for cases that may affect important interests of the other party. They also facilitate channels of communication and, more generally, help to develop mutual trust between counterparts. However, they do not allow for sharing of confidential information (unless investigated parties agree to it, as they typically do in merger review cases), or for rendering assistance in gathering such information or case-specific evidence. Some of the agreements provide for 'negative comity', that is, an obligation to take the other party's important interest into account when enforcing law. Some agreements, for example with the US, also contain 'positive comity' clauses, which enable one party to request the other party to investigate conduct of firms based in the requested party's territory which harm the requesting party's interests. There is no obligation to undertake any enforcement action following such request (that is, it is discretionary). This possibility under

[137] Jean-François Pons, 'Is it time for an International Agreement on Antitrust?' (Frauenchiemsee, 3-5 June 2002), 12.

[138] See, for example, ICN Factsheet and Key Messages, available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/Factsheet2009.pdf>.

[139] These are agreements with: Brazil (2009), Canada (1999), China (2012), India (2013), Japan (2003), Korea (2009), Mexico (2018), Russia (2011), South Africa (2016), Switzerland (2014), United States (1991, 1995 & 1999). See the listing of 'Bilateral relations on competition issues' available at <https://ec.europa.eu/competition/international/bilateral/#s>.

the EU-US agreement has been formally used only once, without much satisfaction to the requesting party (the US),[140] and it seems this solution carries only limited practical potential. The EU developed also one 2nd generation agreement, with Switzerland, concluded in 2013, which goes further. It allows for exchange of confidential information. However, it is only possible in relation to conduct being investigated by authorities in both jurisdictions. That is, it is of no avail in a case opened by the European Commission in relation to conduct not being scrutinised in Switzerland.[141]

Such formal bilateral tiles are particularly useful when it comes to facilitating contacts and trust-building. However, at the turn of the new millennium it became clear that the EU could not 'realistically expect to build the same intensive bilateral cooperative relationship [in competition law] with all … counterparts around the word' due to clear resource limitations.[142] Little has changed since then. 11 cooperation agreements do not amount to a particularly impressive record for a major economy such as the EU. This explains why the EU was originally so eager to find a multilateral solution and why it embraced the less-resource-intense engagement on the ICN forum.

However, it should be noted that any contacts or interactions with foreign competition officials help to eliminate or at least soften potential frictions arising from extraterritorial application of competition laws. With this in mind, the European Commission has long practiced notifying foreign counterparts of cases if they contain elements relevant to the notified country. It has also avoided exercising extraterritorial *enforcement* jurisdiction. For example, it stopped short of engaging in 'fishing expeditions'—sending its inspectors to conduct work outside the EU.[143]

Conclusions

This piece critically analysed the EU's embracing of extraterritorial application of its competition laws. This evolution occurred amidst: growing inter-connectedness of the world's economy; trade negotiations that facilitated increased global trading; and the removal of state-

[140] It was invoked in the Sabre-Amadeu case. US Department of Justice, 'Justice Department asks European Communities to investigate possible anticompetitive conduct affecting U.S. airlines' computer reservation systems', 28 April 1997. As James Rill put it 'the pace of action … suggest[s] that the formal process will not produce results living up to early expectations … formal positive comity is not a fully effective mechanism'. James Rill, 'The US/EC Antitrust Cooperation Agreement: Genesis, Innovation, and Early Implementation', 10 Antitrust Chronicle (2011).

[141] For further analysis see Marek Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement', 19(1) International Journal of Evidence and Proof 11 (2015), available at: https://ssrn.com/abstract=2436467.

[142] Pons (n 137), 3.

[143] Brittan (n 75), 19.

created barriers to cross-border business activities. All of these elements intensified the need to deal with private barriers to trade—that is, restrictive business practices, or, in competition law parlance, anticompetitive conduct. The EU's overall response was balanced.

While the European Commission was eager to assertively follow the US path shaping new jurisdictional standards, the EU courts proved more reticent, or else more pragmatic and eager to remain aligned with international law. It is possible the courts' hesitance was informed, in the first decades, by the relative novelty of the entire EU project and the courts' fairly recent intra-EU standing. Nevertheless, over time the EU steadily expanded the reach of its competition laws by means of policy pronouncements and the gradual imprimatur of the EU courts. By doing so, the EU effectively ended the US dominance in this area of law, setting the stage for a system of multi-polar governance.

As a unilateral action, extraterritoriality was never in the EU's DNA. As a compromise-orientated and consensus-driven creature, in the 1990s the EU invested heavily in galvanising support for a multilateral solution—a binding system of governance within the WTO. Yet, in the face of opposition from the US and some developing countries, these hopes were lost. The EU rechannelled its cooperative efforts into voluntary platforms, primarily into the International Competition Network, while relying also on a rather limited, yet useful, set of bilateral cooperation agreements with some of its key partners. The EU's many efforts to encourage multilateral solutions and the limitations of the available cooperative instruments underscore the necessity, not convenience, of the EU's embracing of extraterritoriality—the only effective tool to address cross-border anticompetitive practices.

The Court's recent pronouncement in *Intel* unambiguously positioned the EU as an assertive and progressive extraterritorial enforcer. The Court's recognition of extraterritoriality two steps removed (extraterritoriality v2) places the EU in the vanguard of competition law enforcement globally. The Court's ruling and the EU's assertive approach should be welcomed by all those who favour limiting the gaps in global governance of transnational anticompetitive conduct.