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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

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*Roundtable on the Extraterritorial Reach of Competition Remedies**

The increasing interdependence of markets and economies means that the behaviour of market participants, and its effects, are often not confined within the territory of the country where the behaviour takes place. Thus, conduct abroad by foreign parties may have negative impacts on domestic markets. In response, competition authorities can take enforcement action against harmful foreign conduct, carrying out investigations in or involving another territory, and imposing remedial measures which may have an effect outside their jurisdiction.

There is on-going debate on the right territorial scope of a remedy. The questions this debate seeks to answer focus on the extent to which a remedy should reach beyond national borders and the suitability of extraterritorial remedies in combatting domestic harm. Ultimately, the correct scope of a remedy depends on the relationship between the territorial nexus of a competition remedy, the alleged violation, and the domestic harm that the remedy aims to counter. This paper looks at recent cases and commentary, and discusses approaches followed by different jurisdictions to this issue.

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1. Introduction

1. In recent years, the OECD has looked at aspects of extraterritorial reach of domestic antitrust law, in particular rules and tests under which competition authorities establish jurisdiction over conduct by non-nationals that occurs outside, but has effects within, their territory.¹ The OECD has also looked at issues arising in cross-border antitrust investigations.² In December 2017, the Competition Committee's Working Party No. 3 (WP3) will discuss the appropriate territorial scope of antitrust remedies over foreign conduct (i.e. conduct by foreign parties occurring outside the investigating authority's territory) and, in particular, cases where these remedies extend beyond the domestic territory.

2. The discussion will focus on antitrust remedies, i.e. behavioural or structural measures that aim to stop an unlawful conduct and its recurrence, cure or prevent the conduct's anti-competitive effects, and restore competition. It will not address sanctions that aim to punish unlawful acts and deter unlawful conduct in the future.³ Hard core cartels are perceived as being unsuitable for measures other than prohibitions and sanctions, and hence are not usually solved through behavioural or structural remedies. This note will therefore focus on remedies in mergers⁴ and abuse of dominance cases, which can include measures terminating antitrust investigations consensually through commitment decisions, consent decrees, consent orders, and written undertakings.⁵

3. To assess harmful conduct, and decide on measures to counter it, competition authorities need to, first, establish jurisdiction over the conduct, and then establish an appropriate nexus between the harm and the remedies which address it. The authority's review and decisions revolve around two basic questions: is the conduct likely to be unlawful and harmful for domestic competition as assessed in accordance with the relevant country's rules? If so, what are the measures that can be taken in response?

4. This paper will look at the tests that jurisdictions rely on to catch foreign conduct and the design of remedies over such foreign conduct, in terms of their territorial scope. It argues that a well-co-ordinated set of domestic remedies may in many cases be more appropriate than one remedy that applies extraterritorially across jurisdictions, assuming that the facts and stages of investigation of the relevant cases allow the design and enforcement of parallel domestic remedies. The paper concludes that designing remedies for conduct with cross-border effects requires good co-operation between competition agencies and, going forward, an alignment of substantive standards.

2. Establishing jurisdiction over foreign conduct that causes domestic harm

5. The first question that a competition agency must answer when determining whether to take enforcement action against potentially unlawful conduct is whether it has the jurisdiction to do so. This depends on the jurisdictional reach of the domestic competition law. This reach is limited by two public international law principles.

6. The first principle is subject-matter (legislative) jurisdiction, which accepts that a state has full authority to lay down general or individual rules applicable to conduct within its territory (the "territoriality" principle) and to its citizens and companies (the "nationality" principle). The territoriality principle, in particular, has a positive aspect (the right to assert jurisdiction within the territory), and a negative one (the obligation not

to assert jurisdiction beyond domestic boundaries, so as not to interfere with the territory and sovereignty of other states).⁶

7. The second principle is enforcement jurisdiction, which grants states with jurisdiction to enforce their laws and decisions by means of measures that may include coercion against concerned parties.⁷

8. The growing interdependence of markets and economies, and the fact that business activities increasingly take place across borders, means that the behaviour of market participants, and the effects of this behaviour, is often not contained within the territory of the country where the behaviour takes place or of which the parties are nationals. Thus, conduct occurring abroad by foreign parties - which in principle would satisfy neither the territoriality nor the nationality principles - may have negative impacts on domestic markets. Over the years jurisdictions have developed case law and rules to assess in which cases they can extend jurisdiction extraterritorially, and what is the appropriate nexus between domestic harm and foreign conduct.

9. An increasing number of jurisdictions rely on the domestic effects of the relevant conduct as the jurisdictional trigger, known as the effects doctrine. Under this doctrine, jurisdictions can legitimately take enforcement action against conduct that is carried out outside their territory by non-nationals as long as it is unlawful under their domestic rules and produces effects within their territory. While the effects doctrine can be understood as an extension of the territoriality principle, it can result in the laws of more than one jurisdiction applying when a particular conduct affects more than one territory. It also means that remedial measures required to cure the competitive harm may need to be enforced extraterritorially, against companies based and action occurring within another state.

10. The exact reach of the jurisdictional powers based on effects on domestic markets has been the subject of much discussion and judicial interpretation. The debate about the jurisdictional reach of the U.S. Sherman Act, in particular, has been ongoing over many decades.⁸

11. In 1945 the U.S. Court of Appeals for the Second Circuit ruled in *Alcoa*⁹ that the Sherman Act reaches conduct that causes intended effects within the United States, and that a state can impose liability even upon foreign persons, for conduct outside its borders that has consequences within. The court in *Alcoa* left unclear how substantial an effect must be in order to trigger the jurisdiction of U.S. law, and what is the nature of the effect required to catch foreign conduct.¹⁰ This lack of clarity has allowed different interpretations of this rule and, at times, prompted backlash from other countries to what was perceived as U.S. jurisdictional overreaching.¹¹

12. In 1982, the U.S. Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA), adding Section 6a to the Sherman Act. This section regulated the Sherman Act's reach with respect to conduct involving non-import trade or commerce with foreign nations. While the FTAIA still subjects conduct involving U.S. import trade or commerce to the Sherman Act, it excludes jurisdiction over non-import foreign trade or commerce unless it has a “*direct, substantial, and reasonable effect*” on U.S. domestic, import, or export commerce and such effect gives rise to a claim under the Sherman Act. Subsequently, the U.S. Supreme Court ruled in *Hartford Fire* that US antitrust law applies “*to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States*”.¹² The FTAIA and *Hartford Fire* tests thus qualify

the effects required to establish jurisdiction, stipulating that trivial harm does not pass the bar.

13. The effects doctrine was developed in the U.S. when other antitrust laws were being adopted around the world, and informed the jurisdictional limits of these laws. Thus, the test of “*direct, substantial and reasonable effects*”, with some differences in wording or intensity, is accepted by most jurisdictions as the limit for extraterritorial application of domestic antitrust laws.¹³ For example, Australia, Japan and Korea rely on domestic effects to establish jurisdiction over a harmful conduct.

14. The European Union (EU) relies on the “*implementation*” test as set out by the Court of Justice of the European Union (the CJEU) in *Woodpulp*,¹⁴ where the CJEU distinguished between the place of formation of an illegal agreement (in that case, price fixing) and the place of its implementation. In *Woodpulp*, the relevant producers were located, and entered into the pricing agreements, outside the EU, but sold the cartelised product to customers within the EU. The CJEU ruled that the implementation of the agreement could be the decisive factor and accepted that the European Commission had jurisdiction to take up the case. In *Gencor*, a merger case, the General Court confirmed the EU’s extraterritorial jurisdiction whenever “*it is foreseeable that a proposed concentration between undertakings established outside the Community will have an immediate and substantial effect within the Community*”¹⁵. The General Court equated this test to the implementation doctrine developed in relation to agreements in *Woodpulp*, thus indicating that the EU applies an effects doctrine similar to that in the U.S. More recently, the matter of the extent of the jurisdiction of EU competition law over foreign conduct was at issue before the CJEU in the context of a decision by the European Commission against Intel.

Box 1. Jurisdiction over foreign conduct that produces probable effects on competition: Intel v Commission

In September 2017, a case dealing with abuse of a dominant position by a non-EU firm (Intel), the Court of Justice of the European Union (CJEU), on appeal against the judgement of the General Court of the European Union (Intel v Commission, T-286/09), confirmed that the European Commission was right to include a supply deal between Intel and Lenovo in China in its EUR 1.06 billion antitrust fine against Intel, on the basis of probable effects on competition.

The Court ruled that “...*it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied. The General Court did not err in law in holding that, faced with a strategy such as that adopted by Intel, it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to assess the substantial nature of its effects on the market of the EU and of the European Economic Area (EEA). ... [To do otherwise would] lead to a fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the European Union’s jurisdiction. ... The General Court noted, as regards the postponement of the worldwide launch of certain computer models, that it was apparent from the evidence before it that sales of those computers were planned in the Europe, Middle East and Africa region, of which the EEA is a very important part, which was sufficient for a finding that there were **at least potential effects in the EEA**”.* (all emphasis added).

This case reaffirms previous case law on the reach of EU antitrust laws and accepts that “probable” or “potential” effects in the EEA may be a sufficient jurisdictional trigger.

Source: Decision of the Court of Justice of the European Union (2017) in case C-413/14 P Intel v Commission.

3. Remedial measures regulating foreign conduct

15. After establishing subject-matter jurisdiction over a conduct, competition authorities have enforcement jurisdiction to take action to make sure that domestic laws are complied with; that the anti-competitive conduct is stopped, punished and prevented from recurring; and that the domestic harm is remedied and further harm avoided. To achieve these goals, agencies may impose remedies on market participants prohibiting the repetition of harmful acts, or imposing obligations on them to make sure that the market can work in a competitive manner.

16. Remedies against foreign conduct raise questions. This note reviews the answers to three such questions in this section:

- How do remedies fit with: (i) the different substantive standards followed by different jurisdictions; (ii) the different effects that the same conduct can have in different jurisdictions?

- How far-reaching should remedies be, i.e. what is their appropriate territorial scope?
- How can jurisdictions and businesses deal with the risk and costs of conflicting remedies when a conduct is caught by more than one jurisdiction?

3.1. Different jurisdictions, different effects, different standards, one remedy?

17. In an increasingly interconnected world, business activities that are carried out across national borders are becoming the norm, rather than the exception. There will often be cases when a conduct has effects in more than one jurisdiction. Such conduct can be caught by each relevant authority applying its jurisdictional tests (i.e. each authority assessing whether the conduct produced harmful effects in their territory, and whether these effects are sufficiently important to merit enforcement attention), competition rules (which determine whether the conduct is lawful or not), and remedial powers (including powers to impose prohibitions against a conduct, or injunctions to follow a course of action).

18. Each competition authority is mandated to enforce its own laws and protect domestic consumers from anticompetitive conduct. This means that an authority is expected to assess the competitive effects of a conduct and, if necessary, to impose remedies. As more competition regimes are established and operational across the globe (currently there are more than 130), the likelihood of the foreign conduct being caught by more than one set of rules, and more than one agencies, increases.

19. The same conduct may have different effects in the different jurisdictions which it affects. Even when the effects of a conduct are similar across jurisdictions, the legal standards to assess the lawfulness of a conduct may be different depending on the jurisdiction. For example, the same conduct can be found to be lawful in one jurisdiction, but unlawful in another. Furthermore, even if a conduct is deemed unlawful across jurisdictions, each jurisdiction may determine that a different remedy is required.

20. In mergers, significant convergence in substantive tests has been achieved over the years. Most jurisdictions can prohibit mergers that they deem likely to substantially lessen competition in a market - although what constitutes a substantial lessening of competition, or the level of plausibility or likelihood required to justify a prohibition or remedy to clear the transaction, may differ from one jurisdiction to the next.¹⁶ There is less convergence in the treatment of unilateral conduct by firms with market power. For example, in the U.S. courts typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50% of the sales of a particular product or service within a certain geographic area.¹⁷ Some U.S. courts have required market share percentages of 70% upwards.¹⁸ In the EU, a dominant company has a special responsibility to ensure that its conduct does not distort competition, and the presumption against dominance starts with lower market shares, below 40%.¹⁹

21. One of the most marked divides among jurisdictions concern the treatment of excessive prices. Some jurisdictions consider excessive prices an illegal exercise of dominant market position. For example, in the EU, excessive pricing is prohibited under article 102 of the Treaty on the Functioning of the European Union, which prohibits abuse of dominance in general and lists as an example “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”, a provision that has been interpreted to include excessive prices.²⁰ Other jurisdictions like Australia, Mexico and the U.S. consider do not regulate excessive pricing. There, competition authorities

assess abuse of dominance in cases of exclusionary conduct and under merger control rules. For example, excessive pricing is not prohibited by the Sherman Act or other U.S. antitrust laws, which allow lawful monopolists, and *a fortiori* other market participants, to set their prices as high as they choose. Limiting the freedom to set prices is deemed to diminish incentives to compete and innovate, and U.S. courts and antitrust agencies have found that determining the reasonableness of prices charged by a lawful monopolist goes beyond their competence.²¹

22. Competition law enforcement does not only depend on legal standards. The number and intensity of enforcement interventions are also dependent on the competition culture, enforcement practice and characteristics of each jurisdiction. For example, when examining a multijurisdictional merger, agencies in jurisdictions which account for only a small part of the transaction may find that the merging parties may choose to exit its market if they place significant restrictions on the merger.²² This departure could reduce competition in the domestic market. As a result, that agency may find it reasonable to approve a merger that would normally be prohibited – often accepting or imposing structural or behavioural commitments to assuage some of the competition concerns.

23. Thus, the imposition of different enforcement decisions and remedies against the same conduct is the natural result of competition rules, standards, and enforcement practices not being aligned across the world (in spite of an increasing convergence in competition regimes and enforcement procedures), as well as of market conditions differing from one territory to the next, thus justifying different decisions. To the extent that enforcement action is consistent with each different domestic enforcement reality and remedies imposed on market participants are limited to the domestic territory, the risk of conflicting remedies curing the same conduct would be minimised.

24. However, extraterritorial remedies designed to capture and correct business conduct outside one agency's jurisdiction – i.e. remedies extending to some other jurisdictions or, in some cases, to activity anywhere in the world – can have more serious implications. Extraterritorial measures mean that the imposing jurisdiction effectively exports its legal standards and enforcement approaches and regulates firms' conduct (including through obligations to act, or refrain from acting, in a particular way) outside its borders.²³

25. When extraterritorial remedies are adopted, it is the jurisdiction that has the strictest standard that will ultimately regulate corporate behaviour by imposing remedies that may affect business conduct in jurisdictions where that same conduct will be found lawful, or at least less harmful.²⁴

26. This can lead to tensions among jurisdictions. On the one hand, it raises issues of respect of foreign sovereignty and international comity; on the other, it creates the prospect of a race among jurisdictions to be the first to take action in order to be able to export domestic enforcement priorities and set globally applicable measures. There is also a risk of significant negative effects on competition and welfare if conducts that are widely considered to be generally pro-competitive become the object of the worldwide prohibition.²⁵

27. There have been a number of recent antitrust patents cases around the world. Jurisdictions take different approaches to antitrust matters involving patents and intellectual property rights (IPRs) in general,²⁶ in particular regarding: (i) the extent of the patent holder's right to exclude, i.e. prevent third parties from using the invention in any way for an agreed period,²⁷ including through refusing to license or seeking injunctions

against breaches of the patent²⁸; and (ii) the pro-competitive or anti-competitive nature of practices such as tying and bundling, discriminatory licensing, cross-licensing,²⁹ grant backs³⁰ and patent holdup.³¹ IPRs are an area in which enforcement and remedial obligations imposed by one competition authority can have important spill over effects on other economies. Thus, their antitrust treatment has sparked considerable debate on the extraterritorial reach of antitrust laws, the territorial character of domestic patents, and the effects that an extraterritorial remedy can have on overseas markets where the protection granted to patent holders is more or less extensive.³²

Box 2. Extraterritorial remedies in cases involving intellectual property rights

(1) Korean Fair Trade Commission: the Microsoft-Nokia merger

In 2013, Microsoft Corporation disclosed its plan to buy Nokia Corporation's Devices and Services business, which produces mobile phones, smartphones, software and tablets. The acquisition would allow Microsoft to enter the market for smartphones. Russia, India, Israel, Turkey, the U.S. Department of Justice and the European Commission cleared the merger deal unconditionally in 2013 and China and Chinese Taipei approved it with conditions in 2014.

The Korean Fair Trade Commission (the KFTC) had concerns that the acquisition would allow Microsoft to engage in unfair business practices. The KFTC believed that the merger would allow Microsoft, which already held a number of patents for smartphones' operating systems, to charge excessive patent fees to competing smartphone manufacturers and thus restrict them from accessing essential smartphone production inputs. In August 2015, Microsoft entered into a consent decree with the KFTC. In this consent decree, Microsoft: (i) committed to license its smartphones' operating systems Standard Essential Patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) conditions; (ii) agreed to royalty terms for its non SEPs; (iii) agreed not to seek injunctions claiming infringement of its SEPs against sales and import in Korea and overseas against Korean smartphone or tablet PC manufacturers.

In this case, the KFTC assessed Microsoft's patents and licensing practices which existed before the merger, and imposed restrictions on Microsoft's ability to set royalty rates and seek injunctions on patents issued outside Korea. This has led commentators to argue that limiting the use of foreign patents enables a domestic authority to become a worldwide regulator that imposes its antitrust laws on foreign IPRs and regulate conduct that would, in principle, be outside its jurisdictional scope (since it is not the competition authority of the jurisdiction issuing the patent).

(2) Federal Trade Commission: Google-Motorola Mobility Inc.

The U.S. Federal Trade Commission (FTC) alleged that Motorola Mobility, Inc. ("Motorola") and its parent, Google, engaged in unfair methods of competition by breaching their commitments to standard-setting organizations (SSOs) to license its standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. The FTC alleged that Google violated its FRAND commitments by seeking injunctive relief against willing licensees of its FRAND-encumbered SEPs and could be caught under the "unfair methods of competition" provision in Section 5 of the FTC Act. Under a settlement reached with FTC in 2013, Google agreed to meet its prior commitments to allow competitors access – on FRAND terms – to patents on critical standardised technologies needed to make devices such as smart phones, laptop and tablet computers, and gaming consoles. Therefore, the settlement bars Google and Motorola from seeking or enforcing injunctions against willing licensee infringers of any FRAND-assured SEP in its global portfolio (thus covering any patent claim on a patent "*issued or pending in the United States or anywhere else in the world*"). The order's geographic scope covers only arrangements with willing licensees who are subject to the

jurisdiction of U.S. District Courts.

(3) European Commission: Rambus

In 2007, the European Commission (the Commission) found that Rambus had abused of its dominant position on the Digital Random Access Memory (DRAM) worldwide market, where Rambus controlled more than 95% of the sales. The Commission alleged that Rambus had engaged in a so-called “patent ambush”, intentionally concealing that it had patents and patent applications which were relevant to technology used in the JEDEC (an industry-wide standard setting organisation) standard for DRAMs, and subsequently claiming royalties for those patents. According to the Commission, Rambus’ concealing of information in order to charge higher prices could amount to an abuse under Article 102 of the Treaty on the Functioning of the European Union. To address the Commission's concerns, Rambus offered a bundled worldwide licence for all its patents related to DRAM products and put a worldwide cap on its royalty rates for products compliant with the JEDEC standards for five years. These commitments were accepted by the Commission and made legally binding in 2009. The Commission justified imposing worldwide measures (i.e. a worldwide license with royalties calculated on worldwide sales) on the basis of the market being worldwide, even though Rambus did not have patents in every country.

Sources: KFTC’s decision of 24 August 2015, Case number 2015Gigyeol2010;

Jurata, J., I. M., Owens (2015), A new trade war: Applying domestic antitrust laws to foreign patents, *George Mason Law Review*, Vol: 22:5, p.1127, www.georgemasonlawreview.org/wp-content/uploads/22_5_Jurata.pdf;

Google Inc., FTC File No. 121-0120, Statement of the Federal Trade Commission, Jan. 3, 2013, www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter;

Maureen K. Ohlhausen Acting Chairman, Federal Trade Commission, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints, IBA 21st Annual Competition Conference September 8, 2017 www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf;

Case COMP/38.636 Rambus of 9 December 2009, OJ C30/17, 2010

3.2. What is the appropriate territorial scope of remedies?

28. Remedies serve a number of objectives: they stop unlawful conduct and prevent its recurrence, deter future unlawful conduct by the same or other parties, and restore competition. In a previous discussion of these objectives, the OECD concluded that remedies need to be (i) effective, i.e. likely to combat the identified harm, (ii) enforceable, i.e. able to be complied with, and to trigger sanctions for non-compliance when they are not followed, and (iii) proportionate, i.e. limited to the least restrictive measures that are necessary to correct the harmful conduct and re-establish competitive conditions in the market.³³

29. An extraterritorial remedy could be effective if it stops the harmful conduct, deters its recurrence and corrects its effects in the domestic market. However, its effectiveness ultimately depends on the ability of a jurisdiction to enforce the remedy in practice.

30. The enforceability of remedies outside the territory of the imposing authority is problematic. The imposing authorities may not have ways of making sure that the remedy is complied with outside its territory, or of taking enforcement action against non-, or partial, compliance by a non-national in another territory.

31. This difficulty extends to both structural and behavioural remedies. Cross-border structural remedies are difficult to enforce if they concern assets outside the jurisdiction, as there may be limits on the use of enforcement measures that have coercive effects in another jurisdiction. Cross-border behavioural remedies need on-going monitoring of compliance in another territory and may require information and assistance from the jurisdiction where the behavioural commitment should take place. This jurisdiction may, however, not have an interest to monitor compliance, as it did not impose the remedy and has no monitoring obligations under its law.³⁴

32. The proportionality of a remedy means that the scope, form and intensity of the remedy must correspond to the seriousness of the violation and the identified competitive harm. The remedy should be suitable and thus able to correct the competitive harm. If more than one suitable remedial measures are available and can be equally effective, the most appropriate remedy is the least restrictive for market participants.³⁵ Proportionate remedies do not attempt to inject more competition into the relevant market than that which would have existed but for the violation. At the same time, such remedies should be reasonably consistent from case to case, and thus allow predictability and prevent arbitrariness.³⁶

33. The proportionality test requires a link between the conduct's harmful effect in the jurisdiction, the remedy and the territory over which the remedy applies; i.e., remedies should be limited to the (territorial) extent required to ensure their effectiveness. In the case of extraterritorial remedies this link is often more remote. A remedy adopted by one competition authority with uniform cross-border application can cause welfare losses by failing to effectively address the different competition conditions – and hence, by failing to recognise the different effects of a conduct or a remedy – in different markets.³⁷

34. For proportionality purposes, a jurisdiction-by-jurisdiction remedial approach that takes jurisdiction-specific competitive effects into account may be preferable. In this vein, authorities may consider to limit their remedies to the domestic market to avoid interfering with foreign markets, assuming that domestic interests are adequately protected. It is noteworthy that authorities that imposed extraterritorial or across the globe remedies argue that they were required to do so in order to counter domestic harm. They argue that the undertaking's business model and transactions are so connected with each other (causing anti-competitive effects on a worldwide scale) that only a remedy with extraterritorial or global effects would be effective.³⁸

35. This frames the challenge with imposing remedies against conduct with cross-border effects. On the one hand, the competitive harm may, in certain circumstances, be dealt with through remedies that affect business conduct outside the jurisdiction. On the other, the only effective alternative to extra-jurisdictional remedies in such circumstances is the adoption of individual remedies in all relevant jurisdictions (some of which may still have extraterritorial reach, if this is necessary to cure domestic harm and no purely domestic suitable remedy exists). This, in turn, presumes that it is possible to separate remedies per jurisdiction, that the relevant competition authorities work together to avoid inconsistency between remedies, and that the facts and stages of investigation of the relevant cases allow the design and enforcement of parallel domestic remedies.

36. Different domestic (jurisdiction-by-jurisdiction) remedies, whether in mergers or conduct cases), can give rise to increased costs for businesses when they are not properly articulated. Inconsistent extraterritorial remedies, however, can have the same costs while involving an additional risk for companies; for a remedy may be lawful in the jurisdiction that imposes it, but unlawful in another, thereby putting companies in an impossible situation.³⁹ In such cases, remedies interfere with business certainty, can result in diminished investments and reduced innovation, and have a chilling effect on legitimate business activity.⁴⁰ Remedies that risk having a mix of lawful and unlawful consequences for parties should thus be discussed and co-ordinated among the relevant authorities, as otherwise the parties are left with the choice of either ignoring the remedy or breaching the law in some jurisdiction.

37. In other words, the adoption of effective remedial action depends on the adoption of appropriate comity and co-operation procedures by enforcement bodies across the world. This will be discussed in detail in the next section.

4. Addressing extraterritorial overreaching in designing competition remedies

4.1. The role of international comity

38. In cases where there is jurisdiction over foreign conduct which does produce substantial domestic effects, considerations of international comity may nonetheless restrain the exercise of jurisdiction. Comity requires that a country takes other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same.⁴¹ Negative or traditional comity involves preventing domestic laws and enforcement actions from harming important foreign interests, and could result in abstaining from starting an enforcement procedure to avoid entering into conflict with another country's priorities.⁴² Positive comity involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the requesting country.⁴³

39. In the 1978 *Timberlane* case⁴⁴, the U.S. Court of Appeals for the Ninth Circuit established a requirement of comity ruling that U.S. courts can refuse to apply the Sherman Act to conduct occurring outside the U.S. borders unless "*the interests of, and links to, the United States — including the magnitude of the effects on American foreign commerce — are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority*".

40. The principle of comity has, in the past, been discussed and relied on mainly in terms of its application to enforcement co-operation in cross-border cartel cases: to ensure that international cartel enforcement is conducted in a manner that balances the policy and enforcement differences among the countries involved. Still, comity principles can play a pivotal role when laws that govern abuse of dominance are different among jurisdictions. In such cases, extraterritorial enforcement may conflict with foreign law and policy priorities.

41. The FTC and DOJ 2017 Antitrust Guidelines for International Enforcement and Cooperation state that "*[w]hen multiple authorities are investigating the same transaction or same conduct, the Agencies may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting*

remedies. [...] An Agency will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to US commerce and consumers and is consistent with the Agency's international comity analysis". This statement reflects a presumption against extraterritorial remedies (whether in mergers or conduct cases), and a requirement to consider comity when imposing such remedies.

42. Comity implies that an agency can consider and decide, at its discretion, whether it could abstain from bringing its own case and impose remedial measures, when it has concluded that its interests are protected by another jurisdiction's actions. An agency would still act and, if necessary, impose remedies that extend beyond its territory, if it believes that this is the only way to cure and prevent domestic harm adequately.

43. In terms of antitrust issues involving IPRs, the importance of international comity is heightened by the fact that, as explained above, jurisdictions approach IPRs differently.⁴⁵ Comity and co-operation among competition authorities are particularly necessary where a remedy affects the enforceability of a patent issued by a country under its laws.

44. The Korean Fair Trade Commission's (KFTC) order against Qualcomm in 2016 provides a good example of how the reach of antitrust orders can trigger controversy about the adequate approach to international comity.

Box 3. KFTC's decision on Qualcomm in 2016

In 2016, the KFTC imposed sanctions against Qualcomm's abuse of its mobile communications Standard Essential Patents (SEPs) by ordering Qualcomm to negotiate licence agreements with willing licensees, for any of its patents, on Fair Reasonable and Non-Discriminatory (FRAND) terms, and to pay a fine. The KFTC's order applies to Qualcomm's global patents portfolio, including Korean and non-Korean patents, and covers all willing licensees.

The KFTC found that, notwithstanding requests from rival modem chipset makers, Qualcomm refused or restricted the licensing of mobile communications SEPs that are essential in manufacturing and selling the chipsets. The KFTC also alleged that Qualcomm leveraged its market power and coerced handset makers to sign unfair licence agreements, offering them only a comprehensive (including SEPs and non-SEPs) portfolio licence and forcing unilaterally decided licensing terms without undergoing a reasonable value assessment. The KFTC alleged that Qualcomm also coerced handset makers to license their own patents for free (free cross-grants).

Qualcomm argued that, if the corrective order applied to foreign territories and patents registered in a foreign country, it would infringe the sovereignty of those other territories. Therefore, in consideration of international comity, the KFTC should limit the scope of the application of the order to licences in Korea and patents registered in Korea.

The KFTC held instead that the conduct of Qualcomm concerned enterprises and patents across the world, and that, under these circumstances, in order to respond to the seriousness of the breach, guarantee the effectiveness of the order and remove successfully the anti-competitive effects, the scope of the order needed to extend beyond Korea and Korean patents. The KFTC argued that Qualcomm's business model and transactions were so connected across territories that the effects of the illegal conduct were likewise closely connected across national borders. Thus, the KFTC concluded that, *"given that it is difficult and ineffective to distinguish the Korean market from overseas markets for the purpose of applying the corrective order to remove the anti-competitive effects, it is reasonable not to limit the corrective order and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anti-competitive effects influencing the Korean market."*

The KFTC held that international comity considerations did not arise because there were no foreign law enforcement procedures under way, thus considering that comity concerns would not arise until there are parallel foreign enforcement procedures and decisions regarding the same conduct.

To prevent possible conflicts with future enforcement actions by other jurisdictions, the KFTC included a provision in the order allowing Qualcomm to request the KFTC to review and reconsider the order if a final and binding judgment, measure, or order of a foreign court or competition authority, conflicts with the KFTC order, thereby making it impossible for Qualcomm to comply with both orders at the same time.

Commentators have argued that the KFTC's imposition of worldwide restraints on Qualcomm's enforcement of its patent portfolio conflicts with basic notions of comity. Comity does not require only the consideration of open parallel enforcement procedures or direct remedial conflicts, but a general deference to other countries' legal systems and

priorities, which differ significantly in the case of intellectual property rights.

Sources: KFTC's decision of 20 January 2017 (Qualcomm), Case number 2015Sigam2118, translated by the American Consumer Institute Center for Citizen Research, www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf;

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4.2. International co-operation in the design of remedies

45. In cases of cross-border conduct with likely harmful effects in more than one jurisdictions, good enforcement practice regarding the carrying out of investigations and the imposition of remedies requires early sustained co-operation among relevant competition agencies.

46. In particular, when a competition agency considers that domestic remedies are not sufficient to correct the competitive harm and plans to impose remedies with extraterritorial reach, early engagement with authorities in other affected territories is crucial to address common issues, as well as reduce the risk of conflicting decisions, if parallel enforcement procedures are under way elsewhere. If this is possible on the facts of the case, authorities should consider the joint design of either one global remedy that assuages the concerns of all involved authorities; or a consistent set of jurisdiction-by-jurisdiction remedies, each countering the harmful effects as and to the extent present in the relevant domestic market. As noted above, some remedies may still need to extend beyond national borders, if this is necessary to cure domestic harm and no purely domestic suitable remedy exists.

47. Designing and deciding on joint or coordinated remedies may be easier in merger cases where the parties and the reviewing agencies often work together to address competition concerns. In merger reviews, parties often provide waivers that enable the agencies in different jurisdictions to co-operate effectively, and have strong incentives to offer a coordinated set of remedies and reach an agreement with all involved competition authorities and thus allow the transaction to go through. The territorial scope of merger remedies is agreed between the parties and the reviewing agencies, although some jurisdictions (for example, Spain⁴⁶) can impose remedies not offered by the parties. Thus, in merger cases, co-operation among competition authorities is usually driven by the parties themselves.

48. This will not always be the case in investigations of alleged abuse of dominance, where the market participant does not have the same incentive to co-operate with competition agencies, may not be willing to provide waivers that could facilitate better cross-border cooperation, and may not come forward with suggested commitments that will allow an early negotiated closing of the case across affected territories. Co-operation in cases of abuse of dominance may be further hindered by the absence of common standards to assess unilateral conduct.

49. An important consideration in inter-agency cooperation regarding remedies is the existence of competition law enforcement international co-operation agreements. These agreements serve to strengthen the scope and degree of inter-agency co-operation, including for the design, implementation and enforcement of remedies that balance the policy and enforcement priorities of the involved jurisdictions. These agreements are generally signed on a bilateral basis by: (i) two jurisdictions (inter-governmental

agreements⁴⁷, and (ii) two agencies (inter-agency arrangements).⁴⁸ There is an increasing trend of co-operation agreements between competition authorities rather than between governments, as they are more flexible, user-friendly and practical from inter-governmental agreements.

50. Competition enforcement international co-operation also takes place at regional level, and can likewise help the co-ordination of remedial measures against the same conduct.⁴⁹ For example, EU member states and the European Commission co-operate through the European Competition Network (ECN), which enables them to align enforcement actions and adopt measures against cross-border infringements in a co-ordinated way. The ECN is based on a system of parallel competences and establishes flexible work-sharing rules to let a well-placed authority handle a case. This will usually be the authority of the most affected territory, if this authority is able to bring to an end the entire infringement. Parallel action by more authorities may be appropriate where an agreement or practice has substantial effects on competition in their respective territories and the action of only one authority would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. If anticompetitive agreements or practices have effects on competition in more than three member states, the Commission is itself well-placed to take up the case.⁵⁰ Remedies against the same can be discussed and co-ordinated through the ECN.

51. In addition to enforcement co-operation, law and policy convergence are important to ensure consistent approaches to cross-border cases and remedies. Organisations like the OECD and networks like the ICN have greatly contributed to building consensus, promoting competition law convergence and achieving consistent enforcement outcomes. The work of the OECD on international co-operation (including reports, expert opinions, roundtable discussions among competition agencies, the development of co-operation best practices and, importantly, the 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings) has been significant in this respect.

52. Ultimately, designing appropriate and effective remedies for conduct with cross-border effects presupposes an alignment of substantive standards and a reinforcement of co-operation between competition agencies. Given the increase in international commerce and economic integration over the past decades, the effective enforcement of competition law in a world of sovereign jurisdictions requires that enforcement bodies and courts give consideration to principles of international comity, and, at the same time, develop and refine mechanisms for effective international co-operation.

Endnotes

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⁴ OECD Roundtables on mergers at www.oecd.org/daf/competition/mergers/

⁵ OECD (2016), Roundtable on Commitment Decisions in Antitrust Cases, www.oecd.org/competition/commitment-decisions-in-antitrust-cases.htm

⁶ Maher M. Dabbah (2010), *The Unilateral Option: Extraterritorial Assertion of Jurisdiction, International And Comparative Competition Law*, Cambridge University press, p. 420.

⁷ Richard Whish, David Bailey (2015), “The international dimension of competition law” in *Competition Law* (8th edition), Oxford University Press, paragraph 12.04.

⁸ OECD (2015), Roundtable on Cartels Involving Intermediate Goods, Background Paper, www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm

⁹ *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945)

¹⁰ Popofsky, M.S., Extraterritoriality in U.S. Jurisprudence, in 3 *Issues in Competition Law And Policy* 2417 (ABA Section of Antitrust Law 2008), hereinafter ‘Popofsky (2008) p. 2422.

¹¹ In reaction to the perceived overreach of U.S. antitrust laws and civil litigation, many countries have adopted blocking and claw-back statutes. *See* Fugate, W. L. *Foreign Commerce and the Antitrust Laws* (fifth edition), Aspen Publishers (1996), p. 279ff; Born, G.B. *International Civil Litigation in United States Courts*, Kluwer Law International (1996), p. 587ff; Popofsky (2008), p. 2423 and the judgments referred to therein.

¹² *Hartford Fire Ins. v. California* (91-1111), 509 U.S. 764 (1993).

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¹⁴ *Joined Cases 89/85, A. Ahlström Osakeyhtiö and Others v Commission* [1988] ECR 5193 (*Woodpulp*).

¹⁵ *Case T-102/96 Gencor Ltd v Commission of the European Communities*

¹⁶ OECD (2016), Secretariat Background Note for the Roundtable on Agency decision-making in merger cases, www.oecd.org/competition/agency-decision-making-in-merger-cases.htm

¹⁷ US Federal Trade Commission, *Monopolization Defined*, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined

¹⁸ Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)

¹⁹ “If a company has a market share of less than 40%, it is unlikely to be dominant”: http://ec.europa.eu/competition/antitrust/procedures_102_en.html

²⁰ Case 27/76 United Brands Co. v Commission [1978] ECR 207.

²¹ The Supreme Court, in its 2004 Trinko decision, held that “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth.” Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004). See also U.S. contribution in OECD (2011), Roundtable on Excessive Prices, www.oecd.org/daf/competition/abuse/49604207.pdf

²² Katri Paas-Mohando, Extraterritorial Merger Control Enforcement in Small Economies—Challenges and Possibilities JURIDICA INTERNATIONAL 21/2014, <http://dx.doi.org/10.12697/JI.2014.21.12>

²³ Douglas H. Ginsburg & John M. Taladay, The Enduring Vitality of Comity in a Globalized World, GEO. MASON L. REV. (forthcoming 2017).

²⁴ Cooperation, Comity, and Competition Policy, Andrew T. Guzman (editor), Oxford University Press, 2010, chapter 17

²⁵ Koren Wong-Ervin, Bruce H. Kobayashi, Douglas H. Ginsburg & Joshua D. Wright, Extrajurisdictional remedies involving patent licensing, Competition Policy International, December 2016.

²⁶ Canadian Competition Bureau, Intellectual Property Enforcement Guidelines (IPEGs), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04031.html. Chinese Antimonopoly and Anti-unfair Competition Enforcement Bureau of State Administration for Industry & Commerce, Antitrust Guideline on Intellectual Property Rights Abuses 16, www.saic.gov.cn/fldyfbzdjz/gzdt/201601/W020160108580399473419.pdf. Japan Fair Trade Commission, Guidelines for the Use of Intellectual Property under the Antimonopoly Act, www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/IPGL_Frand.pdf. Korea, Getting The Deal Through 2017, Intellectual Property & Antitrust, <https://gettingthedealthrough.com/area/17/jurisdiction/35/intellectual-property-antitrust-korea/>

²⁷ “A patent is a right granted by a government to an inventor in exchange for the publication of the invention; it entitles the inventor to prevent any third party from using the invention in any way, for an agreed period”: <https://stats.oecd.org/glossary/detail.asp?ID=2023>.

²⁸ Assistant Attorney General Makan Delrahim Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference, Los Angeles, November 10, 2017 “Patent rights are conferred by statute and guaranteed by the U.S. Constitution. The enforcement of valid patent rights should not be a violation of antitrust law. **A patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent.** Under the antitrust laws, I humbly submit that a unilateral refusal to license a valid patent should be per se legal. ... Under the existing statutory scheme, **it is not the duty or the proper role of antitrust law to referee what unilateral behavior is reasonable for patent holders in this context.**” (emphasis added), www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center

²⁹ Cross-licensing agreements give two parties the rights to use each other's patents. Sometimes the agreements also include rights to pending patents. OECD (2009), Executive Summary of the Roundtable on Competition, Patents and Innovation II www.oecd.org/daf/competition/45019987.pdf

³⁰ A grant back is a “*provision in a license agreement, which requires a licensee to license any improvements it develops back to the licensor, usually with rights to sublicense. Grant-back clauses are common where the licensor wishes to preserve a standard. Grant-back clauses can raise problems under Competition Law, especially if they require the licensee to grant the licensor an exclusive license to the improvement. License-Back Clause is sometimes used as a synonym for a grant-back clause*”: www.ipglossary.com/glossary/grant-back-clause/#.WgwyRk2Wxjo

³¹ A patent holdup can occur after a patent has been incorporated in a standard and has been declared as standard-essential. The patent holder “*may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives*”: U.S. Department of Justice and the Federal Trade Commission (2007), ‘Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition’, www.justice.gov/atr/public/hearings/ip/222655.pdf. For a general discussion on intellectual property and standard setting, OECD (2014), Hearing on Intellectual Property And Standard Setting, www.oecd.org/competition/competition-intellectual-property-standard-setting.htm

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³⁸ Case COMP/38.636 Rambus of 9 December 2009, OJ C30/17, 2010

³⁹ Andrew T Guzman, The case for international antitrust, in: Competition laws in conflict – Antitrust jurisdiction in the global economy, Richard A. Epstein and Michael S. Greve editors, the AEI Press, 2004

⁴⁰ Douglas H. Ginsburg & John M. Taladay, The Enduring Vitality of Comity in a Globalized World, GEO. MASON L. REV. (forthcoming 2017).

⁴¹ OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf

⁴² OECD inventory of international co-operation agreements on competition, Provisions on Negative Comity, www.oecd.org/daf/competition/competition-inventory-provisions-negative-comity.pdf

⁴³OECD inventory of international co-operation agreements on competition, Provisions on Positive Comity, www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf

⁴⁴ *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976)

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⁴⁶ OECD (2016), Summary of Discussion of the Roundtable on Agency decision-making in merger cases, www.oecd.org/competition/agency-decision-making-in-merger-cases.htm

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⁴⁹ 46 out of 55 respondents to the OECD/ICN survey on international enforcement co-operation expect to see in the future more international enforcement co-operation (including coordination of remedies) at regional level: OECD (2013), Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation, www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf.

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