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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

**Executive Summary of the Roundtable on the Extraterritorial Reach of
Competition Remedies**

**Annex to the Summary Record of the 126th meeting of Working Party No 3 on Co-
operation and Enforcement**

4-5 December 2017

This Executive Summary by the OECD Secretariat contains the key findings from the Roundtable on the Extraterritorial Reach of Competition Remedies held under Item 5 of the 126th Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement of 4 and 5 December 2017.

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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Executive Summary

By the Secretariat*

Working Party No. 3 of the OECD Competition Committee held a roundtable on the extraterritorial reach of competition remedies on 5 December 2017. Based on the background paper prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. The prevalence of the effects doctrine as the jurisdictional test over foreign conduct enables competition authorities to review and take measures against acts that cause domestic harm, regardless of the nationality of the perpetrator or the place where the infringement took place.

The increasing interdependence of markets and economies means that the behaviour of market participants, and its effects, are often not limited to the territory of one jurisdiction. Conduct by foreign entities taking place overseas may therefore have harmful effects on domestic markets.

Almost all jurisdictions rely on the qualified effects test to establish jurisdiction over foreign conduct, meaning that they are able to review foreign conduct that causes domestic harm, and impose remedial measures against it. The competition authorities in affected territories may thus review the same conduct to the extent that it produces effects in their jurisdiction.

If a conduct can be separated into two parts (one that produces qualified domestic effects and another that affects only a foreign territory), the home competition authority has jurisdiction only over the part of the conduct that produces domestic effects. When a conduct is not separable into parts, the authority has jurisdiction over the whole. This means that, in non-separable cases, more than one competition authorities may take measures against the same conduct. The question, in such cases, is whether there are limits on the exercise of jurisdiction to avoid instances of double jeopardy, over-enforcement and overlapping or conflicting remedies.

2. In recent cases addressing conduct by foreign entities, competition authorities have taken different approaches to the appropriate territorial scope of remedies

Remedies need to be (i) effective, i.e. likely to cure the identified harm; (ii) enforceable, i.e. able to be followed or to trigger sanctions for non-compliance when they are not followed; and (iii) proportionate, i.e. the least restrictive of the available effective measures. Effectiveness requires taking measures able to stop the harmful conduct, deter its recurrence and correct its effects on the domestic market. Proportionality requires limiting the geographical scope of remedies to that necessary to correct the harmful conduct; i.e., 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.

*This executive summary does not necessarily represent the consensus view of Working Party No. 3. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

In a number of recent antitrust patents cases around the world, competition authorities took different approaches to the territorial delimitation of remedies. For example, the Korean Fair Trade Commission (KFTC) in 2016 required Qualcomm to grant access to its non-Korean standard essential patent (SEP) as it considered that the affected market was worldwide, and the KFTC could not limit the scope of the corrective measures to the domestic market. The European Commission, in the 2014 Motorola case, limited the remedies imposed to Motorola for abusing its dominant position as a SEP holder by seeking an injunction against Apple in Germany to conduct occurring in the EEA and patents granted in the EEA. The decision constrained Motorola's ability to enforce its European SEP in Germany only, although Motorola was adopting similar conduct outside the EEA, based on its non-European SEPs.

3. Comity considerations may lead to limit the scope of remedies; however, there is no hard rule consistently applied across jurisdictions.

The growing number of competition regimes increases the potential for conflicting substantive standards. Still, substantive competition rules have converged over the years, thus lowering the probability of hard conflicts of laws. Also, competition authorities may decide to refrain from taking action in cases of hard conflict of laws, i.e. against an entity that cannot comply with the laws of two jurisdictions at the same time. However, in cases where the relevant rules leave parties free to choose between different courses of action, some authorities have taken action against a party that, in its domestic jurisdiction, chose one of several lawful options, which was found to breach the competition rules of the enforcing (foreign) jurisdiction.

Authorities should consider comity and tailor their enforcement actions to minimise conflicts, taking into account not only hard conflicts of laws but also another sovereign country's choices in regulating its own domestic commerce. If the remedy has a stronger impact in territories other than that of the competition authority issuing the remedy, the issuing authority should tailor the measure to avoid unnecessary spill overs. Otherwise, remedies against conduct lawful in the territory where it originates from (but found unlawful in another) can interfere with business certainty and have a chilling effect on legitimate business activity and investment.

If businesses are required to follow the law of all jurisdictions where their conduct may have an effect, the most restrictive jurisdiction would de facto set the rules of global commerce. Businesses should be able principally to observe the law and policy choices of domestic jurisdictions in which they operate, while, at the same time, competition authorities should respect the law and policy choices of foreign jurisdictions where these do not undermine their own competition laws. Thus, extraterritorial remedies should be exceptional and imposed only when a domestic remedy cannot cure the majority of the harm. If a conduct is not separable into parts and thus the authority cannot limit the remedy to the domestic part of the conduct only, it could ask the company to propose solutions to the problem as it affects the domestic territory, irrespective of where the conduct must be changed.

4. In the absence of hard limits derived from public international law regarding the right geographical scope of remedies, interagency co-operation in imposing measures against conduct affecting more than one territories is crucial.

Recent decisions where, in different cases based on similar underlying facts, different authorities applied remedies with different geographical scope make a case for more consistent enforcement approach to avoid overlaps and conflicts. Good enforcement

practice requires early engagement of authorities in all affected territories to address common issues, as well as reduce the risk of conflicting decisions, if there are parallel enforcement procedures.

Co-operation can include discussing or jointly designing remedies, to arrive at a remedy package that solves competition concerns in each affected jurisdiction. In other cases, authorities can refrain from taking action altogether, when a remedy issued in another jurisdiction is sufficient to resolve the competition concerns at home, and is effective, viable, and will be enforced.

In cases where competition authorities decide to impose remedies with extraterritorial reach, it is important to give reasons for this decision, for clarity and transparency purposes. Parties should have the opportunity to understand the remedy and provide inputs so that the remedy is effective.

Convergence of substantive standards also helps limit the potential for conflict. Standing competition fora, including the OECD and the International Competition Network, promote a meaningful discussion of the substantive differences among jurisdictions and enable the identification of areas of convergence.