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DEDICATED TO THE MEMORY OF PROFESSOR ROGER GOEBEL

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## Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind

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## ESSAY

### EXTRATERRITORIAL JURISDICTION, ANTITRUST, AND THE EU *INTEL* CASE:

### IMPLEMENTATION, QUALIFIED EFFECTS, AND THE THIRD KIND

*Eleanor M. Fox\**

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#### *I. INTRODUCTION*

This Essay in honor of the memory of my dear friend and co-author, Roger Goebel, presents a cutting-edge issue of extraterritoriality. May the law of one jurisdiction, whose competition law reaches a set of practices that may be anticompetitive, also reach wholly offshore conduct that is part of the same strategy? Does it matter

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that the conduct is not implemented in the jurisdiction, and its prospective territorial effects are derivative from its effects on the world market? This question was before the Court of Justice of the European Union in the now famous case, *Intel Corp. v. Commission* (“*Intel*”).<sup>1</sup>

The Court in *Intel* examined two alternative jurisdictional<sup>2</sup> bases, each reflecting a theory of the case: (1) was the impugned conduct *implemented* in the European Economic Area (“EEA”)?<sup>3</sup>; and (2) did the conduct have *qualified effects* (foreseeably substantial and immediate) in the EEA? Despite the words of the Court of Justice of the European Union which presume to apply the qualified effects test, I conclude that the Court applied a third test—a “qualified effects extension” for ancillary, directly related conduct. Was application of the third test appropriate?

## II. THE INTEL CASE

Intel, an American company, was the dominant supplier of a critical chip in laptop computers and notebooks; it held approximately seventy percent of the European market in the ten year period during which its conduct was examined by the European Commission.<sup>4</sup> Its only significant competitor was AMD, also an American company. AMD finally developed a superior chip, and Intel went into action to derail it. Intel implemented two sets of strategies. One was to offer its significant customers loyalty rebates that had the effect of exclusivity

1. Case C-413/14, *Intel Corp. v. European Comm’n*, ECLI:EU:C:2017:632, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=4BD0BE51134530A8C90EA42A507D7621?text=&docid=194082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11710678> [<https://perma.cc/W75S-BF77>] [hereinafter CJEU judgment].

2. I treat the words “reach-of-the-law” and “jurisdictional” interchangeably, although the two concepts can have different procedural consequences.

3. The EEA links the European Union with the member states of the European Free Trade Area, Norway, Iceland, and Liechtenstein. It allows these states to participate in the internal market on the basis of adopting the law and principles of the internal market. See *European Economic Area (EEA)*, EUROPA (Feb. 5, 2016), [https://eeas.europa.eu/diplomatic-network/european-economic-area-eea/348/european-economic-area-eea\\_en](https://eeas.europa.eu/diplomatic-network/european-economic-area-eea/348/european-economic-area-eea_en) [<https://perma.cc/2YMG-4S2M>].

4. Case T-286/09, *Intel Corp. v. Commission*, ECLI:EU:T:2014:547, ¶ 25, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11713196> [<https://perma.cc/89PS-56X3>], *revs’d on other grounds*, Case C-413/14 P [2017], <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198941&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=11714117> [<https://perma.cc/7NN8-J9TB>] [hereinafter General Court judgment].

with Intel; these were called exclusivity rebates. The other was, as the court called them, naked restraints. For Intel's big customers who had already signed on with AMD to buy its new chip, Intel made an offer they could not refuse: Breach your contract with AMD and return to the Intel fold; Intel will pay you well to do so. Typically, Intel paid its unfaithful customers to forsake the AMD chip for six months, a critical period for traction for the new product.<sup>5</sup>

As for most of the naked restraints and exclusivity rebates that constituted the European Commission's abuse of dominance case against Intel, the conduct unarguably had sufficient links to the European Union or the EEA and Intel did not contest jurisdiction. But the links were more tenuous in the Intel-Lenovo episode. Intel's customer, Lenovo, was a Chinese firm. The chip sales implicated were between Intel in Silicon Valley and Lenovo in Beijing. The finished products, computers assembled by Lenovo in Beijing, were sold from Beijing to the world. The computers implicated (those that would have incorporated an AMD chip had Intel not induced the breach of contract) were relatively few—a few thousand. They accounted for a small share of the world market for the chips, and it was not clear if and how many of them reached the EEA. Additionally, Intel and AMD were, of course, American firms. Not initially but on its first appeal, Intel challenged the European Union's jurisdiction over the Lenovo episode. Did EU law properly reach it? To answer this question, we consider the language of the Treaty on the Functioning of the European Union ("TFEU"),<sup>6</sup> the requirements of public international law, the EU case law, the reasoning of the EU jurists, and policy.

The first touchstone for considering the reach of EU competition law is the Treaty provision concerned. Article 102 of the TFEU prohibits the abuse of a dominant position "*within the internal market or in a substantial portion of it . . .*"<sup>7</sup> The second touchstone is public international law, which disallows assertion of jurisdiction where it would unreasonably interfere with the laws or policy of another sovereign state. The occurrence of foreseeably substantial and

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5. See Cyrus Farivar & Andrew Cunningham, *The rise and fall of AMD: How an underdog stuck it to Intel*, ARS TECHNICA (Apr. 21, 2013), <https://arstechnica.com/information-technology/2013/04/the-rise-and-fall-of-amd-how-an-underdog-stuck-it-to-intel/> [<https://perma.cc/KS82-CK6C>]; Intel, T-286/09, ¶¶ 129-34, 198-220.

6. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326/47) [hereinafter TFEU].

7. *Id.*

immediate effects in the territory is a recognized basis for jurisdiction.<sup>8</sup> The third is the Court of Justice case law. The principal judgment is *A. Ahlström Osakeyhtiö v. Commission* (“*Wood pulp*”),<sup>9</sup> a case involving price-fixing outside of the European Union of goods sold directly to EU buyers. The *Wood pulp* Court interpreted the Treaty to reach the offshore price-fixing on grounds that the conspiracy was *implemented* in the European Union.

Intel argued that the words of Article 102 TFEU<sup>10</sup> require that the abusive acts take place within the internal market. Intel further argued, under *Wood pulp*, that the Intel-Lenovo acts were not implemented in the internal market. Further, it argued that EU law did not have an effects test. Finally, it contended that even if the European Union did have an effects test, the test was not met because any foreseeable European effects of Intel’s dealings with Lenovo were insubstantial and not immediate.<sup>11</sup>

The Commission found liability at a point in time before Intel asserted lack of jurisdiction.<sup>12</sup> On Intel’s appeal, in addition to its substantive holdings, the General Court found that the jurisdictional requirements were met on grounds of both implementation and qualified effects. It saw Intel’s conduct as a single and continuous infringement. It found that Intel’s conduct had an immediate effect on Lenovo’s conduct and was part of an overall strategy with effects on the entire world market including the EEA. Again, Intel appealed.

The Advocate General, Nils Wahl, deemed the General Court’s analysis flawed. Contrary to the General Court, Wahl concluded that Intel did not implement the Lenovo-related conduct within the internal European market.<sup>13</sup> The Advocate General urged the Court of Justice

8. See RESTATEMENT OF THE LAW, FOURTH, FOREIGN RELATIONS LAW OF THE U.S. §§ 401-13 (AM. LAW INST. 2017).

9. Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 & C-129/85, *A. Ahlström Osakeyhtiö v. Commission of the European Communities* (“*Wood pulp*”), 1994 E.C.R. I-00099. The Court observed that the place of implementation of the anticompetitive agreement is more important than where an agreement was made, lest price-fixers easily evade liability rule.

10. “Abuse within the internal market” may be contrasted with the words of Article 101, which condemns anticompetitive agreements with the object or *effect* within the EU or EEA.

11. General Court judgment ¶¶ 221-28.

12. *Id.* ¶ 246.

13. Case C-413/14 P, *Intel Corp. v European Comm’n*, ECLI:EU:C:2017:632, ¶¶ 307-14, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198941&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=11714117> [https://perma.cc/7NN8-J9TB] [hereinafter Advocate General opinion].

to explicitly adopt the qualified effects test,<sup>14</sup> but concluded that the General Court misapplied the qualified effects test in any event.<sup>15</sup> It was not enough that Intel's *conduct* had a direct and immediate effect on Lenovo's *conduct* regarding Lenovo's purchase of chips, nor that the Intel-Lenovo episode was part of a *general strategy* that had sufficient effects in the EEA. Rather, the Commission had the obligation to prove that Intel's *Lenovo-related conduct* had foreseeably direct and immediate anticompetitive effects in the internal market. The claim that it had such effects appeared "hypothetical, speculative and unsubstantiated."<sup>16</sup> But, "it [could not] be ruled out that the Lenovo agreements could have had a significant impact on AMD's continuous capacity to develop, manufacture and market computer processing units ("CPUs") worldwide, including in the EEA."<sup>17</sup> "[T]he General Court should have asked: could those agreements immediately or directly diminish Intel's competitors' ability to compete for x86 CPUs within the internal market."<sup>18</sup> The General Court made no such analysis and this key question, which could have revealed the substantiality and immediacy of the effects in the EEA, went unanswered.<sup>19</sup>

After the thorough and thoughtful opinion by the Advocate General on extraterritorial jurisdiction, the Court of Justice wrote a thin judgment on the point.<sup>20</sup> The Court summarily rejected as unfounded all of Intel's grounds of appeal in the space of a mere two pages. The Court held first (as it backed into an implicit holding that EU law accepts the qualified effects test) that the qualified effects test pursues the same objective as the implementation test: preventing conduct that has anticompetitive effects likely to impact the EU market.<sup>21</sup> Implicitly, EU competition law must be copious enough to prevent its evasion by

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14. *Id.* ¶ 296.

15. *Id.* ¶¶ 320-26.

16. *Id.* ¶ 324.

17. *Id.* ¶ 325.

18. *Id.* ¶ 322.

19. Advocate General Wahl advocated caution and restraint. He said:

I consider it to be particularly important that jurisdiction is asserted with restraint in relation to behavior that has not, strictly speaking, taken place within the territory of the European Union . . . [I]t is only with a great deal of caution that the effect of the conduct complained of can be used as the yardstick for asserting jurisdiction. That is all the more important today [in a world of more than 100 competition authorities].

*Id.* ¶ 300.

20. Admittedly, the Court had to resolve major substantive issues going to the heart of Article 102 that may have overwhelmed the jurisdictional point.

21. CJEU judgment ¶ 45.

firms doing culpable acts offshore. Second, the court held that public international law allows jurisdiction “when it is *foreseeable* that the conduct in question will have an *immediate* and *substantial effect* in the European Union.”<sup>22</sup>

Regarding foreseeability of immediate effects, the Court said: “[I]t is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.”<sup>23</sup> Further, “Intel’s conduct vis-à-vis Lenovo formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with an AMD CPU would be available on the market, including in the EEA . . . .”<sup>24</sup> Thus, “the General Court did not err in considering . . . that Intel’s conduct was capable of producing an immediate effect in the EEA.”<sup>25</sup>

As to substantiality, the Court said: “It suffices . . . that the General Court held that Intel’s conduct vis-à-vis Lenovo formed part of an overall strategy aimed at foreclosing AMD’s access to the most important sales channels . . . .”<sup>26</sup> “[F]aced with [such] . . . strategy . . . , 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 EEA.”<sup>27</sup> “[T]o do otherwise would lead to an artificial 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.”<sup>28</sup>

The brief, uncomplicated Court of Justice judgment contrasts with the cautious opinion of the Advocate General. The Advocate General presented a challenge. The *Intel* appeal, he said, “will enable the Court to fine-tune [the] line of case-law [on extraterritorial jurisdiction] and adjust it to present day conditions, characterized by global economies, integrated marketplaces and elaborate patterns of trade.”<sup>29</sup> The Court side-stepped the challenge.

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22. *Id.* ¶ 49 (emphasis added).

23. *Id.* ¶ 51.

24. *Id.* ¶ 52.

25. *Id.*

26. *Id.* ¶ 55.

27. *Id.* ¶ 56.

28. *Id.* ¶ 57.

29. Advocate General opinion ¶ 280.

### III. WHO WAS RIGHT?

#### 1. The Wording of Article 102

Article 101 prohibits anticompetitive agreements with a distortive “object or effect” “within the internal market.”<sup>30</sup> Article 102 prohibits “an abuse” “within the internal market.”<sup>31</sup> Do these phrases and their differences mean that the Treaty can catch anticompetitive *agreements* launched offshore (that may have an *effect* in the internal market) but cannot catch abuses of dominance launched offshore because the Treaty prohibits abuses only if they are *within* the internal market? Advocate General Wahl properly answered “no,”<sup>32</sup> and the Court of Justice agreed.<sup>33</sup> The difference in the language of the two articles was surely fortuitous. The court rightly construed the Treaty language not to stand in the way of an appropriate reach of the law to abusive conduct from abroad.

#### 2. Was Intel’s Lenovo-related conduct implemented in the internal market?

The General Court, referencing Lenovo’s acts, said “yes.” Advocate General Wahl, referencing Intel’s acts, said “no.” All Intel did was shift Lenovo’s future purchases (in China) from American chip rival AMD back to itself. Intel did not sell products to Lenovo in the EEA.

The Advocate General is correct. It is a stretch to characterize Intel’s conduct in Silicon Valley, and agreements to sell chips from Silicon Valley to Beijing to be assembled in computers in China and shipped from China to the world, as abusive behavior *implemented* in the EEA.

But the European Commission and the General Court have already stretched the natural meaning of “implementation.” An example is the merger of Gencor and Lonrho,<sup>34</sup> leading platinum firms in South Africa. The merger threatened anticompetitive effects in the

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30. TFEU, *supra* note 6, art. 101 (emphasis added).

31. TFEU, *supra* note 6 (emphasis added).

32. Advocate General opinion ¶¶ 288-89.

33. CJEU judgment ¶¶ 42-46.

34. Case T-102/96, Gencor Ltd. v Comm’n of the European Communities, 1999 E.C.R. II-00753 [hereinafter Gencor/Lonrho]. See ELEANOR M. FOX & DANIEL A. CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW 394-97 (West 2d. ed. 2017) [hereinafter FOX & CRANE, GLOBAL ISSUES].



world, of which the European Union was the third biggest buying market after the United States and Japan.<sup>35</sup> The General Court affirmed the European Commission's finding that the merger was implemented in the European Union and was covered by the EU Merger Control Regulation.<sup>36</sup> It was a fact that Lonrho had sales offices in the European Union<sup>37</sup> (although the harmful effects would have been felt in the European Union just as surely if Lonrho had no sales offices there). The judgment and its general acceptance in the European Union caused observers to conclude (before the *Intel* case), that for practical purposes the European Union had an effects test.<sup>38</sup> A version of the effects doctrine is widely accepted in the world, and is particularly evident with regard to multinational mergers whose effects are felt around the world.<sup>39</sup> It is considered fair game for any nation within whose borders anticompetitive effects of a merger may be felt to examine the merger and impose remedies to alleviate the anticompetitive harm in the nation.<sup>40</sup>

### *3. Does the European Union Have or Should It Adopt an Effects Test?*

The General Court thought that the European Union already had a qualified effects test. The Advocate General observed that the issue was unresolved but thought it important for the European Union to have an effects test. He invited the court to adopt one and give guidance as to its parameters.<sup>41</sup> The Court of Justice treated the question as a non-issue, stating merely that "the qualified effects test pursues the same objective [as the implementation test], namely preventing conduct which, while not adopted within the EU, has anticompetitive effects

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35. See *Gencor/Lonrho* ¶ 60.

36. *Id.* ¶¶ 68-69, 87-88.

37. *Id.* ¶ 69.

38. See Luca Prete, *On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules*, 9 J. OF EUR. COMPETITION L. & PRAC. 492, 493 (2018).

39. See FOX & CRANE, GLOBAL ISSUES, *supra* note 34, at 1-2, 5, 21-24, 570.

40. Typically, one or both merging firms do some significant business in the regulating state. A significant stream of revenues into the jurisdiction justifies premerger notification requirements and thus premerger vetting with a view towards clearance or remedies. See INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, NEXUS TO REVIEWING JURISDICTION (2018) available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf) [<https://perma.cc/CPK7-ZNYK>].

41. See Case C-413/14 P, *Intel Corp.*, *supra* note 13.

liable to have an impact on the EU market.”<sup>42</sup> Moreover, the court said, the test is “justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.”<sup>43</sup> Thus, it is now clear that the European Union has a qualified effects test.

Of the three sources—the General Court judgment, the Advocate General’s opinion, and the Court of Justice judgment—the Advocate General’s opinion was the truest to the state of the law on implementation and on effects jurisdiction, and the most transparent.

*4. Under the Qualified Effects Test, Does EU Law on Abuse of Dominance Reach Intel’s Lenovo-Related Conduct?*

This was the key question. Did or would the United States-to-China conduct have foreseeably immediate and substantial effects within the EEA?

As we saw, the General Court said “yes.”<sup>44</sup> It found the effects immediate because no Lenovo notebook incorporating an x86 CPU produced by an Intel competitor was available anywhere in the world including the EEA. This was foreseeable and intended. Moreover, the effects were substantial because the conduct was part of a single and continuous infringement, the General Court said, and presumably the other parts of the continuous infringement were substantiated.<sup>45</sup>

The Advocate General disagreed with the reasoning, as noted. The Court of Justice upheld the General Court in broad strokes and simply did not engage with Wahl’s analysis. The Court pulled the Lenovo episode up by its metaphorical bootstraps, characterizing its European effects as substantial merely by bundling the episode with the conduct that underpinned the rest of the case. The Court thus maneuvered around and assumed away the question of the Lenovo’s episode effects in the EEA.

Which is the better approach? We begin a discussion of this issue by asking, first, why we have jurisdictional limits—a question not even referenced by the Court of Justice. Second, we ask why we might want and to some extent need a significant outreach to condemn anticompetitive offshore acts. Third, we ask, is there a reasonable

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42. CJEU judgment ¶ 45.

43. *Id.* ¶ 49.

44. General Court judgment ¶ 250 et seq.

45. *Id.* ¶¶ 260-90.

reconciliation of the two motivations—the need for limits and the need for breadth?

Why jurisdictional limits? Reading the Court of Justice judgment, one might lose sight of the fact that there *are* jurisdictional limits. The reasons are first, that outreach threatens jurisdictional clash, in which legitimate interests of one nation clash with legitimate interests of another; and second, that outreach threatens to undermine certainty of business.

Let us first consider business certainty. The interest of business to avoid overlap of laws is a credible claim but a contingent one. Different jurisdictions have different laws and their laws have different nuances. This is a fact of life. A world competition regime was proposed in the 1990s, and before that in the 1940s, but the nations did not adopt such an international law of competition and we are left with a multiplicity of laws.<sup>46</sup> In the absence of an international law of competition, business must live with and adjust to diversity. There are on-going robust attempts at convergence of national laws among the competition authorities of the world, and this project helps to minimize differences;<sup>47</sup> but it doesn't eliminate them.

Second, systems clash, pitting one jurisdiction's norms against another's. One jurisdiction may invade the interests of another, even if it cannot help but do so as it protects its own legitimate interests. Antitrust clashes happen less and less frequently as legal principles increasingly converge. In some spheres, significant convergence has been achieved. Cartel law is first among converged national rules.<sup>48</sup> In such areas of consensus, we need worry less about systems clash caused by enforcement outreach, even while we continue to develop

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46. See ELEANOR M. FOX, ANTITRUST WITHOUT BORDERS: FROM ROOTS TO CODES TO NETWORKS (2015), available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Fox-FINAL.pdf> [<https://perma.cc/5NVF-RA43>].

47. See INTERNATIONAL COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org> [<https://perma.cc/M42E-B447>]; see also THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS (Paul Lugard ed. 2011).

48. Establishment of the strong national rules against cartels has the felicitous by-product effect of keeping the global commons free of cartels. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012); see also Eleanor M. Fox, *Motorola Mobility: How Far Should A Nation's Law Reach*, THE ANTITRUST SOURCE 1 (Oct. 2018) [hereinafter Fox, *Motorola Mobility*]; Eleanor M. Fox, *China, Export Cartels, and Vitamin C: America Second?*, COMPETITION POLICY INTERNATIONAL (Mar. 13, 2018) [hereinafter Fox, *America Second?*].

norms and procedures to avoid conflicting remedies, including double counting of damages.<sup>49</sup>

But there are also spheres of substantive divergence. Abuse of dominance is first among them. One nation's (view of) abusive conduct is sometimes another nation's (view of) pro-competitive conduct.<sup>50</sup> Conflicting substantive appreciations as to what conduct is anticompetitive might counsel sensitivity to outreach of national law in this area, which the *Intel* case potentially inhabits. What EU law calls anticompetitive exclusionary conduct US law might call a procompetitive response to competition by a rival. US authorities might characterize the EU condemnation as chilling the competition of an inventive firm and reducing its incentives to invent.<sup>51</sup>

But why then might policy (sometimes) call for a wide outreach to offshore acts? Increasingly, the conduct that anticompetitively harms a nation takes place offshore.<sup>52</sup> Sometimes the line from the conduct's launch to the victim's harm is not perfectly direct, but it is an unwavering line nonetheless. The conduct might be a step or two removed from the market harm,<sup>53</sup> but the arrow is set in motion and inexorably will reach its target. Cartels of components in nation A, assembled into final products in nation B, that reach foreseeable consumers in nation C are a prime example.<sup>54</sup> The offending conduct is a consensus wrong, and unless the victims or their state call the violators to account, the conduct may go unpunished, and the cartels will proliferate despite their near universal condemnation.<sup>55</sup> Abuses of dominance travel across borders, too. A nation beset by antitrust harm

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49. See INTERNATIONAL COMPETITION NETWORK, *supra* note 47.

50. See Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, 59 ANTITRUST BULL. 129 (2014) [hereinafter Fox, *Why Europe Is Different*]. Compare *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), with *Microsoft Corp. v. United States*, 253 F.3d 34 (D.C. Cir. 2001). There is a divergence of appreciation of what is anticompetitive even in the United States. There is a similar debate in the European Union.

51. See Fox, *Why Europe Is Different*, *supra* note 50. Compare *Novell, Inc.*, 731 F.3d 1064 with *Microsoft Corp. v. United States*, 253 F.3d 34.

52. See FOX & CRANE, *GLOBAL ISSUES*, *supra* note 34, ch. 8 at 527-74.

53. Eleanor M. Fox, *Extraterritoriality and Input Cartels: Life in the Global Value Lane—The Collision Course with Empagran and How to Avert It*, 9 CPI ANTITRUST CHRONICLE 1 (2014) [hereinafter Fox, *Extraterritoriality*].

54. *Id.*

55. See Eleanor M. Fox, *Antitrust and the Clash of Sovereigns*, in 2 DOUGLAS GINSBURG LIBER AMICORUM: AN ANTITRUST PROFESSOR ON THE BENCH (forthcoming 2019); Fox, *Extraterritoriality*, *supra* note 53.

has, in general, the right to apply its usual standards to condemn the conduct that is launched abroad.<sup>56</sup>

The two options—to condemn, or to keep hands off—cut in opposite policy directions. Is there a rule of reconciliation?

An often applied rule of thumb helps to bring the two motivations into sympathy. The offshore conduct must cause or be reasonably likely to cause antitrust harm in the enforcing jurisdiction and to do so reasonably directly, and remedies should not be disproportionate to the territorial harm.<sup>57</sup> Proof of this connectivity is not an onerous requirement. But the requirement should be taken seriously especially in the case of divergent substantive norms. That is why, in applying the qualified effects test, Advocate General Wahl was correct. The General Court should have asked whether Intel’s Lenovo-relevant conduct was likely to “diminish Intel’s [only] competitor’s ability to compete . . . within the [European] internal market.”<sup>58</sup>

#### IV. THE THIRD TEST

The Court of Justice purported to apply the qualified effects test. But did it? There seemed to have been no fact-finding to support a conclusion that Intel’s agreements with Lenovo had foreseeable *immediate and substantial* effects in the EEA. The hidden holding of the case is: where offshore conduct not directly implemented in the EEA and potentially, although not immediately,<sup>59</sup> affecting the EEA is an integral part of a strategy covered by EU law, EU law covers the conduct. “[T]o [exclude the conduct] would lead to an artificial fragmentation of comprehensive anticompetitive conduct capable of affecting the market structure within the EEA, into a collection of

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56. See FOX & CRANE, *GLOBAL ISSUES*, *supra* note 34, at 527-74.

57. See US DEP’T OF JUSTICE & FED. TRADE COMM’N, *ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION* § 3 (2017).

58. Advocate General opinion ¶ 322.

59. The Court does not concede that the effect may not be immediate. The Court says the conduct “was capable of producing an immediate effect in the EEA.” CJEU judgment ¶ 52. If “immediate” means “immediate,” the conclusion is doubtful. At least one US court has given the US counterpart adjective, “direct,” a pragmatic meaning so that less work is required of “directness” where substantial effects are clearly foreseeable. The clause “direct, substantial and foreseeable” is given an interdependent and iterative meaning. *Minn-Chem, Inc.*, 683 F.3d at 845. If the extraterritoriality jurisprudence is to be modernized to fit the globalized world, this approach may be necessary.

separate forms of conduct which might escape the European Union's jurisdiction."<sup>60</sup>

Is this "qualified effects extension" a wise and appropriate basis for laws' reach?

There are five reasons to give an affirmative answer, and there are five reasons to give a negative answer. First, I state the reasons supporting the flexibility.

First, as background, the conservative inclination (the presumption against extraterritoriality) was devised in an era before globalization when economic issues were truly a two-sovereign "game." Cross-border transactions were not predominant. Norms in favor of more liberal trade as developed in the GATT and WTO were only nascent. There was no recognition of mutual as well as global gains in both economic welfare and peace by community-minded thinking. Moreover, few countries had antitrust laws and fewer had competition cultures. We are living in a different era. More than 130 countries have competition laws, and they have or are developing competition cultures, and most recognize the global benefits of restraining anticompetitive conduct.<sup>61</sup> Strategies enabled by new technologies have transnational if not global effects; multinational corporations are bigger than nations and can play national regimes off against one another; and strategic economic behavior to avoid regulation or put costs on foreigners is disfavored in the world trading system because it harms people as consumers, firms competing on the merits, and global welfare.<sup>62</sup> In this altered world marketplace, the presumption against extraterritoriality for economic law in defense of markets is no longer appropriate.<sup>63</sup> We need to deal with the reason behind the presumption: to prevent clashes caused by one sovereign's unreasonable intrusion on another sovereign's legitimate interests, and to tailor the law of restraint to the reasons for it. Since general retreat and withdrawal from antitrust enforcement against non-nationals and foreign-based acts would deeply undermine the global and national competition systems, it is fitting to stress modes for accommodation more than rules for retreat.

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60. CJEU judgment ¶ 57.

61. FOX & CRANE, GLOBAL ISSUES, *supra* note 34, ch. 8 at 1-2.

62. See Fox, *America Second?*, *supra* note 48.

63. As noted, there is no longer a presumption against national laws' reaching offshore conduct that is directly targeted at, and harms, the enforcing nation.

Second, which is a subset of the first, strategies of multinational firms are commonly global, and different functions, such as manufacturing components, assembling finished products, and distributing the finished products, commonly take place in different countries. In the absence of an international law of antitrust, unless a jurisdiction can examine the full scope of a market problem, transactions harmful to the jurisdiction and the world will fall through the yawning cracks between our far-from-seamless 130 antitrust laws.

Third, Intel's strategy had precisely the characteristics that counsel a broader outreach of the law. The market was a world market and was highly concentrated, affecting computer users worldwide. The strategy was global—to suppress the new invention of the only significant competitor/supplier of a critical input into computers. EU law clearly applied to core acts comprising the strategy. The conduct radiated out from its core to wherever Intel had significant customers who would be tempted by rival AMD's new invention. The Intel-Lenovo episode was part of the unitary strategy challenged by the European Commission, even though its geographic locus was entirely offshore and the target market was global, not specifically the European Union. As the Court observed, shaving off this episode would artificially fragment holistic conduct.<sup>64</sup>

Fourth, grappling with the possibility that jurisdiction over the episode could interfere with legitimate interests of another sovereign, here, the United States, home of Intel,<sup>65</sup> we ask two questions: first, was there a direct conflict with the law of the United States, in the sense of the case *Hartford Fire Ins. Co. v. California* (“*Hartford Fire*”)<sup>66</sup>? That is, was it impossible for Intel to comply with the laws of both jurisdictions at the same time? The answer is no. Second, was the EU enforcement in tension with US law or policy in a softer sense, as in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.* (“*Empagran*”)?<sup>67</sup> For

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64. *CJEU* judgment ¶¶ 50, 56-57.

65. What are the legitimate interests of the United States? The United States has a legitimate interest in common with the EU: maintaining a competitive market for the good of consumers and other market players by proscribing anticompetitive abuses of dominant power. Does it have a legitimate interest in protecting its national champion? It is an accepted norm, vigorously urged by the United States, that antitrust law does not protect national champions. But if EU competition law should be nationalistic and apply its competition law to handicap the efficiencies of US firms (which is sometimes charged but adamantly denied), the US would have a role in calling out the need to protect efficient competition.

66. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 (1993).

67. See *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

example, does US antitrust law promote the Intel conduct, deeming it a permissible and even virtuous way to compete? The answer is not clear. The US FTC consent order against Intel<sup>68</sup> supports a negative answer, although incumbent-firm-leaning Supreme Court decisions would lend support to an affirmative answer: US law may encourage what EU law prohibits.<sup>69</sup>

Fifth is a proposition rather than a reason: with the other elements present, as above,<sup>70</sup> the fact of conflicting jurisprudence and debate in a defendant's home country should not defeat outreach by a state enforcing its law non-discriminatorily to satisfy an antitrust interest likely to affect its territory.<sup>71</sup> Reasonable accommodation can be made at the remedy stage.

We turn to five reasons that could lead one *to reject* the qualified effects extension. First, the commonly applied rule of law on extraterritoriality requires that the impugned conduct have an immediate, substantial, and foreseeable effect in the enforcing jurisdiction.<sup>72</sup> Second, the test makes good policy sense; namely, to minimize conflicts, to avoid encroaching on the interests of other sovereigns, to avoid creating uncertainty for business firms and an increased risk of conflicting rules, and to further good administration. Good administration would entail avoiding control over conduct in

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68. See *Matter of Intel Corporation*, F.T.C. Docket No. 9341 (Nov. 2, 2010) (consent order), [https://www.ftc.gov/sites/default/files/documents/cases/2010/08/100804inteldo\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/cases/2010/08/100804inteldo_0.pdf) [<https://perma.cc/NP8X-P4MS>].

69. See *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Pac. Bell Tel. Co. v. LinkLine Commc'n, Inc.*, 555 U.S. 438 (2009). For a circuit court opinion written by now Supreme Court Justice Gorsuch, see *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013).

70. This would be especially true where the home country did not complain about the exercise of jurisdiction. Compare *Gencor/Lonrho*, where South Africa expressed its view that the merger of the two South African firms was not anticompetitive and that the merger was good for South Africa, but it did not complain about the EU prohibition. See FOX & CRANE, GLOBAL ISSUES, *supra* note 34, at 394-97. In *Wood pulp*, the United States not only did not complain about the European Union's suit against an American export cartel authorized under the Webb Pomerene Act but in effect told the European officials: if this is a cartel into your jurisdiction, prosecute it. See *Wood pulp*, *supra* note 9.

71. Similar debate exists on the same point of law within the EU. Moreover, the Commission's decision is appealable through the European system. Indeed, in *Intel* itself, the Court of Justice reversed and remanded the judgment of the General Court that upheld the decision of the Commission. See CJEU judgment ¶ 148.

72. See US DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 57.



which the regulating nation has no interest.<sup>73</sup> Third, international law requires no less. The territorial test with its limited extraterritorial reach stabilizes the international order. For all that may be said and desired about a cosmopolitan vision of world community, it is not the law. It has not been bargained for by the nations and is not the customary law of nations.<sup>74</sup> Indeed, the current *modus operandi*, for better or worse, is nationalistic, not cosmopolitan.

Fourth, the state of globalization in the world and the constant emergence of new technologies that cross borders are reasons for, not against, limits to national law. Firms constrained by a hundred sovereigns cannot be as inventive as firms with one governmental master. With an increasing application of nations' antitrust laws to successful global firms, innovation will decline and consumers and the world will be worse off.<sup>75</sup>

Fifth, Intel's challenged conduct is precisely in the area of the greatest divergence of substantive antitrust law; namely, when are single-firm strategies of dominant firms anticompetitive? US and EU law conflict.<sup>76</sup> Especially in this area, it may be argued, jurisdictions should not extend the reach of their laws; they should stay within their bounds.

## V. CONCLUSION

The two sets of arguments<sup>77</sup> are based on different world views of community, political economy, power, and the purview of the state versus the purview of the market. This writer is persuaded by the first set.<sup>78</sup> This is so largely because the strategies referenced are global and

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73. See Advocate General opinion ¶¶ 298-302; Luca Prete, *On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules*, 9 J. OF EUR. COMPETITION L. & PRAC. 492, 493 (2018).

74. "Customary international law results from a general and consistent practice of states followed out of a sense of legal right or obligation." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 8, § 402, cmt. b.

75. This was one of defendant's arguments in *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.). *But see* Fox, *Motorola Mobility*, *supra* note 48.

76. See Fox, *Why Europe is Different*, *supra* note 50.

77. There are middle grounds. Analysts or policy-makers might accept some but not all of the reasons and propositions on either side.

78. The question of the third way need not even have been reached if the General Court had asked the Advocate General's question and answered it in the affirmative: "[C]ould [the Intel-Lenovo] agreements immediately or directly diminish Intel's competitors' ability to compete for x86 CPUs chips within the internal market"; could they have had a significant

the constituent pieces are synergistic. Moreover, a principle of jurisdictional retreat would defang national laws in their mission to control abuses of market power that would sanction harm to every nation's citizens by the largest firms in the world.

