Organisation for Economic Co-operation and Development

**DAF/COMP/WP3/WD(2017)46**

**Unclassified** **English - Or. English**

**17 November 2017**

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

## Working Party No. 3 on Co-operation and Enforcement

# Roundtable on the Extraterritorial Reach of Competition Remedies - Note by BIAC

**4-5 December 2017**

This document reproduces a written contribution from BIAC submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

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

Please contact Ms. Despina Pachnou if you have any questions regarding this document
[phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org]

**JT03423199**

*This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

# *BIAC*

The Business and Industry Advisory Committee ("BIAC") to the OECD intends to emphasize the following principles in relation to the extraterritorial reach of competition remedies.

## 1. Introduction

1. The topic of extraterritorial remedies is a crucial one for businesses. The extension of remedies beyond borders creates an immediate potential for conflict and inconsistent treatment under the competition laws. Businesses should be able to rely on the principle that adherence to the laws of the jurisdictions in which they operate will protect them from legal intrusion into their commercial affairs. The unwarranted extension of competition enforcement agencies into the commercial affairs of companies in foreign jurisdictions puts this principle at risk, creating uncertainty that weighs disproportionately on business enterprises.

2. Particular harm to business can arise when jurisdictions seek to enforce restrictive competition rules in foreign jurisdictions that may have more permissive competition rules. This denies companies the reasonable right to rely on more the permissive rules that may exist, and denies countries the sovereign right to balance economic interests and establish rules that they believe will attract business. In short, unrestrained extraterritorial enforcement creates the risk that the most restrictive competition laws will dictate business practices on a global level.

3. BIAC supports the proposition that antitrust authorities should have the ability to identify violations of the competition laws that produce substantial harm to their domestic consumer welfare, and to implement measures that alleviate such harm including, in some cases, remedies that have effects abroad. In an increasingly complex global antitrust enforcement landscape, however, agencies can no longer implement relief without full consideration of the implications of relief on the international market and without due regard for the rights of foreign sovereigns to regulate their own commerce, according to their own economic principles. In short, no antitrust authority should impose remedies that dictate commercial outcomes in other jurisdictions absent a full consideration of the principles of jurisdiction, enforcement authority, domestic effect and comity.

## 2. Preconditions to the Use of Extraterritorial Remedies

4. Extraterritorial remedies should be used only in extraordinary circumstances because they necessarily inhibit the rights of enterprises to act freely in foreign jurisdictions and potentially infringe foreign sovereignty. The principle of territoriality implies that a country which seeks to assert authority beyond its own borders invades the sovereignty of other countries in contravention of the basic principles of public international law.[1] While reasons sometimes exist for exerting authority over foreign

[1] Maher M. Dabbah, *The Unilateral Option: Extraterritorial Assertion of Jurisdiction, in* International and Comparative Competition Law 418, 420 (2010).

conduct in order to protect important domestic interests, extraterritorial remedies always implicate foreign sovereignty and those interests must be fully considered before implementing a remedy with extraterritorial implications.

5. It is no longer sufficient for agencies to consider the implications of extraterritorial remedies only in cases of true conflict with foreign laws or foreign remedies. While conflicting remedies certainly require one of the jurisdictions to defer (or both of them to reconsider), extraterritorial remedies create tensions in competition law cases much more frequently than in just those cases involving true conflict. But these tensions are equally pernicious as the cases involving true conflict.

6. The U.S. recently reinforced the broader scope for considering foreign interests in its *Antitrust Guidelines for International Enforcement and Cooperation* ("*U.S. International Guidelines*").[2] The Guidelines articulate a clear policy indicating that comity considerations are prevalent even absent a conflict.

> *[T]he Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law. In determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct.*[3]

7. This highlights the inextricable relationship between extraterritoriality and comity: agencies should not engage in the former without full consideration of the latter.

8. There are several preconditions to the use of extraterritorial remedies in competition cases. An agency must have appropriate dominion over the matter under investigation and a justification for the exercise of that dominion. Several elements must each be satisfied for the agency to appropriately exercise its authority.

9. First, an agency must have appropriate jurisdiction over both the persons, including both natural persons and business enterprises that are the subject of the investigation. The exercise of personal jurisdiction typically requires either that the person be present in the forum, or purposefully avail themselves of the benefits, and therefore the liabilities, of involvement in the forum state. While this normally is not a complex analysis in competition cases, it is crucially important when considering the application of personal jurisdiction to a business enterprise where care must be taken to respect the legal principle of corporate separateness. Under this principle, which is supported by numerous international conventions and treaties, the activities of a domestic subsidiary in a jurisdiction cannot, without more, be attributed to a foreign parent. The foreign parent can be hailed into the jurisdiction only if they, themselves, meet the criteria necessary for asserting personal jurisdiction, or if there is a basis for piercing the corporate veil that is presumed to exist between the parent and the subsidiary. Accordingly, where personal jurisdiction rests only as to a subsidiary, the imposition of an extraterritorial remedy on a corporate parent would not be a proper exercise of jurisdiction.

[2] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (Jan. 13, 2017), *available at* www.justice.gov/atr/internationalguidelines/download [hereinafter U.S. INT'L GUIDELINES].

[3] *Id*. at 29.

10. In addition to personal jurisdiction, subject matter jurisdiction must also exist. This requires that the agency be conferred with the specific authority to address the subject matter that gives rise to the alleged violation. This is not to be presumed, however, as agencies frequently have limitations on their subject matter authority. Many agencies, as an example, do not have authority to address certain matters related to agriculture, real estate, insurance, banking and numerous other areas that may be reserved to other authorities or deemed to be outside of the scope of competition agency authority.

11. In addition to personal and subject matter jurisdiction, the foreign conduct giving rise to the offense must be conduct that the domestic antitrust laws were meant to address, and the agency must have the authority to act in response to that domestic effect. While this concept is sometimes conflated with subject matter jurisdiction and is related to the concept of "enforcement jurisdiction" as discussed in the Secretariat's call for contributions, it can be seen as an independent requirement that the agency be vested with the specific authority to act, not as to the subject matter, but as to the harm that results from the alleged violation. Typically, this requires that any foreign conduct must have a sufficient effect within the jurisdiction to justify the exercise of domestic authority over that foreign conduct. Since foreign conduct can often have a mere "ripple effect" on domestic consumer welfare that would be too attenuated to fall within the scope of the competition laws, the conduct should have a "direct, substantial and reasonably foreseeable" effect on domestic commerce to be cognizable under domestic antitrust laws.[4] As elaborated in a recent Opinion of the Advocate General in the European Commission action against Intel Corporation, "[t]hat does not mean . . . that any effect, no matter how weak or indirect, could trigger the application of EU competition rules. In a globalised economy, conduct that takes place anywhere in the world, for example in China, will almost inevitably have some sort of effect in the European Union. Yet, the application of Articles 101 and 102 TFEU cannot be based on a link or effect that is too remote or purely hypothetical."[5]

12. A direct, substantial and reasonably foreseeable domestic effect may justify a remedy involving foreign conduct, but a question remains as to the appropriate scope of relief as it relates to that harm. As a general principle, a jurisdiction should order relief that is no broader than necessary to alleviate the harm to domestic consumer welfare (i.e., it should apply a "least restrictive means" approach). The U.S. agencies recently reinforced this principle in its *International Guidelines*. "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 U.S. commerce and consumers and is consistent with the Agency's international comity analysis."[6] Thus, in all cases, enforcers should not impose remedies on conduct that produces solely foreign effects.

13. Moreover, domestic agencies should not be seen to impose remedies that appear to favour domestic producers abroad as this contravenes the important principle of non-

[4] See Foreign Trade Antitrust Improvements Act, Pub. L. 97–290, tit. IV, 96 Stat. 1246 (1982) (codified as amended at 15 U.S.C. § 6a (2012).

[5] Case C‑413/14 P, Intel v. Eur. Comm'n, Opinion of Advocate General, ¶ 299 (Oct. 20, 2016), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CC0413.

[6] U.S. INT'L GUIDELINES, *supra* note 2, § 5.1.5.

discrimination.[7] Enforcers should recognize that extraterritorial remedies can have de facto, as well as de jure, effects on the businesses they impact. For example, a mandate to change the way a software system operates in a particular jurisdiction can have potentially global ripple effects if the system must interoperate globally. Or, even if it is technically possible to extract the domestic workings of the software system, doing so may have significant negative effects on the efficiency or network benefits of the system.

## 3. Comity Considerations and Extraterritorial Remedies

14. The Organization for Economic Cooperation and Development ("OECD") has described comity as the "international legal principle whereby a country agrees to take other countries' important interests into account while conducting its law enforcement activities."[8] According to the OECD, "[f]or over 100 years, public international law has acknowledged comity as a means of tempering the effects of the unilateral assertion of extraterritorial jurisdiction."[9] In short, authorities should limit the scope of their remedies to ensure that they address only harm to domestic consumers and extend no further than necessary in doing so.

15. If an agency satisfies the other preconditions for imposing an extraterritorial remedy – personal jurisdiction, subject matter jurisdiction, domestic effects and least restrictive means – it must then weigh the comity implications of that remedy. The comity consideration, in this regard, should extend beyond the mere question of whether a hard conflict exists. The principle of comity seeks to prevent a nation's domestic laws from supplanting other nations' laws where those other nations may have a stronger interest in regulating conduct within its borders. It also applies in cases where a foreign harm is not independent of a domestic harm and even where foreign actions cause some level of domestic harm. It is for this very reason that comity provisions are set out in numerous cooperation and trade agreements.[10] As a further example, as recognized in the legislative

[7] See Maureen K. Ohlhausen, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints, Address Before the IBA 21st Annual Competition Conference 2 (Sept. 8, 2017), *available at* www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf.

[8] ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 8 (2014), www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf.

[9] Id.

[10] See ORG. FOR ECON. COOPERATION & DEV., INVENTORY OF CO-OPERATION AGREEMENTS: PROVISIONS ON POSITIVE COMITY (2015), *available at* www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf (identifying several examples of cooperation agreements that include comity provisions). For instance, Article 6 of the 2013 EU-Switzerland cooperation agreement states: "If the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other Party may adversely affect the important interests of the former Party, it may, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anticompetitive activities, request that the competition authority of the other Party initiate or expand appropriate enforcement activities." The EU's cooperation agreements with several other jurisdictions include similar comity provisions. *See, e.g.*, Article 6 of the EU-Korea cooperation agreement, Article 5 of the EU-Japan cooperation agreement, Article 5 of the EU-Canada cooperation agreement; and Article 5 of the EU-US cooperation agreement. *See also*, Article 5 of the US-Mexico cooperation

history of the FTAIA, authorities are free to apply principles of international comity and decline considering issues where a foreign nation's interests are superior to those of the U.S., even if the FTAIA's effects test would apply to make the case reachable under U.S. law.[11]

16. As the U.S. agencies acknowledge in the recently-released *U.S. International Guidelines*, competition law enforcers must take into account the significant interests of foreign sovereigns prior to enacting any remedy that may conflict with those interests.[12] In doing so, comity dictates that enforcers review not only the degree of direct conflict with foreign laws, but also (i) the articulated interests/policies of other governments, and (ii) whether objectives sought to be obtained through competition law enforcement could be achieved by foreign enforcement.[13]

17. The tension between domestic enforcement and foreign sovereign interests can arise from the application of different substantive standards. It would be inefficient for business to be held hostage by the most restrictive set of competition laws, and inappropriate for any single jurisdiction to dictate the global approach to commerce. But a "race to the bottom" is at risk if comity issues are not fully considered.

18. A good example is the use of exclusive purchasing contracts.[14] In the U.S., the enforcement agencies recognize exclusive purchasing by a company, even one that is a large player but not a monopolist, as having potentially pro-competitive efficiencies.[15] These potential efficiencies come from the buyer being able to gain certainty of supply and the seller's ability more efficiently to plan production and potentially increase output.[16] But the same large player defined in the EC as dominant and therefore as an "unavoidable trading partner," could be found to have imposed a "restriction by object,"

agreement, Article 5 of the US-Japan cooperation agreement; Article 4 of the US-Brazil cooperation agreement; and Article 5 of the US-Israel cooperation agreement.

11 Susan E. Burnett, *U.S. Judicial Imperialism Post Empagran v. F. Hoffmann-Laroche? Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust*, 18 Emory Int'l L. Rev. 555, 590 (2004) ("Congress explicitly stated that issues of international comity are unaffected by the FTAIA and should continue to play a role in whether a court should hear a case once jurisdiction is determined under the FTAIA." (citing 128 Cong. Rec. H18,953 (daily ed. Aug. 3, 1982) (statement of Rep. McClory))).

12 U.S. INT'L GUIDELINES, *supra* note 2, §§ 4.1 and 5.1.5 (stating that extraterritorial remedies must be "consistent with the Agency's international comity analysis").

13 *Id*.

14 Douglas H. Ginsburg & John M. Taladay, *Comity's Enduring Vitality in a Globalized World*, 24:5 GEO. MASON L. REV. (forthcoming 2017).

15 *See Exclusive Dealing or Requirements Contracts*, U.S. FED. TRADE COMM'N, *available at* www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or.

16 *See* Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949) (describing the possible benefits of requirements contracts as assuring for the buyer "supply, afford[ing] protection against rises in price, enabl[ing] long-term planning on the basis of known costs, and obviat[ing] the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand"); *see also* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012) (recognizing that "[e]xclusive dealing agreements are often entered for entirely procompetitive reasons, and generally pose little threat to competition").

which is per se unlawful in the EC.[17] A remedy imposed by the EC to void such a contract in Europe may well make it infeasible for exclusive purchasing to continue in the U.S., creating a scenario in which the EC's remedy governs the commercial conduct in the U.S. This could occur even though the U.S. has a much different view of the substantive antitrust standards and an equally significant and legitimate interest in regulating its domestic commerce.

19. Further significant substantive differences among competition laws exist on issues such as excessive pricing,[18] portfolio effects doctrine,[19] the use of a *per se* rather than a rule of reason standard for minimum resale price maintenance,[20] the application of a margin squeeze doctrine,[21] and the use of mandatory licensing of intellectual property. In situations where substantive differences exist, comity considerations should mandate that an agency limit its relief so as not to undermine the economic choice of a foreign sovereign, even if it means that some measure of the domestic harm is not entirely relieved.

[17] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, 13 [hereinafter EC Abuse Guidance]; Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), 2012 O.J. (C 326) 88.

[18] EC Abuse Guidance, *supra* note 17, at 8.

[19] ORG. FOR ECON, CO-OPERATION & DEV., *Portfolio Effects in Conglomerate Mergers* 7 (2002), www.oecd.org/competition/mergers/1818237.pdf ("Portfolio effects in conglomerate mergers include potential pro- and anti-competitive effects that might arise due to a merger uniting complementary products in which one or more parties enjoy significant market power."). *Compare* Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), *available at* www.justice.gov/archive/atr/public/press_releases/2001/8510.pdf (concluding that the GE/Honeywell merger would be procompetitive), *and* Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), *available at* www.justice.gov/archive/atr/public/press_releases/2001/8140.pdf (requiring certain divestitures before the U.S. approved the merger), *with* Press Release, Eur. Comm'n, The Commission Prohibits GE's Acquisition of Honeywell (July 3, 2001), *available at* http://europa.eu/rapid/press-release_IP-01-939_en.htm (concluding the GE/Honeywell merger would have created impermissible dominant market positions post-merger). *See* William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, 10 GEO. MASON L. REV. 533, 541 (2002) (suggesting that the GE/Honeywell merger could be considered a portfolio effects case).

[20] *Compare* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007) (establishing framework of analysis that considers market power and market structure to assess the actual effects of minimum resale price maintenance (RPM) under a rule of reason, and abandoning the *per se* standard of analysis that had applied to minimum RPM since Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)), *with* Commission Regulation (EU) 330/2010 of April 20, 2010, On the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1, 4. *See* Eur. Comm'n, Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1, 7.

[21] *Compare* Pac. Bell Tel. Co. v. LinkLine, 555 U.S. 438, 449, 453, 457 (2009) (when an integrated firm can legally refuse to deal in the upstream product, a margin squeeze complaint may not be brought under Section 2 of the Sherman Act), *with* Case C-280/08P, Deutsche Telekom AG v. Eur. Comm'n, 2010 E.C.R. I-9555 (margin squeeze treated as a stand-alone abuse of dominant position without the need to establish a duty to deal with a rival).

20. A similar limitation on the scope of remedy might be required based on subject matter limitations. For example, serious comity considerations would come in to play if an agency attempted to impose remedies that exerted control or restrictions on the real estate of a foreign jurisdiction, such as an airport near the border, even if the abuse relating to the foreign real estate created domestic harm.

21. BIAC believes that there are serious concerns that arise with respect to a remedy that seeks to exercise jurisdiction over foreign intellectual property rights, particularly patent rights. Extraterritorial remedies that impose conditions on foreign patents can result in significant substantive conflicts given the dramatically different approaches taken globally on competition matters involving intellectual property rights. For example, it would be improper for an enforcer to mandate compulsory licensing of foreign patent rights where the country granting those rights has a policy against compulsory licensing. This is particularly important because patent rights are by their nature strictly territorial. It is a fundamental principle of patent law that they can only be enforced against activities occurring inside the territory in which they were granted.[22] There is no potential for a foreign patent right to cause a direct effect within an enforcing jurisdiction; the only conceivable effect would be indirect. Seeking remedies with respect to foreign patents, therefore, unquestionably would impact the legitimate interests of a foreign sovereign in a way that likely would merit deference.

22. Comity considerations imply that a "worldwide" remedy imposed by a single jurisdiction would be difficult to justify in any case. Even if extraterritorial relief is required to address domestic harm, the collateral impact of a worldwide remedy shows an obvious disregard for comity and sovereignty. Moreover, a worldwide remedy necessarily implicates purely foreign-to-foreign commerce that is beyond the reasonable reach of an agency's jurisdiction.

23. Crafting remedies can often be a challenge, particularly in conduct-related/antitrust cases. Agencies should ensure that remedies address domestic harm to the greatest extent possible while also respecting comity considerations to the greatest extent possible. This suggests a need for careful analysis of: (a) the source and scope of domestic harm relative to the foreign conduct; (b) the need for relief to extend beyond national borders to alleviate domestic harm; (c) the implications of any extraterritorial relief in foreign jurisdictions; (d) the interests of foreign jurisdictions in both the substance of the alleged violation and the subject matter of the remedy; and (e) whether a more narrowly tailored remedy will alleviate a substantial portion of the domestic harm without offending notions of comity.

## 4. Extraterritorial Remedies in Merger Cases

24. Competition authorities have made significant progress in addressing cross-border remedies in multijurisdictional merger cases since the challenges of these cases first arose. Mergers create a somewhat unique situation in that merging parties, by legislative

[22] *See, e.g.*, Life Technologies Corp. v. Promega Corp., 137 S.Ct. 734, 743 (2017) ("when . . . a product is made abroad and all components but a single commodity article are supplied from abroad, this activity is outside the scope of the statute [on patent infringement, 35 U.S.C. § 271]"); Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 441 (2007) ("It is the general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country.").

fiat, are required to notify mergers to multiple jurisdictions at once and obtain clearance before proceeding with their transaction. Notification thresholds typically are set to ensure that all mergers with a potentially material impact on commerce in a jurisdiction are captured. The merger notification statute, in this respect, defines personal and subject matter jurisdiction and the threshold (if properly set) may define the level at which a domestic effect is at least conceivable, if not foreseeable.

25. Another unique factor in merger cases is the incentive of the parties to quickly resolve asserted competition issues to obtain approval for their transaction. In nearly all jurisdictions, competition concerns in merger cases are resolved by undertakings offered by parties, rather than relief ordered by an agency or court over the objections of the parties. This means that the parties themselves can fashion remedies to address competition concerns and can restrict those offerings, on extraterritorial or other grounds, to the extent they believe appropriate, subject to the potential prohibition of the transaction.

26. Appropriate restraints on extraterritoriality in the merger context thus arise in two settings. First, it is important for the agency not to request or demand relief that exceeds the appropriate territorial limits of its authority. Agencies should not use the leverage of a merger to demand relief that is outside of the scope of its authority. Parties who are under significant pressures to close a multi-jurisdictional transaction, for example, may be willing to sacrifice assets without objection that are beyond the appropriate reach of the agency, but agencies must be careful not to use this leverage inappropriately. While it sometimes may be appropriate for an agency to insist on the divestiture of a foreign asset to alleviate harm to competition, appropriate restraint must be used to ensure that the relief requested falls within the agency's authority.

27. Second, and relatedly, agencies should be careful not to accept undertakings from parties that would fall outside of their territorial purview. If parties offer a package of remedies that includes relief that extends beyond the proper authority of an agency, the agency should accept only the relief within its authority and tailor the remedy appropriately.

28. As BIAC emphasized in its submission in respect of the October 2013 Roundtable on Remedies in Cross-Border Merger Cases, where divergence among agencies exists, agencies should introduce considerations of comity into their analysis of merger remedies.[23] In those situations where the affected geographic market spans several jurisdictions and the enforcement agencies generally agree on the nature and the likelihood of anticompetitive effects, agencies should introduce notions of comity in reaching decisions on remedies.[24] Also, rather than imposing duplicative remedies, agencies should allow the jurisdiction with the greatest ability to enforce the remedy to be the lead, and perhaps exclusive, enforcer to impose a remedy.[25]

29. BIAC further noted: "[I]t is important that authorities weigh the magnitude of the extraterritorial remedy against the scope of the domestic harm and avoid requiring a remedy that exceeds the scope of the harm. Behavioural relief that is limited to activities solely within the jurisdiction, if feasible and not in conflict with the objectives of other

[23] OECD, *Remedies in Cross-Border Merger Cases* 105 (2015), *available at* www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf.

[24] *Id*.

[25] *Id*.

jurisdictions that are the centre of gravity for the companies at issue, may raise fewer issues of unintended or undesirable extraterritorial consequences than divestiture commitments located outside the jurisdiction seeking relief. As mentioned above, however, care should be taken to ensure that the remedy imposed takes into account the potential efficiency and other benefits of the transaction as well as any spill over effects on other jurisdictions."[26]

## 5. Extraterritorial Remedies in Unilateral Conduct Cases

30. The risks of divergence among agencies on substantive issues may be highest in unilateral conduct cases, which also implies a high risk of tension created by extraterritorial remedies. Unlike cases involving mergers where remedies are agreed by the parties, or cartels where the penalties typically involve fines and cease and desist orders, unilateral conduct remedies can often require the disposition of rights or assets against the will of the respondent. To the extent that the rights or assets ordered to be disposed are outside of the enforcing jurisdiction, significant comity issues are implicated.

31. Intellectual property, along with other technology products and services, may be among the interests particularly subject to adverse effects from the lack of comity. Indeed, global remedies with respect to IP rights, including regulation of foreign patents, "has the potential to produce significant negative effects on competition and welfare, particularly if conduct that is widely considered to be generally procompetitive is the object of the worldwide prohibition."[27] These and other products and services commonly transited across borders, such as energy, commercial banking, natural resources, and electronics, differ from traditional products and services that are typically local or regional in scope. In these sectors, jurisdictions should be particularly vigilant to respect the legitimate interests of other sovereigns with different competition laws.

32. For instance, the European Commission's two recent enforcement actions regarding standard essential patents—one involving Motorola and the other involving Samsung—illustrate appropriate limits on intellectual property remedies, consistent with principles of international comity.[28] Specifically, the Commission's decisions[29] limit the parties' ability to seek injunctive relief on FRAND-assured standard essential patents only with respect to the European Economic Area and only on patents issued in Europe.

---

[26] *Id*. at 106.

[27] Koren Wong-Ervin et al., *Extra-Jurisdictional Remedies Involving Patent Licensing*, COMPETITION POLICY INT'L 2 (Dec. 2016), www.competitionpolicyinternational.com/wp-content/uploads/2016/12/CPI-Wong-Ervin-Kobayashi-Ginsburg-Wright-Final.pdf.

[28] *See generally* Case AT.39985—Motorola Mobility LLC, Comm'n Decision, (Apr. 29, 2014) (summary at 2014 O.J. (C 344) 6), *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf; *see also* Case AT.39939—Samsung Elecs. Co., Comm'n Decision (Apr. 29, 2014) (summary at 2014 O.J. (C 350) 8), *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

[29] In the case of Samsung, the Commission decision (pursuant to Article 9 of Regulation (EC) No 1/2003) was the result of commitments that Samsung offered to address the alleged competition concerns. Case AT.39939—Samsung Elecs. Co., Commitments Offered to the Eur. Comm'n (Apr. 29, 2014), *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf.

The decisions, as a result, do not reach foreign patents outside the European Economic Area.

33. Likewise, Acting U.S. Federal Trade Commission Chairman Ohlhausen recently clarified that the scope of the FTC's Consent Decree in *Google/MMI*, which represented a voluntary commitment by the parties, was constrained by the jurisdiction of the District Court. She noted that "[t]hrough this limitation, the consent cabins its application only to the aspects of the global conduct needed to effectively redress harm or threatened harm to U.S. commerce and consumers."[30]

34. By contrast, the KFTC's recent decision against Qualcomm would appear to impose a remedy that would expressly require Qualcomm to alter its conduct on a global basis.[31] The KFTC asserted that "the illegal conduct of [Qualcomm has] been carried out not only against the Korean enterprises and the Korea-registered patents in the territory of Korea but also in the remaining parts of the world, in the same way and at the same time. The effects of the illegal conduct influence overseas markets as well as the domestic market."[32] It concluded that "it is reasonable not to limit the [remedial measures] 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."[33]

## 6. Extraterritorial Remedies in Cartel Cases

35. Cartel cases present a special problem as it relates to indirect effects, particularly relating to domestic effects caused by foreign sales of price fixed goods or components. BIAC explored these effects at the October 2015 Roundtable on Cartel Cases Involving Intermediate Goods, where we noted enforcement against indirect effects creates the potential for punishment for the same cartel behaviour – and the same cartel harm – in several jurisdictions at once.[34]

36. On the issue of exercising jurisdiction over indirect effects of cartels, we further expressed that authorities should analyse whether the price-fixed component caused an actual anticompetitive price increase in the finished product as it was sold in the enforcing jurisdiction. "In other words, even where subject matter jurisdiction is exercised on the basis of the 'effects' doctrine, effects should not be presumed by mere sale of the component in a finished good within a jurisdiction. Fact- and economic-based tests should be the basis for this determination."[35]

---

[30] Ohlhausen, *supra* note 7, at 7.

[31] Korea Fair Trade Comm'n, Case No. 2015SiGam2118, *In re* Alleged Abuse of Market Dominance of Qualcomm Inc., Decision No. 2017-0-25 (Jan. 20, 2017), *unofficial translation available in English at* www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf.

[32] *Id*. at 139.

[33] *Id*.

[34] BIAC, Summary of Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Comm. Working Party No. 3 Roundtable on Cartels Involving Intermediate Goods 6-7 (Oct. 20, 2015), *available at* http://biac.org/wp-content/uploads/2016/06/2015-10-16-BIAC-Submission-WP3-Cartels-Intermediate-Goods1.pdf.

[35] *Id*. at 2.

37. Exercise of jurisdiction over indirect sales creates a real risk of double-penalization that should be avoided. In *Motorola*, Judge Posner highlighted the risks of double-recovery in a civil action in a way that speaks directly to the identical risk in a government prosecution.[36] Citing the "Charter of Economic Rights and Duties of States" adopted by the U.N. General Assembly in 1974, he noted the States had committed to regulate the activities of corporations to ensure compliance with its laws, and to "cooperate with other States in the exercise of the rights set forth."[37] He criticized that the "United States and other developed countries refused to buy that theory" because they pick and choose which corporate formalities to respect, and which to ignore.[38] This creates the problem, he noted, of creating antitrust penalties for both direct and indirect injury, noting that when both claimants seek redress "their claims would be redundant, because if the direct victim received full compensation there would be no injury to the [indirect victim and] he or it would probably be as well off as if the antitrust violation had never occurred."[39]

38. We reiterate our recommendation that fining guidelines be modified to adjust the fines on direct sales of price fixed goods to take into consideration the proportion of those goods that are exported in downstream products.[40] Guidelines also could be adjusted to calibrate the fine for indirect sales to reflect the actual effect (incorporating the concept of pass-through) in the jurisdiction.[41] For the purpose of this roundtable, we add that any jurisdiction imposing a fine based on indirect sales should take into account whether, and to what extent, another jurisdiction already imposed fines on the undertaking based on the direct sales of the product in that jurisdiction, and modify the fine accordingly.

## 7. Conclusion

39. There are a number of significant hazards associated with extraterritorial remedies, as discussed above. BIAC believes that the large majority of these hazards can be resolved through communication, coordination, convergence and deference to the legitimate interests of foreign sovereign authorities. Most importantly, in competition cases agencies should recognize that comity must apply to situations that go beyond a true conflict in order to allow foreign sovereigns to regulate their own commerce based on their own economic standards.

[36] Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015).

[37] *Id*. at 820.

[38] *Id*.

[39] *Id*. at 821.

[40] BIAC, *supra* note 34, at 7.

[41] *Id*.