



Regulating Without Borders: Reevaluating the Scope of EU Competition Law

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Abstract

In the modern globalized world, extraterritoriality has become a sensitive topic of competition law. The more economically interdependent the states become, the more difficult it is to regulate competition. This policy brief investigates the application of European Union competition law beyond the borders, concentrating on the issue of overlapping jurisdictions. Based on the case study, it highlights the risks that foreign firms face from struggling with different regulatory approaches. With some suggestions for improved regulatory coherence, this brief adds to the continuing discussion on striking a balance between upholding the principle of international comity and enforcing competition laws effectively.

Keywords: EU competition law, extraterritoriality, effects doctrine, international resistance, sovereignty, international cooperation.

Introduction

The European Union (EU) has adopted a broad extraterritorial policy based on the effects doctrine, under which EU competition law applies wherever foreign activities significantly affect its internal market¹. This approach places the EU — along with the United States, which derives its authority from the Sherman Act — at

the forefront of global antitrust enforcement. The extraterritorial application of EU competition law raises, however, serious legal, economic, and political concerns. It requires protecting the balance between the EU's commitment to overseeing competition in its internal market, on the one side, and respect for non-EU member state sovereignty and regulators' autonomy, on the other. International business activities often involve many countries, resulting in conflicts of jurisdiction due to various competition rules, and have become a great challenge for the multinational business sector.

International resistance and jurisdictional conflicts remain as main challenges in the process of the extraterritorial application of EU competition law.

Global Resistance and Sovereignty Concerns

At the heart of the international resistance lies the principle of state sovereignty. States contend that each nation ought to have the sole authority to control business operations inside its boundaries, free from outside intervention. Critics argue that strong jurisdictions like the U.S. and the EU violate national sovereignty when they impose extraterritorial legislation.

These sovereignty-based objections are often framed through the lens of “legal imperialism”. This term describes the situation when regulations from one nation are imposed on international markets, potentially impairing other

¹ Court of Justice of the European Union, Case C-413/14 P, Intel Corp. Inc. v European Commission, ECLI:EU:C:2017:632.



states' capacity to control their economic affairs. Concerns about legal imperialism are especially pressing in light of international digital markets.

Non-U.S. and non-EU regulators argue that the enforcement of American or EU laws could undermine other countries' local competition laws and policy objectives. Foreign countries may be required to adapt to U.S. or EU competition laws that favor U.S. or EU consumers and business interests at the expense of local markets². At the same time, to better serve their national interests, some jurisdictions have attempted to create their competition regimes. For instance, a move toward more robust market regulation at home and abroad is reflected in China's expanding engagement in international antitrust enforcement³. Over the last few years, the State Administration for Market Regulation (SAMR) has investigated and penalized domestic giants like Alibaba as well as foreign firms, demonstrating a readiness to exercise extraterritorial jurisdiction. In April 2021, SAMR fined Alibaba a record RMB 18.228 billion (USD 2.8 billion) for practicing "choose-one-from-two" exclusivity on merchants—a record enforcement demonstrating Beijing's resolve to penalize platform monopolies.⁴ This is China's evolution into a third worldwide antitrust regime after the EU and U.S. increasing the risk of duplicate jurisdictions and variable obligations for multinational companies.⁵

While SAMR continues to increase its tools and deepen international collaboration, China is not merely a recipient of international

implementation but is actually shaping the future international competition norms.

This resistance reflects the tension between the extraterritorial application of competition law and any meaningful international cooperation on cross-border regulatory matters.



Jurisdictional Conflicts and Legal Overlaps

Before the 20th century, states were typically forbidden by international law from controlling the actions of foreign nationals outside of their borders. After recognition of effects-based jurisdiction, it is clear that there may be a situation when more than one state has an interest in regulating the business activity or transaction in question⁶.

Two of the most significant antitrust cases — Microsoft and Google — graphically illustrate the conflict of jurisdictions.

In the early 2000s, both the European Commission and the Department of Justice indicted Microsoft for bundling Windows with Internet Explorer. The U.S. government, via the

imposing an RMB 18.228 billion fine (USD 2.8 billion) on Alibaba for exclusive-dealing practices, April 2021.

⁵ D. Zhu, China's extraterritorial jurisdiction in antitrust cases: The implications of its expanding reach, *International Antitrust Bulletin*, 3(2), 2019.

⁶ D. Sokol, *Antitrust Procedural Fairness*, Oxford University Press, 2018.

² L. Foster, The Implications of U.S. Extraterritorial Antitrust Enforcement, *Journal of International Economic Law*, 15(3), 2012

³ D. Zhu, China's extraterritorial jurisdiction in antitrust cases: The implications of its expanding reach, *International Antitrust Bulletin*, 3(2), 2019.

⁴ State Administration for Market Regulation, Administrative Penalty Decision (2021) No. 28,



Department of Justice, issued a very nominal settlement that even granted it concessions as minor as modifying its business practices. The EU, however, issued harsh penalties, such as banning some software and unleashing competitors to interoperability information⁷.

Another major case illustrating jurisdictional conflicts in global competition law is that of Google Shopping. While the U.S. Federal Trade Commission simply closed down its case with no substantive enforcement, the European Commission fined Google €2.42 billion in 2017 for discriminating against its comparison shopping product in its own favor in search placements⁸.

These differing decisions put Google in a compliance dilemma with contradictory requirements across jurisdictions.

Such cases underscore the risks of regulatory fragmentation. When two of the most important antitrust regulators, the U.S. and the EU, issue incompatible decisions, multinational businesses are faced with legal uncertainty and limbo and the potential for non-compliance. This not only jeopardizes legal certainty but also erodes mutual confidence among legal systems.

Brexit has added another layer of complexity. After Brexit, companies dealing in the EU and the UK, along with all multinational enterprises operating in countries all around the world, also have to bear its after-effects in EU competition law. Brexit removed the UK from the European Commission's control. The UK now has its own independent competition authority, the Competition and Markets Body (CMA), which functions independently from the European Commission. While the EU continues to impose

its competition laws on conduct affecting the EU internal market, the CMA enforces UK competition law, including its extraterritorial application, against conduct affecting the UK market. This regulatory fragmentation can adversely affect trade relations as well.

Pathways for Regulatory Cooperation

For the business sector to effectively handle contemporary difficulties and flexibly adapt to the conditions of the digital market, international cooperation is critical. The principle of comity — by which regulators consider legitimate foreign counterparts' interests and domestic legal frameworks — is a realistic solution. A case in point is the 1991 EU-U.S. Agreement on Cooperation in Antitrust Matters, which promotes mutual notification and coordination of cross-border investigations. Comity agreements, however, rely on goodwill, trust, and shared values. In practice, political and economic interests will likely clash and override ideals of cooperation. More binding and more effective tools for enforcing cross-border competition—e.g., mutual recognition or joint investigations—must be weighed.

In addition, there is a need for the EU to establish capacity and trust with many developing third countries that for various socio-political and economic reasons, possess weak institutional settings that can hinder the successful enforcement of competition regulatory policies. The incorporation of mutually agreed requirements that reflect changing conditions in these countries will enable the EU to extend its competition policies⁹.

⁷ European Commission, Case COMP/C-3/37.792 – Microsoft, Commission Decision of 24 March 2004.

⁸ European Commission, Case AT.39740 – Google Search (Shopping), Commission Decision of 27 June 2017.

⁹ G.Arangio-Ruiz, The Internationalization of Competition Law and the Role of Developing Countries, *Journal of World Trade*, 30(2), 1996.



European Commission – center of EU competition enforcement.

Conclusion

The principle of extraterritoriality in European competition law is the fundamental principle that explains the extraordinary capacity of the EU to impose its legal order in the international arena. It demonstrates the readiness of the EU to solve challenges and to adapt its rules to new situations, which is typical of the success of the Union since 1952¹⁰.

However, responsibility comes with such power. In an era of interconnected jurisdictions, economic interdependence, and growing geopolitical competitions, enforcement policies that are blind to the reality of legal pluralism may create more problems than it solve. Rather than trying to "police" international markets alone, the EU should lead the development of an international cooperation-based competition system—one that bans unfair competition without promoting political opposition or legal fragmentation. A more balanced approach will make the EU as a global regulator more legitimate and promote long-lasting policy harmonization. The EU must work on ensuring better collaboration with external regulators via improved mechanisms of comity and regionalized negotiations especially with such

big markets as the U.S. UK, and China to provide solutions to modern challenges. Further, the EU is advised to specify the scope of its effects doctrine so as to enhance the legal certainty of multinational corporations that are engaged in business within schemes of overlapping regulation. Such measures will allow maintaining the credibility of the EU as a global standard-maker, not violating the international pluralism of law.

As the ECJ acknowledged in the *Van Gend en Loos* case, the EU is a creation of "a new legal order of international law," whereby sovereign rights were fused for collective benefits¹¹.

The EU does not only consider the competition policy as a regulated measure but also as an instrument of fairness and international competitiveness. To meet the new challenges, it seeks to fostering innovation, enhancing cooperation and formation of regulations that suits the globalized market.

¹⁰ I. Fevola, *Extraterritorial Application of EU Competition Law*, Università degli Studi di Torino, 2016.

¹¹ Court of Justice of the European Union, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.