International Abuses, EU Solutions: Using EU Structures to Address the Challenges of International Antitrust

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Modern markets are increasingly international, online and unrestricted by geographic borders and territoriality. Competition regulation remains decidedly domestic in nature, restrained by principles of jurisdiction and state sovereignty in a way that multinational business is not. With the rise of online markets and transnational trade, legislators and regulators are increasingly expected to grapple with abuses of dominance which span multiple jurisdictions. However, traditional approaches to state sovereignty and prescriptive jurisdiction present fundamental challenges to the effective implementation of competition policy in these modern markets. In particular, abuses of dominance by international or online firms have the potential to profoundly impact national economies. Yet unlike other competition ills, such as cartels, abuse of dominance is not the subject of widespread international regulatory cooperation or legislative uniformity. Against this background, substantive convergence emerges as a potential solution to jurisdictional clash but, as this article explores, it faces legal, sociopolitical, and practical obstacles that make its success not only unlikely, but not necessarily desirable. While recognising the unique political context of the EU legal system, in particular the role of market integration and its place at the core of policy decisions, this article explores what practical guidance may be found in the EU competition law framework. It explores EU horizontal, administrative measures which could be repurposed in order to bring further predictability and clarity to international jurisdictional issues. It concludes by proposing that EU approaches to case allocation, horizontal best practice standards and peer review may be meaningfully adapted by the international competition law community, in order to alleviate jurisdictional issues in competition regulation.

Keywords: jurisdiction, antitrust, EU, regulation, international, competition, convergence, cooperation, multinational markets, EU, abuse of dominance

1 INTRODUCTION

International markets are increasingly borderless, transnational, and unconstrained by geographic dimensions. The proliferation of online commerce and complex

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international value chains has created an increasingly internationalized and interconnected business world. As a result, the impact of competition law abuses by firms can be similarly borderless or transnational.

Despite this, competition regulation remains comparatively domestic in nature, restrained by traditional principles of jurisdiction and state sovereignty in a way that multinational business is not. Increasingly, nations seek to regulate the actions of firms which are not located within their territory, yet whose actions significantly impact their domestic markets. In particular, abuses of dominance by international or online firms have the potential to profoundly impact national economies. Yet unlike other competition ills, such as cartels, abuse of dominance is not the subject of widespread international regulatory cooperation or legislative uniformity. Nor does the regulation of abuse of dominance benefit from voluntary information sharing and notification in the same way as merger assessments. While business transcends international boundaries, jurisdictional issues hamper the ability of many nations to pursue these antitrust abuses in a similarly transnational manner.

In part, this is due to the inability of traditional Westphalian[1] notions of jurisdiction to meet the challenges of competition regulation in an increasingly globalized world. In an attempt to address this, many nations have asserted prescriptive (or legislative) jurisdiction on an ad hoc basis, founded on their own interpretation of domestic regulation (and tempered by international norms). The application of the arising principles, such as the Effects Doctrine and comity, has produced inconsistent and at times contradictory results.[2] Resultantly, overregulation and jurisdictional clash are becoming more common in the international competition law landscape.

Against this background, substantive convergence emerges as a potential solution to jurisdictional clash. However, as this article explores, it faces legal, sociopolitical, and practical obstacles that make its success not only unlikely, but also not necessarily desirable. Accepting these obstacles to convergence, this article turns to the unique structures, arrangements and mechanisms used by the European Union to administer its own competition law. Given the scale and scope of the unique legal and policy structure of the EU, the EU system provides interesting administrative and practical mechanisms for balancing a multitude of competing interests, including the competing interests of sovereign states. Focusing on one of the most debated areas of competitive abuse; abuse of dominance, this article proposes that workable, practical tools for addressing difficulties in international prescriptive jurisdiction may be found within the EU approach to competition law implementation. Specifically,

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1 International law norms borne out of the 'Peace of Westphalia' signed in 1648 and explicitly recognizing the sovereignty of nations and protection against interference.

2 Damien Geradin, Marc Reysen & David Henry, *'Extraterritoriality, Comity, and Cooperation in EU' Competition Law*, in *Cooperation, Comity and Competition Policy* 34 (Andrew Guzman ed., OUP 2010).

that the EU competition law framework; case allocation, non-territorial considerations, horizontal best practice standards and peer review principles, may be adapted to alleviate conflict of prescriptive jurisdiction in multinational or online abuse of dominance cases.

At its core this article argues that current systems for addressing jurisdictional clash in competition law regulation must evolve if they are to be effective, and the practices and structure of the EU provide a firm example of how that may happen.

This article examines the challenges arising from domestic attempts to legislate over international or transnational abuse of dominance cases. It will deal only with prescriptive jurisdiction over abuse of dominance case, as abuse of dominance is one of the competition law ills over which there is the least international cohesion. Other areas of competition regulation such as mergers and cartels are subject to different considerations, cooperation agreements and practicalities. The scope of this article is further limited, to an assessment of prescriptive jurisdiction, as enforcement and adjudicative jurisdiction raise their own unique issues deserving of separate analysis.

With these limitations in mind, this article commences a broad examination of the Customary International Law (CIL) principles of jurisdiction, and the ways in which these are at odds with the transnational nature of modern economic activity and competition regulation. It then examines the viability of substantive convergence of national competition law as a means to resolve the challenges of prescriptive jurisdiction over abuse of dominance cases.

Finally, this article explores the EU approach to managing the implementation of its own competition regulation by the EU Member States. It draws inspiration from the EU's unique approach to managing regulation in the context of the 'centrifugal pulls'[3] of each Member States' own interests. It examines some of the practical measures used in managing issues of conflicting or overlapping regulatory interest in antitrust abuses with a 'community dimension', with a view to how these mechanisms and tools may be repurposed for the international context.

While recognizing the unique political context of the EU legal system, in particular the role of market integration and its place at the core of policy decisions, the EU's unique governance structure and the implications of its underlying purposes must be acknowledged. This article argues that many of its tools can be modified and implemented in an international context, as an alternative to substantive convergence or harmonization.

[3] Katalin J. Cseres, *The Implementation of the ECN+ Directive in Hungary and Lessons Beyond*, 12 YARS 55, 60 (2019).

2 PART 1: BACKGROUND

2.1 Customary international law and modern regulation

In order to analyse issues in prescriptive jurisdiction over competition law breaches, it is necessary to examine the underlying principles of CIL. Despite the internationalization of businesses and markets, international jurisdictional principles remain firmly rooted in territoriality. Jurisdiction, namely the scope of a state's power to legislate and enforce its laws,[4] provides states with both the authority to act and protection against actions by other states. It requires that nations accept the boundaries[5] of their sovereign reach in order to protect the legitimate interests of other actors. International jurisdiction is largely[6] governed by CIL and is underpinned by strong respect for national sovereignty, embodied in a presumption against extraterritorial[7] action. With the exception of particularly egregious crimes, and excluding harms of a purely economic nature,[8] valid jurisdiction[9] requires a territorial[10] or personal link between the conduct and the state seeking to assert jurisdiction. Jurisdiction exercised in circumstances where a state holds no prescriptive jurisdiction under CIL, yet attempts to legislate regardless, may be rightly considered an exercise of 'extraterritorial jurisdiction'.

Although well established, jurisdictional CIL does not align with the reality of online commerce, or regulation of international abuses of dominance. With the rise of open and multinational trade, anticompetitive acts not instigated or perpetrated on a sovereign's soil may none the less have significant economic impact on the markets of that territory. As Fox puts it, 'the line from the conduct's launch to the victim's harm is not necessarily direct, but it is an unwavering line none the less'.[11] In these cases, CIL may not recognize the affected state as having jurisdiction, due to an absence of territorial or personal nexus. Conversely, online conduct may give rise to a panoply of territorial jurisdictional claims. These claims may be based on where the server is located, where the content is viewed, where the content is uploaded, where the content is directed or where effects are felt.[12] In both of these circumstances, a

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4 Cedric Ryngaert, *The Concept of Jurisdiction in International Law*, in *Research Handbook on Jurisdiction and Immunities in International Law* (Alexander ed., Elgar 2015).
5 Francis Mann, *The Doctrine of Jurisdiction Revisited After Twenty Years*, 3 RCADI 15 (1984).
6 Anders Henriksen, *International Law* 87 (OUP 2017).
7 Eleanor M. Fox, *Antitrust: Updating Extraterritoriality*, 1 Antitrust & Pub. Pol'y 1 (2019).
8 Henriksen, *supra* n. 6, at 29.
9 This article will be dealing only with prescriptive jurisdiction as enforcement and adjudicative jurisdiction raise their own unique issues.
10 Ryngaert, *supra* n. 4.
11 Eleanor M. Fox, *Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind*, 42 Frd I.L.J. 982, 994 (2019).
12 Ryngaert, *supra* n. 4, at 10.

rigid application of CIL norms risks abusive conduct being broken up, with no single state examining it in its entirety.

As a result of these market complexities, domestic courts and legislators are required to grapple with a number of distinct challenges. For example, in the case of transnational conduct, courts and legislators must address the question of the justiciability of conduct which occurs wholly offshore, by offshore actors. In the case of wholly online commerce, they are increasingly required to consider the regulation of market abuses that impact upon the nation in question by virtue of their impact on a global market or supply chain, rather than through a specific territorial connection. As a result, there may be conflict over which state is properly entitled to assert prescriptive jurisdiction or firms may be subject to multiple actions in multiple states for a single act.

While the arbitration of disputes under private international law is 'based on the principle that a foreign legal system is of equal value with the law of the forum',[13] international competition law disputes are not subject to the same principles. This is because modern competition law is enacted in the overwhelming public interest of the legislating state. Thus, the competition law of a given state 'does not act as a neutral arbitrator between the substantive competition law of a foreign state and the law of the forum'.[14] This leaves abuses of dominance with an international dimension in somewhat of a no-man's land.

2.2 The effects doctrine and comity

As a result, many nations[15] have attempted to address the rigidity of territorial jurisdiction by pushing the boundaries of territoriality,[16] or by asserting non-territorial connections.[17] In the US and the EU, this has produced (variations upon) the 'Effects Doctrine'; the extension of jurisdiction to acts which, although not occurring on that nation's sovereign soil, affect the market of the nation in question.[18] Elsewhere, nations have maintained a stricter, traditional adherence to territoriality[19] and declined to extend jurisdiction to acts without a territorial nexus to the asserting state.

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13 Luca Prete, *On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?) Application of EU Competition Rules*, 9 JECLP 488 (2018) (fn 8).

14 Ivo Schwartz & Jurgen Basedow, *Restrictions on Competition*, in *International Encyclopedia of Comparative Law* vol. III (Elsevier 1997).

15 France, Germany, Brazil, China, Japan, Korea, India.

16 Joanne Scott, *The new EU 'Extraterritoriality'*, 51 Common Mkt. L. Rev. 1343 (2014).

17 For example; Alcoa (*United States v. Alcoa*) 148 F.2d 416 (2d Cir. 1945).

18 *Ibid*.

19 For example, Australia, Japan, Fiji.

Despite its uptake by the EU (to some extent)[20] and the US, the Effects Doctrine is, by its very nature, a national law[21] with limits largely determined by national judges. It is not broadly accepted[22] in the international community. Its uptake is not uniform,[23] nor without international objection,[24] often opposed in practice[25] and not subject to uniform principles of application. As a result, many argue that it cannot constitute good international law[26] and, due to its inconsistent application,[27] is likely to cause jurisdictional conflict.

In addition to inconstancies of application, the Effects Doctrine raises questions of overlapping and concurrent jurisdiction. As Scott notes, where nations seek to regulate extraterritorially it is 'more than likely'[28] that another state will have regulated the same conduct. As the application of extraterritorial prescriptive jurisdiction has become more common, many nations have sought to deal with the resultant conflict of jurisdiction through variations on the principle of comity.[29] Comity is a horizontal[30] and voluntary principle, relying on domestic courts to take account of the interests of other nations. It can be described as malleable, vague[31] and requiring significant judicial interpretation.[32] Accordingly, comity has been critiqued as perpetuating national interests and 'favouring the home crowd'.[33] For example, in *Kiobel*[34] the United States Supreme Court declined to delimit jurisdiction despite numerous international objections. Comity is also beleaguered by inconsistency of interpretation and application,[35] making it an arguably insufficient protection against unwarranted exercise of extraterritorial jurisdiction.

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20 The EU has adopted a variation on the Effects Doctrine. One which retains an element of the more traditional jurisdictional basis; territoriality.

21 Fox, *supra* n. 11, at 991; Prete, *supra* n. 13, at 494, 488 (fn 8).

22 Brendan Sweeney, *Combating Foreign Anti-competitive Conduct: What Role for Extra-Territorialism?*, 8 Melb. JIL 35, 55 (2007); Brief by the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party in *Kiobel et al. v. Royal Dutch Petroleum et. al*. 569 U.S. 108 (2013).

23 Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 Va. J. Int'l L. 911 (2003).

24 Malcolm N. Shaw, *International Law* 499–505 (7th ed., CUP 2014).

25 Roger Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 Va. J. Int'l L. 1 (1992); Amicus, *supra* n. 22.

26 Scott, *supra* n. 16, at 1380.

27 Amicus, *supra* n. 22.

28 Scott, *supra* n. 16, at 1364.

29 Brendan Sweeney, *International Governance of Competition*, in *Comparative Competition Law* (John Duns, Arlen Duke & Brendan Sweeney eds, Elgar 2015).

30 Eleanor M. Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, in *Cooperation, Comity and Competition Policy* 270 (Andrew Guzman ed., OUP 2010).

31 Sweeney, *supra* n. 22, at 57.

32 Prete, *supra* n. 13.

33 Cedric Ryngaert, *Jurisdiction in International Law* 19 (2nd ed., OUP 2015).

34 *Kiobel et al v. Royal Dutch Petroleum Co*. 569 U.S. 108 (2013), at 22.

35 For example, that the EU's application of comity-like principles is primarily administrative, a matter of discretionary administrative restraint, in contrast to US style legal doctrine.

The development of this tapestry of legal principles has produced unpredictable and often unchecked assertions of jurisdiction. As a result, international firms may engage in regulatory arbitrage, forum shopping[36] and stalling tactics[37] in order to avoid regulation or seek the most favourable terms.[38] Conversely, firms may suffer from uncertainty over the applicability of national laws, and fear of overregulation. In a bid to reduce compliance costs and legal complexity, they may therefore simply comply with the competition law of the most 'aggressive' state.

Despite best efforts of national courts and regulators, conflict over jurisdiction in international abuse of dominance cases remains a live issue in modern markets. With such a range of issues arising from traditional, territorially focused constructions of jurisdiction, many practitioners, regulators, and scholars have actively sought alternative solutions.

3 PART 2: SUBSTANTIVE CONVERGENCE, A SOLUTION TO OUR JURISDICTIONAL WOES?

Given the lack of clear and consistent rules governing extraterritorial prescriptive jurisdiction, substantial convergence of international competition laws is often proffered as a panacea for the jurisdictional challenges of multinational markets.[39] Substantive convergence, when it occurs organically or through the 'enlightened choices'[40] of jurisdictions, can produce business and legal certainty, open up international trade, decrease transaction costs[41] and allow for greater efficiency in regulation. In its perfect state, it would allow nations to rely on their counterparts to prosecute competition law wrongs or, alternatively, allow for uniform jurisdictional rules which would eliminate jurisdictional clashes.

For these reasons, competition law convergence has obvious appeal. Unsurprisingly, it has been the goal of many international competition forums since the 1940s.[42] However, at present there remain 160 diverse competition regimes[43] across the globe. The diplomatic,[44] technical and political task of signing

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36 R. Hewitt Pate, *Current Issues in International Antitrust Enforcement*, Remarks Before the Fordham Corporate Law Institute 31st Annual Conference on International Antitrust Law and Policy (7 Oct. 2004), http://www.usdoj.gov/ atr/public/speeches/206479.pdf (accessed 10 Nov. 2019).

37 Brief of Amicus Curiae, Economists and Professors in Support of Petitioner, in *Motorola Mobility LLC v. AU Optronics Corp.*,746 F 3 d 842, 15 Apr. 2015.

38 Fox, *supra* n. 11, at 994.

39 Stigler Centre for the Study of Economy and the State, *Final Report of the Stigler Committee on Digital Platforms* (Stigler Centre Sept. 2019).

40 Fox, *supra* n. 30, at 267.

41 *Ibid*.

42 Havana Charter 1948 UN Doc E/CONF.2/78, Sales No 1948.II.D.4.

43 Fox, *supra* n. 30, at 276.

44 American Bar Association, *Report Concerning Private Anticompetitive Practices as Market Access Barriers* 67 (ABA 1999).

these nations to any single legal regime is not insignificant, particularly to a regime which involves differing perceptions of complex economic issues. Following the failure of proposals for substantive norms convergence alongside a World Trade Organization (WTO)[45] dispute resolution mechanism, suggestions for substantive convergence have repeatedly[46] failed to gain widespread support. Both 'developing' nations[47] and nations such as the US have repeatedly opposed substantive convergence, often citing diversity of law and the 'ill fit' of other national regimes to their particular circumstance.[48] After many fruitless attempts (Havana Charter,[49] San Paulo,[50] the Jenny Group,[51] The Munich Group,[52] Cancun[53] and Doha[54]) the failure of the WTO to secure agreement on convergence of competition policy was perceived as the convergence movement's 'ultimate failure'.[55] Despite its appeal, and repeated attempts to champion its uptake, substantive international competition law convergence appears perpetually stymied. There are many economic, philosophical, and contextual factors which have contributed to this, some of which are explored in the following paragraphs.

3.1 Economic issues

One of the factors contributing to the failure of international competition law convergence may lie in what Stuke describes as the inherent 'self-interest' of nations.[56] As Guzman[57] points out, the assumption that a nation will act in its own self-interest is a reasonable one, and a factor of its government's key role and function. In addition to protecting activities obviously occurring in their own interests, a nation's reliance on export or imports will directly affect how it views

45 Group of Experts' Report ('Van Miert Report'), *European Commission, XXVIth Report on Competition Policy* 95 (1996).
46 Petros C. Mavroidis & Damien J. Neven, *Competition Enforcement, Trade and Global Governance a Few Comments*, in *Reconciling Efficiency and Equity a Global Challenge for Competition Policy* 407 (Damien Gerard & Ioannis Lianos eds, CUP 2019).
47 Joel Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'*, 6 JIEL 3 (2003).
48 Fox, *supra* n. 30, at 267.
49 Havana, *supra* n. 42.
50 UNCTAD, *Communication from the Group of 77 and China* (2004), http://www.g77.org/doc/members.html (accessed 18 May 2007).
51 Mavroidis & Neven, *supra* n. 46, at 407.
52 Joseph Stiglitz & Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (OUP 2005).
53 World Trade Organisation Ministerial Conference (Cancun Mexico 2003).
54 World Trade Organisation Ministerial Conference (Doha 2001).
55 World Trade Organisation General Council, *The July Decision* (1 Aug. 2004); Dennis Davis, *Extraterritoriality and the Question of Jurisdiction in Competition Law*, in *Reconciling Efficiency and Equity a Global Challenge for Competition Policy* (Damien Gerard & Ioannis Lianos eds, CUP 2019).
56 Maurice Stucke, *Should Competition Policy Promote Happiness?*, 81 Fordham L. Rev. 2575 (2013).
57 Andrew T. Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 Va. J. Int'l L. 933 (2003).

and implements competition policy.[58] A nation that relies on imports may favour stronger extraterritorial competition regulation, because it bears the brunt of the cost of offshore anticompetitive behaviour. By contrast an export heavy economy (engaging in export cartels for example) is 'exporting' some of the harm of anticompetitive conduct and may therefore favour weaker regulation of its export industries and restricted extraterritoriality.[59] Essentially, a nation may permit otherwise prohibited anticompetitive conduct[60] because other nations will be subject to any monopoly rents and deadweight loss which result.[61]

A particular nation's approach to competition regulation may be further impacted by their import/export mix. Even assuming a nation is lenient towards its own exporting firms, it may favour strong extraterritorial regulation if it is subject to foreclosing conduct offshore.[62] Nations with different import/export mixes (and those with closed economies) will therefore disagree on the appropriate limits of competition regulation and extraterritoriality, making international convergence difficult.

3.2 Institutional philosophy

A further impact upon a nation's willingness to converge is found in its broader institutional setting, including the underlying philosophy of its competition law regime. Many competition regimes, such as those of the US and UK, found their roots in the Chicago School of competition theory. Although these regimes adapted and evolved in response to changing influences, they still maintain a common core adherence to the Consumer Welfare Standard.[63] Despite the influence of the Chicago School and its firmly economic approach to competition ills, some newer competition regimes do not adhere so closely to its principles.[64] For example, nations such as Indonesia and South Africa have left room for explicit social and democratic goals[65] in their competition regimes. In doing so, they have altered both the substantive development of their laws and the ways in which potential cases of anticompetitive conduct are selected and prosecuted. This move has been criticized by some scholars as allowing for 'wrong' interpretations of competition law by 'weak

58 *Ibid*.
59 For example; *Webb-Promerene Act* 15. U.S.C; *Foreign Trade Antitrust Improvements Act* 1982 15 U.S.C.
60 *Ibid*., at 61–65.
61 Guzman, *supra* n. 57.
62 Andreas Themelis, *The Internet, Jurisdiction and EU Competition Law: The Concept of 'Over-territoriality'*, in *Addressing Jurisdictional Implications in the Online World*, 35 World Comp. 325, 333 (2012).
63 Diane R. Hazel, *Competition in Context: The Limitations of Using Competition Law as a Vehicle for Social Policy in the Developing World*, 37 Hous J. Int'l L. 275 (2015).
64 *Ibid*.
65 Eleanor M. Fox, *Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia*, 41 Harv. Int'l L.J. 579 (2000).

regulators' and an inexperienced judiciary.[66] However, this is not to say that these systems of competition regulation do not work for those jurisdictions[67] or that diversity is disagreeable. Difficulties in convergence aside, there is a desirability to diversity which is often overlooked, as Fox comments, 'opening the channels of experimentation has its own rewards'.[68]

3.3 Broader institutional context

Not only does the underpinning philosophy of a nation's competition law impact its development, but so too does the context in which it operates; its broader institutional setting.[69] There is strong evidence that cultural perceptions and norms significantly impact upon a society's understandings of criminality and the desirability regulation. For example, in Japan longstanding supplier agreements and lateral business relationships, to the exclusion of others, are considered by many to be culturally important.[70] However, in the US and EU, these may be more akin to exclusionary conduct and cartel behaviour.[71] A further example is the contrast between the Indonesian 'Desa' (village) governance system (resulting in what many would see as cronyism)[72] and the relative impartiality prescribed by Western competition law.[73]

Furthermore, numerous[74] studies show that countries with similar ethno-cultural profiles are more likely to maintain similar laws than those with more diverse profiles. For example, studies by Cheng[75] and Jong Lee[76] found that individualistic cultures had a different appetite for prosecution of offences compared to collectivist cultures.[77] Furthermore, differences in a culture's risk preferences and perception created diverging views on appropriate penalties for offences.[78] It follows that each society, and their political and legal regimes, will have their own understandings of

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66 Hazel, *supra* n. 63.
67 William Easterly, *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Penguin 2006).
68 Fox, *supra* n. 30.
69 Douglass C. North, *Institutions and Economic Theory* (1992), AE 3.
70 Robert L. Cutts, *Capitalism in Japan: Cartels and Keiretsu*, 70 HBR 48 (1992).
71 *Ibid*.
72 For example; Fox, *supra* n. 65; Hazel, *supra* n. 63.
73 *Ibid*.
74 Thomas K. Cheng, *How Culture May Change Assumptions in Antitrust Policy*, in *The Global Limits of Competition Law* 207 (Ioannis Lianos & Daniel D. Sokol eds, SUP 2012).
75 *Ibid*.
76 Ki Jong Lee, *Promoting Convergence of Competition Policies in Northeast Asia Culture – Competition Correlation and Its Implications*, in *The Global Limits of Competition Law* (Ioannis Lianos & Daniel D Sokol eds, SUP 2012).
77 Cheng, *supra* n. 74.
78 *Ibid*.

the criminality of certain acts and differing opinions on the desirability of their regulation. This is particularly evident in the case of competition wrongs, such as abuse of dominance, which unlike cartels, are not universally accepted or defined. Such factors may make convergence problematic. Not only is it impractical, it ignores the very real impacts of cultural differences on both the type of law which is suitable for a nation and the way in which it will develop and be applied once it has been transplanted.[79] Although this may frustrate the development of a universal competition law, and with it the hope to remedy jurisdictional conflicts by this means, it is necessary for the freedom and legal growth of nations.[80] In fact, it may be counterproductive to the diversity and development of competition law globally to expect that the competition law of all nations should develop in uniformity. There is much to be said for the benefits of regulatory diversity, and the innovations that can, in the right circumstances, be brought about by the regulatory competition it may foster.

3.4 Regional spheres of convergence

Although these cultural and contextual differences may make global convergence of competition law unlikely, cultural, contextual and political similarities between some nations have assisted an alignment of some competition policies. In fact, it could be argued that in some parts of the world partial or regional convergence has begun, in the form of 'regional spheres'[81] of competition law and policy. This has occurred primarily through adoption of regulation and programs for resource[82] and information sharing. The EU has been particularly successful in developing such a sphere in the broader European continent and has cultivated a reputation as a 'global regulator'.[83] A study by Bradford et al[84] demonstrates that EU regulation has influenced, in some form or the other, 130 competition regimes worldwide.[85] This influence is bolstered by the mandated harmonization of some areas of EU Member State competition laws, and the 'voluntary harmonization'[86] that can be observed in others.

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79 Albert Allen Foer, *Cultural Dimensions of Competition*, in *Reconciling Efficiency and Equity a Global Challenge for Competition Policy* (Damien Gerard & Ioannis Lianos eds, CUP 2019).
80 Mavroidis & Neven, *supra* n. 46, at 398.
81 Fox, *supra* n. 30, at 279.
82 For example; ACCC Competition Law Implementation Program, *see* https://www.accc.gov.au/about-us/international-relations/competition-law-implementation-program-clip (accessed Mar. 2020).
83 Anu Bradford, Adam Chilton, Katerina Linos & Alex Weaver, *The Global Dominance of European Competition Law over American Antitrust Law*, 4(16) Alexander J. Empirical Legal Stud. 757 (2019).
84 *Ibid*.
85 *Ibid*.
86 Cseres, *supra* n. 3.

The EU is not the only competition regime to have significant influence over the development of the global competition law landscape. The US also has a significant global impact, with key provisions of the *Sherman Act* being adopted in many parts of the world, by virtue of the US' significant 'persuasive powers'.[87] In the Pacific Region, Australia and New Zealand further exemplify the formation of these spheres of influence. These nations' competition legislation is substantively the same, while many nearby nations such as Fiji have translated parts of the Australian legislation into their domestic law.[88]

Despite these areas of commonality, many regulatory regimes with a common legislative root have substantially diverged over time. This is often in response to different interpretations of legal principles, economic harm, social values, and procedural requirements. This is the natural consequence of precedent development, and adaptation of laws by domestic enforcers. In cases where laws are replicated between regimes there is generally no mechanism for enforcement of the norms of the originating state's laws. Nor should there be. Therefore, transplanting[89] common competition policy across a region is no guarantee that jurisdictional conflict, or substantive divergence can be avoided. In fact, even within these regional groupings differences in competition law and policy are likely to persist, making substantive convergence difficult.

3.5 Divergence between spheres

In addition to differences which may arise within these regional groupings, there is significant divergence between the global competition law 'spheres' themselves. For example, there is a history[90] of variance between the EU and US competition law regimes, amplified by each nation's perceived desire to promote its competition law as 'best practice'.[91] Furthermore, some disagreements arise from divergence in how regulators and courts consider markets operate,[92] fears over 'false positives'[93] and institutional differences. For example, recent US administrations have shown a trend towards favouring big-business innovation, seeing large firms as incubators of innovation which could not be achieved by smaller firms.[94] By contrast, the EU Commission has focused on facilitating new entrants, as dominance would chill

87 Anu Bradford, *The Brussels Effect*, 107 Nw. U. L. Rev. 1 (2012).
88 *Competition and Consumer Act 2010* (Cth); *Commerce Act 1998* (No. 50 of 1998) (Fiji).
89 A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh 1974).
90 Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different*, 59 Antitrust Bull. 129 (2014).
91 *Ibid*.
92 *Ibid*., at 132.
93 Geradin, *supra* n. 2, at 39.
94 Fox, *supra* n. 90.

their incentives to invest.[95] Furthermore, the EU focuses on obligations on the dominant firms while US courts have often considered this a form of forced sharing.[96] In addition to these divergences, there is a fundamental difference in the ways in which competition law is regulated between these two jurisdictions.[97] US competition authorities have been criticized for holding significantly less 'overt power' than other regulators.[98] By contrast the EU Commission is increasingly considered to be 'pushing the envelope' in competition regulation.[99]

These differences are evident when the divergent outcomes of EU and US investigations into the same conduct are considered. For example, contrasting the EU's finding (and USD 2.3 billion fine) against Google for manipulating search results in its online search services,[100] against the decision of the US Federal Trade Commission's finding of 'no bias' in Google search results is a clear example of the differing approaches to abuse of dominance cases worldwide.[101] Cases such as *Intel,*[102] *Adsense*[103] and *Microsoft*[104] provide further examples of this difference. In *Microsoft*, the rift between the EU's view of exclusionary conduct can be contrasted with the US view of EU action as chilling its firms' incentives to innovate.[105]

Although there are growing areas of unity between regulators on some key issues (no doubt bolstered by recent antitrust appointments and announcements made by the Biden administration), for example, the need to address data use by multinational platforms,[106] there remains disagreement on how, why and by whom action should be taken. Despite seemingly broad legislative consensus on the need to address certain issues, these conflicts highlight a simple reality in promoting

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95 Geradin, *supra* n. 2.

96 Eleanor M. Fox, *Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.–Europe Divide*, 98 Neb. L. Rev. 102 (2019).

97 For example, *ibid*.; Bradford, *supra* n. 83.

98 Sweeney, *supra* n. 22, at 44.

99 Ryngaert, *supra* n. 33, at 67.

100 *Google Search (Shopping)* [Case 4444] Commission Decision (2017) OJ C.

101 USFTC, *In the Matter of Google Inc., Statement of FTC Regarding Google's Search Practices*, FTC File No. 111-0163 (2013).

102 Case T-286/09 *Intel Corporation v. Commission* [2014] OJ C245/8.

103 European Commission, *Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising*, Press Release IP/19/1770 (20 Mar. 2019), http://europa.eu/rapid/press-release_IP-19-1770_en.htm (accessed 10 Dec. 2019).

104 *Microsoft Corp. v. Commission of the European Communities* (Case T-201/04) Commission Decision COMP/C-3/37.792 [2004] OJ L 32.

105 Fox, *supra* n. 90; *ibid*.

106 For example, the US FTA recently ordered large tech players to explain their data use (including Amazon and Facebook) and the Biden administration has publicly called for 'new tech rules' while the EU considers new proposals on digital services in the Digital Services Act and the Digital Markets Act. For example, https://www.washingtonpost.com/politics/2021/01/18/biden-antitrust-big-tech/ (accessed 20 Jan. 2021), https://www.economist.com/business/2020/12/15/the-eu-unveils-its-plan-to-rein-in-big-tech (accessed 6 Feb. 2021).

convergence as a jurisdictional panacea; if the largest players cannot agree, conflicts of jurisdiction will persist.

3.6 Soft convergence

In the face of this lack of consensus on substantive global competition law convergence, alternate methods for achieving competition law policy goals have been examined. Relevantly, a large focus of the international competition law community has become communication and cooperation, through networks such as the International Competition Network (ICN), Organization for Economic Co-operation and Development (OECD) and The United Nations Conference on Trade and Development (UNCTAD).[107] Notably, UNCTAD has a specific mandate as the 'focal point' of competition and consumer protection issues. Its purpose differs from that of the ICN in that it specifically aims to contribute to poverty reduction and the achievement of the Sustainable Development Goals, by improving markets' functioning through strengthened competition and consumer protection.[108] As part of this, UNCTAD provides technical assistance to developing nations as well as providing a forum for intergovernmental deliberations, both of which may contribute to a measure of 'soft convergence' in the international legislative regimes.

Most relevantly, the ICN exists as the largest unifying[109] forum for international competition law cooperation. It operates as a platform for discussion of practical competition policy enforcement issues and encouraging procedural convergence. The ICN has been successful in developing best practice standards and encouraging their uptake.[110] For example, the development and promotion of ICN best practices for cartel leniency programs have led to legislative change in Australia, Japan and Brazil.[111] Likewise, ICN merger control recommendations have been adopted by over half of the ICN's member countries.[112] Despite the success[113] of these institutions in bringing about these changes, they remain instruments best characterized as instruments of 'soft convergence'. Although they assist significantly in the development of competition law policy and regulation they offer no concrete mechanism for preventing or resolving jurisdictional disputes should cooperation fail.

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107 The United Nations General Assembly entrusted UNCTAD to be the focal point within the UN on competition and consumer protection issues, as contained in General Assembly resolutions 35/63 of 22 Apr. 1980 for competition and 70/186 of 22 Dec. 2015 for consumer protection.

108 General Assembly resolutions 35/63 of 22 Apr. 1980 for competition and 70/186 of 22 Dec. 2015.

109 Geradin, *supra* n. 2, at 41.

110 *Ibid*.

111 Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 115 (2007).

112 Geradin, *supra* n. 2, at 43.

113 Fox, *supra* n. 30, at 274.

In summary, the jurisdictional challenges of legislating over online and international abuse of dominance cases remain unaddressed by CIL, substantive convergence or international cooperation. Perhaps in part due to the 'inherent self-interest' of nations, or as a by-product of regulatory and legal diversity arising from competition policies philosophical and institutional contexts, some nations will remain unable to legislate over competition law wrongs affecting their economies, while in other cases firms may fall victim to overregulation and legal uncertainty. In light of this, it becomes increasingly important that alternative, creative solutions to jurisdictional issues be explored.

Any such solution to this issue should aim to pre-emptively address jurisdictional conflict and provide more concrete processes for resolving disputes as they arise. Given the current issues attending substantive convergence of competition regimes, it must respect state sovereignty, particularly judicial and legislative freedom, and be non-prescriptive in relation to outcome. Furthermore, for any proposed solution to be legitimate there must be clear recourse for affected parties to challenge decisions. While CIL norms and convergence may not rise to this challenge, the EU system may provide a unique insight into new mechanisms to ameliorate jurisdictional challenges in abuse of dominance cases.

4 PART 3: THE EU APPROACH

4.1 WHY LOOK TO THE EU?

One regulatory system providing a source of creative solutions to some of these issues is the competition law enforcement of the EU. The EU competition law system is a unique governance system[114] in which EU competition law is applied by both the EU Commission and the EU Member States. In doing so, Member States employ their own competition law enforcement structures[115] with varying levels of judicial oversight and review.[116] Member States are free to apply their domestic competition law in circumstances where the impugned conduct does not have an effect on trade between Member States.[117] In other cases the Member States administer EU law through their domestic enforcement and judicial structures. Member State courts are sensitive to protection of their judicial independence and their polity appear highly

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114 Katalin J. Cseres, *The Implementation of the ECN+ Directive in Hungary and Lessons Beyond*, 12 YARS 55, 60, 59 (2019).

115 Ioannis Lianos & Arianna Andreangeli, *The European Union: The Competition Law System and the Union's Norms*, in *The Design of Competition Law Institutions: Global Norms, Local Choices* 427 (Eleanor M. Fox & Michael J. Trebilcock eds, OUP 2013).

116 *Ibid.*, at 428.

117 European Union, *Consolidated Version of the Treaty on the Functioning of the European Union* (13 Dec. 2007), 2008/C 115/01, 101,102.

sensitive to actual (or perceived) impingement upon national sovereignty. The resulting regulatory arrangements rely heavily on subsidiarity, mutual recognition, and a duty of sincere cooperation, in order to manage the mixture of EU law and national procedural laws.[118] Given the diverse interests and factors at play, it is perhaps unsurprising that this 'network governance'[119] system initially struggled with issues of overlapping regulatory claims and procedural inconsistency.

The Regulation 1/2003,[120] Notice on Cooperation within the Network of Competition Authorities[121] (the Network Notice) and subsequently the European Competition Network (ECN) + Directive[122] were introduced to address some of these issues. They modernized the rules regarding enforcement of EU competition law by the EU Commission, but to a large degree left national procedures and institutional designs[123] untouched (noting the impact of the ECN+Directive). In fact, Member State laws were largely unchanged, subject to general principles of EU law.[124] The success of this system has been dependent on effective coordination between the centrifugal pulls from Member States towards their own laws.[125] Although issues of divergent application and interpretation remain, the EU competition law framework has been largely successful in 'reconciling the requirements of substantive coherence with the existing procedural diversity'[126] amongst the Member States. It is against this background that some practical instruments may be explored, and potentially applied to the international jurisdictional context.

4.2 Applicability to the international context

This EU competition law system relies on a mix of the EU Treaties, regulations, soft law and overarching, unifying EU law principles.[127] In the absence of an international legislative appetite for substantive convergence, the international community

118 Joint Statement of the Council and the Commission, on the Functioning of the Network of Competition Authorities 15435/02 ADD 1, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (accessed 15 Sept. 2019).

119 Firat Cengiz, *Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach*, 4(54) JCMS 826 (2016).

120 Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L 1, 4 Jan. 2003.

121 Commission Notice 2004/C of 27 Mar. 2004 on cooperation within the Network of Competition Authorities [2004] OJ C 101/43.

122 Directive (EU) No 2019/1 of the European Parliament and of the Council of 11 Dec. 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 (ECN+ Directive).

123 Cseres, *supra* n. 3, at 60.

124 *Ibid*., at 59.

125 *Ibid*.

126 Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003 SEC (2009) 574 final, 29 Apr. 2009, para. 200.

127 Fox, *supra* n. 23.

increasingly relies on a similar mix[128] of measures.[129] This international environment may be conducive to a 'reconceptualization of jurisdiction',[130] shifting away from territoriality whilst retaining the centrality of state sovereignty.[131] As such, the EU's unique system provides an interesting source of administrative and 'soft law'[132] mechanisms which may facilitate structured, international cooperation on jurisdictional issues.

However, the international competition system differs from the EU system in a number of ways. Most notably, unlike the EU, within the international system there is a lack of competition *acquis*, no direct effect[133] of transnational agreements and no overriding (arguably) democratically legitimate governing body. Furthermore, the EU competition regime and the mechanisms outlined in the Regulation 1/2003[134] the Network Notice[135] and ECN + Directive[136] are unique. They are informed by and subject to underlying obligations to the EU Internal Market and applied in the context of Member State subsidiarity to EU rules and regulations, all within the unique framework of the EU institutions. The EU competition regime has always been a core element of the broader EU legal regime, and as such firmly embedded within the EU legal and policy context.[137]

However, the competition law regulatory mechanisms and structures that the EU institutions and Member States have developed, even if very much tied to the broader EU legal setting, provide inspiration for the development of some practical solutions to international issues of jurisdiction. Even though the application of EU competition law within Member States is not 'extraterritorial', there are important parallels between the EU's efforts to coordinate the enforcement of competition law between Member States while still respecting national sovereignty and subsidiarity, and the international community's struggle to regulate markets while respecting national sovereignty, laws and procedures. The differences between the EU and international contexts are not fatal to an analysis of EU mechanisms in an international setting. Rather, it simply necessitates consideration of how any lessons taken from the EU experience could be implemented, particularly in the absence of an overarching regulatory body and unifying body of competition law.

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128 Sweeney, *supra* n. 29, at 348.
129 *See* e.g., MOU between AUS and NZ, Merger agreement between US and EU, etc.
130 Hannah Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. I. L. 251 (2006).
131 Fox, *supra* n. 23.
132 *Ibid*.; Sweeney, *supra* n. 29; Cengiz, *supra* n. 119.
133 Cengiz, *supra* n. 119.
134 (EC) No 1/2003, *supra* n. 120.
135 Notice 2004/C, *supra* n. 121.
136 ECN+ Directive, *supra* n. 122.
137 For example, Niamh Dunne, *Public Interest and EU Competition Law*, 65(2) Antitrust Bull. (2020).

In this regard, the horizontal structures that exist both within the EU and in the broader international community may provide some assistance. Specifically, there are similarities between the ECN and ICN which are of assistance. The ECN is a creature of EU law and subject to the overarching structure of the EU legal regime, rather than being solely dictated by will of individual Member States. It is influenced by the principles and requirements underwriting EU membership, which govern each Member State's application of EU competition law. However, both the ICN and ECN provide a strong cooperation, communication, and dispute resolution platform (within the ICN), with the ECN mechanisms underpinning the EU approach to comity-like considerations, i.e., the exercise of discretion at the regulator level. Furthermore, both the ICN and ECN have been instrumental in the development of 'best practice' guidelines, recommendations, and capacity building, such as cartel immunity policy,[138] merger assessment and investigative procedures,[139] and have structural and substantive similarities which invite comparison.[140]

4.3 Overview of proposals

Despite the differences between the international and EU contexts, there are still lessons from the EU context which are instructive for addressing international jurisdictional issues. While the EU is a unique system of supranational regulation, and its laws not readily used as a template for international competition law harmonization, it provides inspiration for an administrative process for notifying and resolving jurisdictional disputes. Specifically, a base set of international guidelines for determining the likely prevailing jurisdiction and consideration of non-territorial factors in jurisdictional determinations, supported by 'best practice guidelines' for the application of positive comity-like principles in the case of conflict (both by regulators and courts). In the following paragraphs, this article proposes the development of a 'ground up' system of case allocation (including non-territorial considerations) and horizontal best practice standards for comity. This is supported by a peer review process and considerations of practical implementation and legitimacy. It draws upon the mechanisms and procedures in place in the EU competition context and concludes that, despite the unique context of these within the EU, they provide an interesting basis for creative solutions to jurisdictional issues in international abuse of dominance cases.

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138 ICN, *Guidance on Enhancing Cross Border Leniency Applications*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf, Sokol, *supra* n. 111, at 115 (accessed 12 Sep. 2021).

139 Cseres, *supra* n. 3.

140 Guzman, *supra* n. 57.

4.4 Case allocation

Given the inconsistency of the current application of the Effects Doctrine and comity-like principles,[141] there is benefit to developing a common international framework for examining when conduct is likely to have a sufficient (non-territorial) nexus to the state concerned.[142] Relevantly, the Notice[143] outlines a case allocation system[144] designed to prevent and resolve similar issues, which provides assistance. This case allocation system is supported by a requirement that Member States notify the ECN of all 'potential infringements with a community dimension'.[145]

The EU case allocation system applies to cases where an 'effect on trade' is present (i.e., the internal market is at stake) and a number of EU Member States are competent to act. This case allocation system proposes that authority over (EU) multi-Member State competition issues be taken (in first instance) by the Member State upon which the conduct has '*substantial* and direct'[146] effects, and in whose territory the conduct originates. It also proposes allocation of responsibility to a single authority if this is sufficient to bring the entire infringement to an end,[147] for example, in the case of online conduct. In these cases other authorities, equally competent and well placed to act, abstain from action.[148] If a single regulator is not able to bring the infringement to an end, the Network Notice proposes reallocation or coordinated multi-state action through a 'lead authority'.[149] These notification and allocation processes are underpinned by a 'duty of sincere cooperation'[150] between the EU and Member States.[151]

Similar international guidelines could be developed and implemented through the ICN, based on the 'substantiality' of anticompetitive effect on jurisdictions. These guidelines, enhanced by notification procedures, would assist in preliminary consideration of which nation's prescriptive jurisdiction will prevail. This would follow the EU approach in cases of international jurisdictional clash, balancing state interests at the regulator level in the first

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141 Geradin, *supra* n. 2, at 33.
142 International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* 9 (IBA 2008).
143 Notice 2004/C, *supra* n. 121.
144 *Ibid*., para. 8.
145 *Ibid*., para. 17; Council Regulation (EC) 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (ECMR).
146 Notice 2004/C, *supra* n. 121, para. 8.
147 *Ibid*.
148 *Ibid*., para. 9.
149 *Ibid*., para. 13.
150 Case C-234/89 *Stergios Delimitis v. Henninger Bräu* AG [1991] ECR I-00935, at 47.
151 Claudia Massa, *Sincere Cooperation and Antitrust Enforcement: Insights from the Damages and ECN+ Directives*, 16 ECJ 126, 128 (2020).

instance, as opposed to the US-style judicial application[152] of the comity principle. If such a system was endorsed and implemented through the ICN, with notification and cooperation at its core, it would provide a more concrete and predictable framework for regulators and firms alike. It will provide clarity over the circumstance in which a nation would be 'substantially affected' by a competition wrong. This requires increased international cooperation and coordination, something which is already observable in the regulatory community,[153] and therefore would be well served by the application of something equivalent to the EU duty of sincere cooperation,[154] and setting out clear expectations for cooperation. Such a system would provide the practical scaffolding for considering the allocation of jurisdiction based on non-territorial criteria.

4.5 Non-territorial case allocation considerations

For the above allocation system to be effective, the notion of 'substantiality' of effect and conflict of individual states claims over conduct must be examined. As Sweeney[155] notes, the applicability of purely territorial criteria to complex jurisdictional disputes is impractical. In the competition law context, the proliferation of online businesses and presence of increasingly complex value do not neatly fit with a territory-centric conception of prescriptive jurisdiction.[156] Online conduct in particular presents challenges for jurisdictional definition,[157] in the sense that the internet is not subject to any nation's sole competition law. In this context, application of territorial jurisdictional principles will not suffice.[158] Therefore, any international case allocation system must incorporate non-territorial considerations.

The Network Notice does not deal with the allocation of cases outside the remit of the EU competition regime, nor international conflict of jurisdiction. However, it is alive to certain non-territorial considerations, which can be drawn upon in considering international jurisdictional issues. Acknowledging that territoriality may not align with the country upon which the conduct has the strongest effect, the Network Notice emphasizes that case allocation must account for the ability of the nation to bring that contravention to an end.[159] In the context of global harms

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152 William S. Dodge, *International Comity in Comparative Perspective*, in *The Oxford Handbook of Comparative Foreign Relations Law* 9 (Curitis A. Bradley ed., OUP 2019).
153 Fox, *supra* n. 23; Sweeney, *supra* n. 29, at 351.
154 *Delimitis*, *supra* n. 150.
155 Sweeney, *supra* n. 29, at 349.
156 Themelis, *supra* n. 62, at 339.
157 Ryngaert, *supra* n. 4, at 10.
158 *Ibid*.
159 Notice 2004/C, *supra* n. 121, para. 8.

this is an important qualifier. It implicitly hits upon the truth of international competition law, that it is no longer a 'two player game',[160] and therefore traditional notions of territorial jurisdiction are ill-equipped to meet its challenges.

In addressing this issue on the international stage, some academics[161] support a move away from pure territoriality as the arbiter of jurisdictional disputes. For example, Petros suggests that the nation where 'the effects are the largest' should have jurisdiction, with other authorities only intervening if the primary state has not or will not act.[162] In a similar vein, the EU has been effective[163] in using economic thresholds as one means to counterbalance pure territoriality and determine which competition law regime, EU or national, governs certain conduct. For example, the EU Merger Regulation[164] contains economic thresholds to determine if conduct has a 'community dimension'[165] or if it is purely domestic. Similarly, the Non-Appreciably Affecting Trade Rule[166] presumes a certain volume of turnover in any given nation indicates that the nation is 'concerned' with the competition contravention in question.

In the international context, such thresholds can be adapted to supplement territorial considerations in circumstances where the conduct is truly multinational or wholly online. For example, when assessing wholly online businesses the volume of affected consumers[167] or value of economic harm may be used as a proxy for the 'substantiality' of effects on that nation, rather than territorial or geographic market dimensions. In the context of allocating a 'lead authority' to investigate multinational conduct, in the international context it would be necessary to oblige the 'lead authority' to meaningfully account for the interests of all affected nations. On this, Fox[168] suggests that in these cases the nation with the most effected consumers may host a forum where other affected countries will be heard. This necessitates the balancing of competing national interests, by a regulators or national judiciary.[169] In this regard the development of 'best practice' comity principles will be of use (discussed further below).

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160 Fox, *supra* n. 7, at 2.
161 Mavroidis & Neven, *supra* n. 46; Fox, *supra* n. 30; Fox, *supra* n. 23; Sweeney, *supra* n. 29.
162 Mavroidis & Neven, *supra* n. 46.
163 Fox, *supra* n. 23.
164 ECMR, *supra* n. 145.
165 Lianos & Andreangeli, *supra* n. 115.
166 Commission Notice 2004/C of 24 Apr. 2004 on Guidelines on the effect on trade concept contained in Arts 81 and 82 of the Treaty [2004] OJ C 101/07.
167 Eleanor Fox, *Modernization of Effects Jurisdiction: From Hands-Off to Hands-Linked*, 42 J. Int'l L. & Pol. 159 (2009).
168 *See* Fox, *supra* n. 30; Fox, *supra* n. 7.
169 Fox, *supra* n. 23, at 17.

4.6 The global competition commons

Additional alternatives to territorial jurisdiction have been proposed by some scholars.[170] For example, Ryngaert[171] draws on the international model for prosecuting human rights abuses[172] in advocating for third party action in cases of asserting non-territorial jurisdiction. Such a solution has underpinnings of a 'universal welfare'[173] approach to jurisdiction similar to Fox's 'global competition commons'.[174] This theory proposes that given the multiplayer reality[175] of international competition law, the traditional focus on sovereigns and territorial jurisdiction should make way for the 'supra-national concept of the global commons of competition'.[176] It acknowledges the international nature of many competition law breaches and the disparity in regulatory strength between global regulators, and argues that territoriality should yield to considerations in the best interests of the international community.

In this context, action should be taken by the nation best equipped to bring the particular competition law contravention to an end, with less able[177] nations able to 'free ride',[178] to the net benefit of the international community. This solution is appealing; however, it raises the question of how the 'best interests' of the international community will be decided. Perhaps a wealth maximization approach would be one which would most favour developed nations. Conversely international 'best interests' premised on social goals such as alleviating poverty[179] or enhancing food security[180] would assist developing nations, to the economic detriment of developed nations. It is probable that a 'best interest' approach will result in one nation's welfare increasing, to the detriment of another. Although undoubtedly food security should take precedence over welfare maximization of a developed nation, this may be an issue which proves politically and diplomatically thorny. Any such system may therefore require mitigation, for example, through a TRIPS-like scheme of payment transfers[181]; however, at this stage it seems almost unworkably nebulous.

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170 For example, Ryngaert, *supra* n. 33; Fox, *supra* n. 167.

171 Cedric Ryngaert, *Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle*, Criminal Law Forum 153 (2008).

172 *Ibid*.

173 Fox, *supra* n. 30.

174 Fox, *supra* n. 7.

175 *Ibid*., at 1.

176 *Ibid*., at 2.

177 Hazel, *supra* n. 63.

178 Bruno Zanettin, *Cooperation Between Antitrust Agencies at the International Level* 202 (PHD Thesis University of Oxford 2002).

179 Fox, *supra* n. 65.

180 United Nations Special Rapporteur on the Right to Food (Briefing Note No. 3 of 2010) www.ohchr.org/Documents/Issues/Food/BN3_SRRTF_Competition_ENGLISH.pdf (accessed Feb. 2020).

181 Frederick M. Abbott, *The WTO TRIPs Agreement and Global Economic Development*, 72 CKL (1996); Fox, *supra* n. 7.

Although it may not be possible (yet) to establish a 'global commons'[182] of competition welfare, an administrative 'middle ground' may allow nations to assist their less able counterparts in dealing with competition law problems, including abuses of dominance. Prior to the formation of the EU, many European nations were not obliged to restrict anticompetitive conduct which only affected foreign markets.[183] With the introduction of the common market they became obliged to limit such anticompetitive practices, even if they were beneficial to the home state. The Network Notice, informed by the EU Internal Market, provides an example of the importance of a more holistic approach to harm, for example, by making provision for Member States to reallocate cases,[184] even where the conduct occurs outside their physical territory. Although something similar may be proposed in the international context, arguments for expanding jurisdiction based on maximizing global welfare have been expressly rejected in jurisdictions such as the US[185] and globally, 'self-interested'[186] national regulatory decisions are not uncommon.[187] Despite this, some scholars[188] remain optimistic that the international community could likewise move towards a 'continental approach' to competition law and an allocation of jurisdiction based on mutual assistance.

Subject to developing specific criteria for implementation, a system of notification and case allocation as outlined above will assist in preventing jurisdictional conflict in the international sphere. It provides a starting point for consideration of competing state interests and the 'substantiality of effects' on each nation involved. Although not constituting a 'universal welfare' approach to jurisdiction allocation, it provides a mechanism whereby nations better placed to address competition wrongs may take on jurisdiction over multinational competition law issues. Should this occur at the regulator level, it would forestall some international disputes through horizontal cooperation and uniformity of standards. In litigated cases, a common regulatory standard will provide a uniform starting point for judicial consideration of jurisdictional clash. If regulators would be able to apply clear, universal threshold criteria to consideration of jurisdictional issues at an early stage, it should ideally reduce protracted and expensive jurisdictional disputes and forestall overregulation. Such an outcome will benefit governments and firms alike.

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182 Fox, *supra* n. 7.
183 Ryngaert, *supra* n. 33.
184 Notice 2004/C, *supra* n. 121, para. 7.
185 Brief of Amicus Curiae, Economists J Stiglitz and PR Orszag in Support of Respondents, *F. Hoffmann-LaRoche v. Empagran S.A.*, 542 U.S. 155 (No 03-724) 2004, at 80 (2004).
186 Guzman, *supra* n. 57, at 993.
187 For example; Japan: Marubeni–Gavilon merger prohibited the merging entities from exploiting 'synergies which may have given them a competitive edge' against domestic suppliers.
188 Fox, *supra* n. 23, at 9.

It is important to note that a system like the one described above only provides a framework for cooperative allocation of jurisdiction. Such a system will not assist in cases where there is a disagreement as to the existence of a contravention or validity of a prescriptive jurisdiction claimed. Looking forward, it is unlikely that differing national approaches to multinational competition contraventions will dissipate, and it is likely that many nations will continue to apply (variations of) the Effects Doctrine to settle jurisdictional clash. Additionally, different national institutions will shape decisions in their own ways and differing legal rules and outcomes[189] are likely to result. Therefore, as Sweeney notes, 'there will always be an important role for comity'[190] in settling international jurisdictional disputes.

4.7 Horizontal best practice standards and 'comity'

As discussed above, current standards of positive comity are nebulous and inconsistent.[191] Therefore, it would be useful for the international community to develop a 'best practice' approach to case allocation, managing jurisdictional clash and applying comity-like principles. This will build understanding of and respect for foreign enforcement needs[192] and provide a clearer framework for applying domestic regulations 'extraterritorially'. Such principles will be particularly important at the regulatory level[193] making horizontal cooperation crucial.

Within the EU, the ECN provides a forum for the development of best practice standards as well as information sharing and collaboration. It is designed to establish practical, skills based collaboration mechanisms between the Member States, despite their diverse institutional and administrative structures.[194] The relationship between Member States within the ECN is one of parallel or horizontal[195] power, based around a set of administrative performance norms.[196] In addition to the principles of equality, respect and solidarity[197] relationships are enhanced by mutual recognition of the diverse Member State legal systems and the standards that they set.[198] The ECN has been successful in developing best practice principles in notifications, immunity application, merger assessment and investigative procedures,[199] for application across the EU.

189 Cseres, *supra* n. 3, at 73.
190 Sweeney, *supra* n. 29, at 383.
191 Mavroidis & Neven, *supra* n. 46.
192 Sweeney, *supra* n. 29, at 383.
193 *Ibid*.
194 Directive 2019/1, *supra* n. 122.
195 Lianos & Andreangeli, *supra* n. 115, at 432.
196 *Ibid*.
197 Council and Commission, *supra* n. 118.
198 *Ibid*.
199 Cseres, *supra* n. 3.

In a similar vein, the international community could implement best practice principles for a comity-like principle, governing jurisdictional disputes over abuse of dominance cases, through the ICN. This may either be used by regulators to determine which cases to pursue, or incorporated into domestic law for application by the domestic judiciary. It is also relevant to the case-allocation system described above, where a lead authority investigates contraventions affecting multiple nations. By acknowledging the diversity of domestic regulation and introducing a set of guiding administrative principles rather than prescriptive convergence, such a system has the potential to create an international environment which is conducive to experimentation and diversity in competition regimes, within a framework that will improve the quality and consistency of jurisdictional conflict resolution. Furthermore, ICN member nations may be amenable to uptake of such principles, given the success of previous ICN best practice standards.[200]

There are some complexities to implementing such a best practice standard. As discussed, states will favour varying levels of regulation depending on their economic interests. It follows that any resolution must take these economic concerns into consideration. It is beyond the scope of this article to explore this in detail; however, any proposals developed through the ICN may be best served if they explicitly make room for submissions on the economic status of the nations concerned.

Despite making room for such considerations, and given the importance of state sovereignty, application of these principles will be best implemented if it is subject to a variation on the 'substantive inconsistency' rule. For example, in the same way that Member State courts are free to apply their own national law and procedure, to the extent it is not inconsistent with that of the EU, nations could likewise undertake to apply best practice comity principles as long as they are not substantively inconsistent with domestic law. This, like other components of this proposal, will require a measure of reviewability in order to ensure its integrity and functionality.

4.8 Review

Both of the above proposals; case allocation and best practice standards for conflict resolution, raise questions of review and implementation, particularly in the absence of an overarching structure such as that of the EU system. Again looking to the EU for guidance, it is noteworthy that having regard to the quality of individual decisions, the EU Directorate-General for Competition has established a series of informal 'peer review' mechanisms in order to ensure its own efficacy.[201] The

[200] Geradin, *supra* n. 2, at 43.

[201] Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution With Flawed Procedures?*, 4 ELRev 817, 823 (2009).

international community should likewise establish a process for review of national application of the relevant best practice standards. This is something that, given similar mechanisms exist in organizations such as the OECD, may be readily accepted by the international community.

Given the importance of state sovereignty, any new review mechanism should likewise be made up of a group of peers, rather than a lead organization or arbiter. Much like review of Member State court decisions by the EU courts, it should be limited to review of the fact of application of the principles, not the conclusion reached. Such peer review is not a foreign concept in the international community and has increased legal consistency in many areas.[202] For example UNCTAD's peer review process[203] is aimed at providing expert review[204] of competition policy and enforcement, with countries the subject of review being provided with recommendations on improvements to competition law. However, this peer review mechanism does not directly apply any best practice standard, but rather a general review of the broad effectiveness of the particular competition law regime under review.

As far as transparency is concerned, the EU Commission has been a leader in publicizing draft guidelines, seeking comment and holding hearings on such documents.[205] Within the ICN, a similar process could be one the international community 'aspires to'[206] in the competition law context, in order to promote horizontal cooperation and adherence to best practice performance norms.

Despite the foundation of cooperation laid by the ICN, in cases of intractable conflict peer review may be insufficient. Some[207] propose the involvement of a body such as the WTO as arbiter in these cases. This may take the form of an obligation to adhere to the established 'best practice' principles, as a requirement of WTO membership. Although this article will not explore this in detail, it is worth noting that the WTO has had some success in similar schemes,[208] which could be revisited in the context of the proposals in this article.

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202 *Ibid*.

203 For example; United Nations Intergovernmental Group of Experts on Competition Law and Policy, Report on seventeenth session (Geneva), 13 July 2018, https://unctad.org/meeting/intergovernmental-group-experts-competition-law-and-policy-seventeenth-session (accessed 8 Sept. 2021).

204 For example; *ibid*., NCTAD Voluntary Peer Reviews on Competition Law and Policy, *Voluntary Peer Review of Competition Law and Policy: Malawi* (28 Apr. 2021), https://unctad.org/topic/competition-and-consumer-protection/voluntary-peer-review-of-competition-law-and-policy (accessed 8 Sept. 2021).

205 Lianos & Andreangeli, *supra* n. 115.

206 *Ibid*., at 436.

207 For example; Guzman, *supra* n. 57; Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience*, 26 Fordham Int'l L.J. 1505 (2002).

208 For example; Marrakesh Agreement Establishing the World Trade Organization, *Annex 1C, Legal Instruments-Results of the Uruguay Round*, 31, 33 I.L.M. 81 (1994), s. 8, Art. 40(3) (anticompetitive licencing practices); Agreement on Trade Related Aspects of Intellectual Property Rights 15 Apr. 1994, s. 8, Art. 40(3).

4.9 Implementation

With or without the benefit of a peer review process, the above proposals are ambitious and would require careful implementation. In this regard they are best served by a two-stage approach to implementation. In the first stage, members of the core 'regional spheres'[209] (UK, EU, US etc.) can commit to case allocation and best practice principles. They would form a 'G20-like' organization (within the ICN), membership of which is contingent upon adherence to the above best practice and case allocation principles. This will (in its second stage) encourage uptake of these principles within these 'spheres' of convergence and, could (if successful) demonstrate the benefits of horizontal cooperation in alleviating jurisdictional clash. In particular the UK, post-Brexit, has shown itself to be keen to establish new bilateral relationships and extend its cooperation programs across a range of sectors.[210] It seems likely that the UK will continue to pursue any opportunity for closer cooperation, including, one assumes, on trade and regulation. Although firms will still be subject to multiple jurisdictions, such proposals should, over time, provide further predictability in practical application of extraterritorial competition law.

Alternatively, the above measures could be initially implemented in less contentious[211] areas of competition law, such as mergers[212] or cartels.[213] Given the significant convergence and cooperation across jurisdictions in these areas, they may provide a less fraught starting point than abuse of dominance. Once such a system is operational in these areas, regulators will be more able to transfer and adapt the skills and systems to other areas.

4.10 Legitimacy

Regardless of how any such mechanisms are implemented, they are subject to considerations of legal and democratic legitimacy. It is important to recognize that although the above measures involve *soft law* instruments they can have decidedly *hard law* effects. The EU has been a 'pioneer'[214] in soft law governance. However, as Cengiz[215] notes, an increasing reliance on network driven soft law governance leaves competition regimes vulnerable to legitimacy problems.[216] Although substantive

209 Discussed above.
210 For example, AU UK, *Free Trade Agreement* (15 June 2021).
211 Fox, *supra* n. 7.
212 Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, *Competition Policy for the Digital Era* (Report European Commission Directorate General for Competition 2019).
213 Fox, *supra* n. 7.
214 Cengiz, *supra* n. 119.
215 *Ibid*., at 670.
216 *Ibid*.

discussion of legitimacy is beyond the scope of this article, the above proposals may raise such issues. As such it is important that any application of the above principles is reviewable.

Although judicial accountability is not strictly prescribed[217] in the ECN+ Directive,[218] effective judicial protection is a key principle of EU law, and accountability is indispensable to ensuring the 'quality of administrative actions and good governance'.[219] The same can be said for any international system of network governance. Particularly given that any decisions taken by the ECN are not subject to judicial review despite their potential impact upon the legal rights of businesses in the implementing nation. Therefore, it is important that nations employing any such best practice guidelines address how the cooperation mechanisms apply with the fundamental requirements of the rule of law, and more specifically the administrative law principles of good governance.[220]

In this vein, some scholars have proposed multi-level control mechanisms,[221] such as an ombudsman, as a means to provide such reviewability and control. Alternatively, governments may translate regulatory best practice standards into national regulation following due political process. This will somewhat increase transparency and enhance consistency across jurisdictions, as regulators will operate from a common base set of principles. Finally, any such system will need to ensure affected firms' reasonable access to overseas forums, not only to challenge substantive claims but also jurisdictional ones. To implement any scheme in the absence of such recourse would be to risk rendering it illegitimate.

Although far from a complete solution, the EU's implementation of case allocation, best practice standards and peer review mechanisms provides the international community with a different approach to addressing jurisdictional issues in international abuse of dominance cases. While subject to considerations of reviewability and legitimacy, these horizontal, administrative measures can be repurposed within the current international framework in order to bring further predictability and clarity to international jurisdictional issues.

5 CONCLUSION

At the core of the issues outlined in this article, and in the solutions proposed, is the fact that while multinational and transnational firms rapidly adapt to an increasingly

217 Article 5 provides minimum requirements for resourcing, independence and accountability for National Competition Authorities.
218 Directive 2019/1, *supra* n. 122.
219 Cseres, *supra* n. 3, at 83.
220 Fox, *supra* n. 11.
221 Katalin J. Cseres, *Parallel Enforcement and Accountability: The Case of EU Competition Law*, University of Gronigen faculty of Law Research Paper No.2017-11(2017).

globalized world, regulators and legislators struggle to keep pace. Firms are able to operate across international boundaries and in online markets with ease, and as a result any competition law breaches committed by these firms also easily traverse these boundaries. However, traditional notions of the supremacy of state sovereignty and territoriality are hampering nations' ability to legislate over these breaches in a similarly transnational manner. Furthermore, the mechanisms which states have developed in order to assert extraterritorial jurisdiction, within the framework of CIL, are beleaguered by inconsistency of application and continue to result in regulatory clash.

Given the failure of substantive convergence and the complexities of the Effects Doctrine in the US and EU, extraterritorial application of competition law is a necessary reality of modern competition regulation. However, the current international mechanisms for establishing and challenging jurisdictional claims are problematic. Although the EU competition law regime cannot be divorced from the broader EU structure and free market principles, its administrative mechanisms can aid the international community. In an adapted form, they would allow the international community to address jurisdictional conflict and provide more concrete processes for preventing and resolving jurisdictional disputes. Specifically, the development of case allocation principles through the ICN and horizontal coordination of best practice standards for comity will allow the international community to coordinate transnational action more effectively and alleviate jurisdictional clash. It will also provide firms a greater level of legal certainty and forestall regulatory arbitrage and forum hopping.

Regardless of the exact mechanisms chosen, the international community must address jurisdictional issues in order to most effectively legislate over abuse of dominance in international markets. The traditional notions of territoriality and the absolute supremacy of state sovereignty must give way to a more flexible, multi-level international governance structure. A failure to act risks leaving domestic competition law 'defanged'[222] and depriving markets of genuine regulation, to the detriment of the international community as a whole.

[222] Fox, *supra* n. 11, at 998.