Assessing Extraterritorial Application of EU Competition Law

LLM Paper

by Yue Xia

Student number: 01600748

Promoter: Jacques H.J. Bourgeois
Acknowledgement

It has been a period of intense learning for me, not only in legal study, but also on a personal level. I would like to reflect on the people who have supported and helped me so much throughout this period.

I would like to express my gratitude to Professor Jacques Bourgeois for the useful comments, remarks and engagement throughout the learning process of this master thesis.

Furthermore, I would like to thank my friend Tom who encouraged me, stood by me and offered me good working environment with continuous support during the whole process. I would also like to thank my parents for granting me this precious opportunity of pursuing my further study.
Content

Introduction...............................................................................................................................................1

Chapter I. Overview of EU Competition Rules ..................................................................................3
1.1 Legal Basis .........................................................................................................................................3
1.2 Guidelines Adopted by the European Commission .................................................................5
1.3 Legal Basis on Fine Calculation......................................................................................................5

Chapter II. Extraterritorial Application of EU Competition Rules ...............................................7
2.1 The ‘Economic Entity Doctrine’ .......................................................................................................7
2.2 Establishment of the ‘Implementation Doctrine’ ..........................................................................9
2.3 ‘Effects Doctrine’ on Merger Control: Gencor case .................................................................11
2.4 The ‘Effects Doctrine’ and Articles 101, 102 TFEU .....................................................................16
2.5 ‘Implementation Doctrine’ or ‘Effects Doctrine’?—Intel case......................................................17

Chapter III. Extraterritorial Application of EU Competition Rules in Recent Cases Regarding to Fine Calculation ......................................................................................................17
3.1 On Internal Sales and External Sales—Guardian case .................................................................18
3.2 On Sales Made Outside the EU—LG Display and InnoLux Cases .............................................21
   a. The Background ..........................................................................................................................21
   b. LG Display case .........................................................................................................................22
   c. InnoLux Case ............................................................................................................................24
3.3 On Sales Within an Economic Entity—LG Electronic case .......................................................29
   a. Background ..............................................................................................................................29
   b. Contested Decision ...................................................................................................................30
   c. Main Issues ...............................................................................................................................30
   d. Findings of the Court ...............................................................................................................31

Chapter IV. Proportionality of EU Competition Fining System .....................................................32
4.1 Objective of Deterrence ..................................................................................................................33
4.2 Proportionality .............................................................................................................................35
4.3 Liability of Parent Companies ......................................................................................................36
4.4 Predictability of the Fining System ..............................................................................................37

Chapter V. Extraterritorial Jurisdiction Under Public International Law ........................................38
5.1 Principles of Jurisdiction ...............................................................................................................38
5.2 Extraterritorial Jurisdiction in Public International Law ................................................. 39
5.3 Extraterritoriality of EU Competition Rules ................................................................. 41
   a. Application on Imports from the Third Countries into the EU ........................................... 42
   b. Application on Export from the EU to the Third Countries .............................................. 42
   c. Application on Global Conduct ....................................................................................... 43
5.4 Potential Risks of Extraterritorial Application of EU Competition Law .................. 43
   a. Power the Investigate and Enforce .................................................................................. 44
   b. Double Jeopardy ............................................................................................................. 46

Chapter VI. Comity and Cooperation .................................................................................... 47

6.1 Principle of Comity ............................................................................................................ 47
6.2 Bilateral and Multilateral Cooperation ............................................................................ 48
   a. EU/US Cooperation Agreements ...................................................................................... 49
   b. Multilateral Cooperation .................................................................................................. 51
      (A) International Competition Network (ICN) ................................................................. 51
      (B) Organization of Economic Cooperation and Development (OECD) .................... 53
      (C) United Nations Conference on Trade and Development (UNCTAD) ............ 54
      (D) World Trade Organization (WTO) ........................................................................... 55

Conclusion ............................................................................................................................. 56

Bibliography .......................................................................................................................... 59
Introduction

Economic globalization makes the trade barriers between countries gradually tear down and international business activities have become an increasingly significant part in the world economy. With these dramatic changes taking place in the world’s economies in such a remarkably short period, domestic markets have been increasingly opened up to foreign trade and investment. Meanwhile, international organizations like the World Trade Organization (WTO) started to play a significant role in promoting international trade. All these changes create great challenges to competition law systems which are still largely governed by national authorities and countries still have their own exclusive jurisdiction on regulating business activities. The main objectives of competition law are maintaining a competitive market economy, promoting the liberalization of markets, enhancing the consumer welfare and therefore ensuring the efficiency of resource allocation. Therefore, it seems difficult to maintain the fair competition within its territory without applying the competition rules extraterritorially.

Extraterritorial application of competition law refers to the situation where national authorities of one state apply domestic competition law on the alleged illegal activities conducted outside the territory of the state by foreigners. However, such application falls outside of the traditional grounds of jurisdiction and create potential risks of being in breach of principles of sovereignty and non-interference. The extraterritorial application is usually based on the observation that the activities has distorted the competition of the market of that state. Moreover, the jurisdictional conflicts often arise in the enforcement of respective competition rules on international business transactions since international business activities always involve transactions in several countries. Both U.S. and EU competition authorities have been conducting investigations on international cartel practices for years. For example, Microsoft has been the subject of competition rules in several jurisdictions including U.S. and EU. In
the field of merger control, the mergers between car producers, platinum manufacturers and other industries which produce anti-trust effects in multiple countries were all investigated by competition authorities in those countries. \(^1\) The main issues are whether a domestic competition authority could apply its competition rules extraterritorially and whether there should be laws to prevent the ‘excessive’ assertion of such extraterritorial jurisdiction.

The extraterritorial application of competition law has also been a heated issue for years and EU competition regime, with the European Commission (the Commission) at the apex of its enforcement structure, has steadily evolved to become one of the most mature regimes in the world. \(^2\) Based on the Articles 101 and 102 TFEU, the Commission has practiced the extraterritorial jurisdiction on many cases over the years. Although these core provisions don’t explicitly indicate their extraterritorial jurisdiction, the enforcement of the Commission had been recognized by the European Courts in different cases though different doctrines. The main three theories are ‘economic entity’ doctrine, the ‘implementation’ doctrine and the ‘effects doctrine’. When considering the anticompetitive effects created by extraterritorial conducts, the European Courts supported the Commission’s view that EU competition rules should be applied strictly and broadly on them in several cases. One of the recent cases is the LG Electronic v. Commission case. \(^3\) In this case, the General Court again recognized the Commission’s decision on extraterritorial jurisdiction over an undertaking established outside the EU for the conducts of its subsidiaries.

On the territorial scope of EU competition rules, another hotly debated aspect is the calculation of fines. Fines are one of the main methods of enforcing the Article 101 and 102 TFEU. Regulation 1/2003 enables the Commission to penalize the infringers

---


\(^2\) Geradin, Damien and Reysen, Marc and Henry, David, Extraterritoriality, Comity and Cooperation in EC Competition Law (July 2008).

by imposing fines to create a deterrent effect. Meanwhile, 2006 Guidelines on the method setting of fines which is adopted from 1998 guidelines demonstrates the fining calculations. Although the aforementioned legal basis makes the commission’s fining process become more transparent, predictable and accountable over the years, the proportionality of the fining still remains controversial.

This article discusses the issues emerge from the extraterritorial application of EU competition rules. Chapter I introduces the legal framework of EU competition rules briefly, then Chapter II demonstrates how extraterritorial jurisdiction in EU competition rules has developed over the cases. Chapter III analyses cases related to the extraterritorial jurisdiction in EU competition rules regarding calculation of fines. The issues of current fining mechanism when determining the fines of international participants will be discussed in Chapter IV from the perspective of proportionality. Chapter V focuses on the extraterritorial jurisdiction under public international law. Chapter VI gives an overview on how the EU engages in the international cooperation in respect of extraterritorial application of EU competition rules. And finally, a conclusion regarding both issues will be provided.

Chapter I. Legal Framework of EU Competition Rules

Before demonstrating how ECJ has dealt with the extraterritorial jurisdiction of EU competition rules issue through several cornerstone cases, it is necessary to have an overview of EU competition rules regime.

1.1 Legal Basis

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by

---

4 COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
5 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)
associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.⁶ Article 101(3) TFEU provides the exceptions where the provision will be declared inapplicable.⁷ The requirements for exemptions are very strict and usually can’t be fulfilled. Article 102 prohibits any abuse by one or more undertakings of a dominant position⁸ within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.⁹ After the major reform on competition procedure, Council Regulation (EC) No 1/2003, the EU competition rules, namely Articles 81 and 82 EC (now Articles 101 and 102 TFEU) are now directly enforced both by the Commission and National Competition Authorities (NCAs) of Member States. Aside from applying these rules, the Commission also has investigative powers to that end (e.g. inspection at business and non-business premises, written requests for information, etc.).¹⁰ Besides, the commission is empowered to fine the undertakings for violation of the EU competition rules. As for the national part, not only NCAs are entitled to enforce the rules, but also National courts may apply these

---

⁶ A concerted practice has been described as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition", see judgment of the European Court of Justice, Case 48/69, Imperial Chemical Industries Limited v. Commission [1972] E.C.R. 619, para. 64.

⁷ Article 101(3) TFEU provides that: "If an anti-competitive agreement or practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the benefit, and which does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question ".

⁸ Dominance has been defined in relation to "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers", see judgment of the European Court of Justice, Case C-27/76, United Brands v. Commission [1978] E.C.R. 207, para. 65. A presumption of dominance arises where an undertaking has a market share of 50%, see judgment of the European Court of Justice, Case C-62/86, AKZO v. Commission [1991] E.C.R. I-3359, para. 60. Additional factors are also taken into account in order to establish dominance especially where an undertaking holds a market share of less than 50%. Such factors include ownership of intellectual property rights (see judgment of the Court of First Instance, Case T-30/89, Hilti v. Commission [1991] E.C.R. II-1439, para. 93) and superior technology (United Brands, above, paras. 82-84).

⁹ Such abuse may, in particular, consist in:
  "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
  (b) limiting production, markets or technical development to the prejudice of consumers;
  (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

¹⁰ http://ec.europa.eu/competition/antitrust/overview_en.html
provisions to protect the individual rights conferred on citizens by the Treaty.\textsuperscript{11}

\textbf{1.2 Guidelines Adopted by the European Commission}

Building on these achievements, the Communication on Ten Years of Antitrust Enforcement identified further areas to create a common competition enforcement area in the EU.\textsuperscript{12} Apart from this, the Commission has also developed a series of policies to ensure that EU competition rules are applied coherently throughout the EU (e.g. actions for damages before national courts and cooperation with NCAs). The Commission released the Guidelines on the effect concept\textsuperscript{13} in which the Commission made interpretation on the concept of the effect under Articles 81 and 82 EC (Articles 101 and 102 TFEU). According to this Guidelines, any direct or indirect, actual or potential influence may be considered as effects.\textsuperscript{14} The Guidelines also make it clear that the EU competition rules may also apply to undertakings located outside the EU territory.\textsuperscript{15}

\textbf{1.3 Legal Basis on Fine Calculation}

Imposition of fines is the main instrument that the Commission uses when dealing with infringement of EU competition rules and fine-setting has been a contentious issue for a long time. Article 103(2) (a) TFEU empowers the Commission to propose rules \textit{“to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102...”}

\begin{itemize}
\item \textsuperscript{11} Ibid.
\item \textsuperscript{12} COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives
\item \textsuperscript{13} Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004/C 101/81
\item \textsuperscript{14} Ibid., para. 36
\item \textsuperscript{15} Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004/C 101/81, Paragraph 100 provides that: “Articles 81 and 82 apply to agreements and practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community. Articles 81 and 82 apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is either implemented inside the Community, or produce effects inside the Community. Articles 81 and 82 may also apply to agreements and practices that cover third countries, provided that they are capable of affecting trade between Member States. The general principle set out in section 2 above according to which the agreement or practice must be capable of having an appreciable influence, direct or indirect, actual or potential, on the pattern of trade between Member States, also applies in the case of agreements and abuses which involve undertakings located in third countries or which relate to imports or exports with third countries.”
\end{itemize}
by making provision for fines and periodic penalty payments”.

To realize the objectives of punishment and deterrence, the Articles 23 and 24 of Regulation 1/2003 provide the Commission powers to enforce the rules and fine undertakings for infringements. It sets out the principles that the fine should be based on the gravity and duration of the infringement and caps the maximum fine at 10% of the overall annual turnover of the undertaking.

Although the commission is not obliged to set out general guidelines, it released the first guidelines on the method of fines in 1998 to make the fining policy more transparent and its actions accountable. However, the amount of fines turned out to be too low for large companies, especially those involved big volumes of sales and repeat offends. Thus, the Commission revised the Guideline in 2006 and provides a clearer guidance to undertakings. Currently, the procedure of fine calculation is set out in the 2006 Fining Guidelines. The fining policy is based on the principles that higher fines will be charged on those who has more economic influence, higher value of sales or longer period of breaches. Firstly, the basic amount of fine is calculated according to the guideline. Then the fine may be reduced in case of leniency application, and agreed settlement, or exceptionally, if the undertaking demonstrates inability to pay.

When determining the basic amount of fines, it is provided in point 13 of the Guidelines that the Commission “will take the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area within the EEA”. When infringement goes beyond the geographic scope of the EEA (e.g. worldwide market-sharing arrangements), point 18 of the

---

16 Article 103(1) (a) TFEU
17 Article 23(2) of COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty provides that:

“...For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.
Where the infringement of an association relates to the activities of its members, the fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association.”
18 Supra note 5.
19 Supra note 5.
20 Supra point 13
Guidelines offers a different way of fine calculation.\textsuperscript{21}

**Chapter II. Extraterritorial Application of EU Competition Rules**

As one of the most active economies in the world, the internal market is strongly influenced by the conducts of undertakings made abroad.\textsuperscript{22} Therefore, the Commission underlined in its annual report that although the competition provisions do not explicitly provide the extraterritorial application, as EU is the major player in and increasingly globalized world economy, competition policy must also adopt a global outlook.\textsuperscript{23} Based on the goals of EU competition rules, those provisions are frequently applied extraterritorially in recent years. Cases have indicated that EU commission has been seeking to punish all types of anticompetitive conducts, regardless of the nationality or the location of incorporation of the undertakings concerned. To justify the extraterritorial application of EU competition rules, the Commission has always been looking at the effects that those agreements and practices have on the EU market. But this criterion was not recognized by the European Courts for a very long period. The courts seem unwilling to adopt the ‘effects doctrine’ which is very similar to the ‘rule of reason’ criteria that the United States uses. Instead, the courts has adopted two other legal theories on the extraterritorial application of EU competition rules, the first one is the ‘economic entity’ doctrine and the second one is the ‘implementation’ doctrine. However, on 1999, the ‘effects doctrine’ was finally endorsed by the Court of First Instance (CFI, now the General Court) unprecedentedly in merger control case.

2.1 The ‘economic entity doctrine’

\textsuperscript{21} Supra point 18
\textsuperscript{22} Daujotas, Rimantas, Extraterritorial Application of Competition Law: Different Angles – Same Conclusion (April 2011).
\textsuperscript{23} The European Commission's 2008 Report on Competition Policy, para 164.
Dyestuffs case is one of the most important cases that applied economic entity doctrine. The main issue in this case is whether the Commission has jurisdiction over non-EU parent companies because of their EU subsidiaries’ infringements. The commission found that several aniline dye manufacturers had fixed prices for dyestuffs sold in the Common Market during the period from 1964 through 1968. The applicants argued that neither the Commission, nor the ECJ, had any jurisdiction. Both the Commission and the Advocate General demonstrated their willingness of adopting the American-style ‘effects doctrine’. Instead, the court claimed the jurisdiction by establishing the ‘economic entity’ theory. In the judgment, the ECJ explained the rationale of considering the subsidiary and its parent company as a single economic entity.

The ECJ found that the applicant was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in EC and in fact used such power. Therefore, the ECJ recognized the Commission’s jurisdiction ratione personae by considering the parent companies and subsidiaries as a single economic entity. In this case, instead of elaborating on the antitrust effect the non-EU parent companies have created, this doctrine is based on nationality principle. The ECJ’s coy stance vis-à-vis the ‘effects doctrine’, however, could be attributed to the fact that Europe’s political elite at that time vociferously criticized the doctrine when employed by the US antitrust authorities. The economic entity doctrine was also used in several other cases after

---

25 See Opinion of Advocate-General Mayras of 2 May 1972 in cases 48, 49 and 50-57/69 [1972] E.C.R. II -665, p. 693-694. According to the ‘effects doctrine’, the US authorities are able to apply the Sherman Act abroad if the activities has created effects within the territory of US. See United States v. Aluminum Co. of America (Alcoa) 148 F.2d 416 (1945);
26 In case C-48/69, Imperial Chemical Industries Limited v. Commission [1972] E.C.R. 619, para 132, the ECJ stated that: stated that: “The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, especially where the subsidiary does not determine its market conduct independently but in all material respects carries out the instructions given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, the prohibitions imposed by Article 85(1) may be considered inapplicable in the relations between the subsidiary and the parent company, with which it then forms one economic unit. In view of the unity of the group thus formed, the activities of the subsidiaries may, in certain circumstances, be imputed to the parent company.”
Dyestuffs such as Continental Can Company case\(^{28}\) and Commercial Solvents case\(^{29}\).

### 2.2 Establishment of the ‘Implementation Doctrine’

The ‘economic entity’ doctrine was suitably applied to similar cases in the following cases after Dyestuffs case, because most undertakings, whose actions outside the Community cause effects within the Community, can somehow be fit within the very flexible bounds of what the ECJ considers as one ‘economic entity’.\(^{30}\) However, as a turning point, the Wood Pulp case\(^{31}\) proved that this doctrine doesn’t apply to all situations and has its inherent limitations because it could not be stretched to all include non-EU infringers.

The Wood Pulp case involved price-fixing collusion of forty-one non-EU (EC) sulfate wood pulp producers with Finnish and U.S trade associations. In 1984, the commission adopted a decision imposing fines on them. Because none of the producers had subsidiaries in EU (EC), so there was no ‘economic entity’ within the EU (EC) territory. The applicants brought an action to the ECJ arguing that the Commission had no jurisdiction over them.

This huge international price-fixing case took the ECJ an unusually long time (almost four years) to reach a judgment which reflects the dilemma that on the one hand, court faced big challenge on justifying the extraterritorial enforcement of EU (EC) competition rule, but on the other hand, it needed a convincing theory to do this.\(^{32}\) In this case, the commission claimed its jurisdiction by stating the conducts created the anti-competition in the common market. And the Advocate General Darmon provided

---


\(^{30}\) Supra note 27.


\(^{32}\) Supra note 29.
a well-elaborated reasoning in his Opinion.\textsuperscript{33} He examined the position of public international law and recognized the distinction between prescriptive and enforcement jurisdiction. In the conclusion, he stated that ‘effects doctrine’ was not against public international law and should be adopted.\textsuperscript{34} However, the court did not explicitly adopt the ‘effects doctrine’, instead, it took another way of reasoning which implicitly demonstrates that the collusion has an anticompetitive effect because it was ‘implemented’ in the EU (EC).\textsuperscript{35} Pursuant to this doctrine, which is based on the territoriality principle, agreements and practices infringe Articles 101 and 101(2) of TFEU notwithstanding their geographic origin and the decisive aspect is whether they are implemented within the EU and trade between Member States is affected.\textsuperscript{36} The ECJ stated in the judgment that the main elements that decide the application of EU (EC) competition rules should not be where the collusion was formed or whether or not the undertakings have subsidiaries in the EU territory. Instead, the decisive factor should be whether such conduct is implemented in the EU. Otherwise, undertakings would easily escape from the restriction of EU (EC) competition rules by not establishing in the EU.\textsuperscript{37}

By taking into account of the influence the undertakings hold in the internal market,

\textsuperscript{34} Supra. In paragraph 57 and 58 of his opinion, he stated that: "... there is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect. Nor does the concept of international comity, in view of its uncertain scope, militate against the criterion either. In the absence of any such prohibitive rule and in the light of widespread State practice, I would therefore propose that in view of its appropriateness to the field of competition, it be adopted as a criterion for the jurisdiction of the Community."
\textsuperscript{35} In paragraph 13 the court states, "those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty." See supra note 31.
\textsuperscript{36} Supra note 2.
\textsuperscript{37} In paragraph 16-18 the court states: "It should be observed that an infringement of Article [81], such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented. The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community. Accordingly the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law". See supra note 31.
the ECJ used a euphemistic way to determine that such influence should be under the supervision of EU competition rules without stating that it is based on the fact that such conduct creates anticompetitive effect in the internal market. After Wood Pulp case, the thresholds of the application of EU competition rules were significantly lowered since the mere fact that the conduct involves goods sold to internal market might meet the criteria. This decision was criticized by the some authors because such expansion of the jurisdiction of EU law might controversially contradict to public international law as “it does not constitute a sufficiently close and relevant link with the regulating State that is compelling enough to justify jurisdiction on its part”.  

38 The dispute that whether ECJ has established ‘effects doctrine’ like the American court did is merely just a semantic argument. What is more important is that this judgment enabled the Commission to broaden the scope of inspection and the decisions were upheld by the ECJ based on this case.

2.3 ‘Effects Doctrine’ on Merger Control: Gencor case39

The ‘effects doctrine’ has been constantly used by the Commission in several decisions and Notices. In Wood Pulp case, the Commission concluded in the decision that the agreements and practices of the undertakings created a substantial, intended and direct effect within EEC,40 and was incompatible with Article 81(1) EC. As mentioned above, Advocate General Darmon also supported the Commission’s reasoning on ‘effects doctrine’.41 Yet the court relied on the implementation of the conduct instead of the effect. However, in merger control cases, the European Courts were more willing to adopt the ‘effects doctrine’. When the conduct is implemented outside EU, as a part of the global market, internal market could be affected by conduct implemented elsewhere.

40 Supra note 31, para. 79.
41 See Opinion of Advocate-General Darmon of 25 May 1988 in joined cases 89, 104, 114, 116, 117 and 125-129/85 [1988] E.C.R. 5214 para.57. He stated that “there is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect”
In 1999, the Court of First Instance (CFI, now the General Court) established the ‘effects doctrine’ to justify the application of EC (EU) competition law in a merger case.

Implats was a South African company operating in the platinum group metal (PGM) sector. It was controlled by Gencor which was another South African company operating in mineral resources and metals industries. LMS was also a South African company controlled by a British company, Lonrho. Lonrho Platinum Division (LPD) was a group of companies incorporated under South African Law which bring together Lonrho’s activities in the PGM sector. LPD was owned 73% by LMS and 27% by Implats. Gencor and Lonrho proposed a concentration in 1995. According to the proposal, Implats would become the sole parent company of LPD. Gencor and Lonrho would hold the joint control of Implats. The concentration proposal was approved by South African Competition Authority but was rejected by the Commission because it considered the concentration was incompatible with the common market. Based on statistical analysis, the Commission concluded that the concentration would have led to dominant duopoly between Amplats and Implats/LPD in the world platinum and rhodium market which would result in the rise of the PGM price and create significant antitrust effect in the common market. Gencor then brought an action seeking for annulment of the decision before the CFI.

Gencor first questioned the jurisdiction of the Commission by saying EU merger control rules didn’t confer jurisdiction to the Commission on the proposed concentration, and such application is incompatible with the public international law. Because the concentration was implemented in South Africa, by applying the

42 Amplats is another main PGM supplier and an associated company of Anglo American Corporation of South Africa Ltd (‘ACC’). ACC acquired a 6% stake in Lonrho, with a right of first refusal over a further 18%. ACC is the main competitor of Gencor and Lonrho in the PGM sector.
43 “In order to conclude that a collective dominant position between Implats/LPD and Amplats would be created as a result of which effective competition would be significantly impeded within the common market (paragraph 219 of the contested decision). Following the concentration, Implats/LPD and Amplats would each hold approximately a 35% share of the world platinum market (a combined market share of approximately 70%) which, following the anticipated exhaustion of Russian stocks in two years, would rise to 40% each (a combined market share of approximately 80%), and each would hold 50% of a combined 89% share of estimated world PGM reserves”. See supra note 31.
implementation doctrine, it was implemented in South Africa instead of the Community. And the concentration was already approved by the South Africa. Moreover, Gencor argued that ‘the Commission cannot claim jurisdiction in respect of a concentration on the basis of future and hypothetical behavior in which undertakings in the relevant market might engage and which might or might not fall within its purview under the Treaty’.

In its judgment, the CFI explained the legal foundation of the jurisdiction and the criteria of ‘effects doctrine’, then examined the whether the Commission has violated the principle of non-interference and the principle of proportionality. The CFI first looked at the economic influence of the two undertakings which has already met the thresholds of world-wide turnover and community-wide laid down in the Regulation

Secondly, the Regulation didn’t preclude its application on the contested concentration. Instead, the 11th recital in the preamble to the Regulation states that “a concentration with a Community dimension exists...where the concentrations are affected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there”. When construing the concept of ‘substantial operation’, the CFI referred to the ‘implementation doctrine’ adopted in Wood Pulp case, saying that the criterion were met since there were sales being carried out in the community and will continue to be carried out. This point answers the doubt raised in respect of the Wood Pulp judgment by Van Gerven: mere selling does equal implementation. Therefore, despite the fact that none of the registered office, mining and production operations are located within the Community, the mere sales already constitute ‘substantial operations’.

In terms of the compatibility with public international law, the court introduced the
criterion for ‘effects doctrine’. The court affirmed that the concentration will not only alter the competitive structure of the PGM market in South Africa but also throughout the world.48 Thus, the competitive structure common market would also be affected. Then the court put forward that if such concentration creates an immediate, substantial and foreseeable effect in the common market, the application of community rules will be justified under public international law.49

Regarding to the immediate effect, the court examined the effect from the perspective of time. The CFI upheld the commission’s opinion that to the time when Russian stocks are exhausted, Amplats and Implats will create a dominant duopoly position. Although the concentration doesn’t lead to immediate abuse of dominant positions, it would have had direct and immediate effect which would create the conditions in which abuses were not only possible but economically rational because of the significant alteration of the structure of the relating market within the Community.50 By using the word ‘direct’, the court emphasized that whether the effect is immediate should be examined in terms of the scale of influence instead of terms of time period.51

As for the substantial effect, given the facts that the concentration would create a dominant duopoly position in the world platinum and rhodium market and that the duopoly undertakings will hold up to 65% of the market share of common market, it can be concluded that the concentration would create substantial effect on the common market. It should be noted that the court rejected Gencor’s argument that the effect is not substantial because the merger affects more in other parts of the world. Therefore, the criteria of substantiality would rely on EU thresholds.

48 Supra note 39, para 89.
49 In paragraph 90 of the judgment, the court states: “Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community”. See supra note 39.
50 Supra note 39, para 94.
With regards to foreseeable effect, the court states that since the results and effects on common market are foreseeable where it would create immediate and substantial effects, the extraterritorial application is therefore justified.

In respect of the principle of non-interference and principle of proportionality, the court made an interesting elaboration. The principle of non-interference requires that where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. And the principle of international comity requires where there is conflict of jurisdiction, the involved authorities shall act in mutual respect and courtesy when exercising their jurisdictions. These two principles are closely linked and were examined together in Wood Pulp case. In that case, the ECJ first narrowed down the scope of principle of non-interference then simply rejected the argument of principle of comity since there’s no objection from the United States. In Gencor case, the CFI used almost the same reasoning to reject the argument of principle of non-interference: “…the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition concerns, without requiring that such an agreement be entered into.”

Interestingly, the decision was criticized because CFI had adopted the ‘effects doctrine’, which was mainly used by U.S. competition authorities and which had never expressly been accepted by the European Courts. Some argued that, in this case, same conclusion would come by adopting the implementation doctrine. The commission has always been taking the view that it can claim jurisdiction on mergers and joint

52 Supra note 31, para 19.
53 Supra note 31, para 20-23.
54 Supra note 39, para 103.
ventures which take place outside the EC or to which non-EC companies are a party, provided that they are likely to have a direct and substantial effect on competition within the common market.\(^{57}\) However, it should be noted that in paragraph 76 of the judgment, the court made it clear that the obligation to notify does not mount to admitting the Commission’s jurisdiction.\(^{58}\) In other words, although the parties have the obligation to notify the Commission when the concentration meets certain thresholds of EU competition rules, the Commission still need to, according to the ‘effects doctrine’, examine whether it comes within its purview. Therefore, it can be concluded that the ‘effects doctrine’ not only provides a more sufficient method of justifying the extraterritorial application of EU competition rules, but also prevents the Commission from breaching the principle of proportionality to some extent.

### 2.4 The ‘Effects Doctrine’ and Articles 101, 102 TFEU

As a striking decision, *Gencor* case established the implications of the ‘effects doctrine’ in merger control, but it remained questionable that whether the extraterritorial application of Articles 101, 102 TFEU is also supported by this doctrine. After 2004, it is now established that Articles 101 and 102 TFEU should also be applied based on ‘effects doctrine’. The commission now is of the view\(^{59}\) that Articles 101 and 102 TFEU apply, irrespective of the location of the undertakings, the conclusion of the agreement or the practice, provided that the agreement or practice produces anticompetitive effects inside the EU.\(^{60}\) Although the effects analysis has been used in the Commission’s practice and supported by Advocate Generals and the General Court, it was only until recently, the Court of Justice applied it on cases concerning

\(^{57}\) Götz Drauz, EEC Merger Control-The First year, in Papers of Antitrust Keynote Speakers-Section on Business Law, 10\(^{th}\) Biennial Conference, Hong Kong, Committee C, Antitrust and Trade Law, October 1991, p.36

\(^{58}\) In para 76 of the judgment, the court stated: “It is necessary first of all to reject the Commission’s argument that, by notifying the concentration agreement for examination and by making clearance a condition precedent to its implementation, the applicant voluntarily submitted to the Commission’s jurisdiction.” See supra note 39.

\(^{59}\) See Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004/C 101/81. Para. 100.

infringement of Articles 101 and 102 TFEU.

2.5 ‘Implementation Doctrine’ or ‘Effects Doctrine’?—Intel case\(^6^1\)

Another recent case concerns jurisdiction issue is Intel case. In this case, the Commission found that Intel paid exclusivity rebates to two computer manufacturers (Acer and Lenovo) which are established in Asia to delay or cancel the marketing products containing their competitor’s products.\(^6^2\) On appeal, Intel challenged the jurisdiction over the transactions by stating that the transactions were made outside the EEA and only a few of the affected computers would be sold in the EEA.\(^6^3\)

The GC first identified two principles that the Commission can use to establish its jurisdictions, namely the ‘implementation doctrine’ and the ‘effects doctrine’. Then the GC underlined that these two are alternative principles, not cumulative, and are both justified under public international law. In the appeal, the GC took the view that the infringement has met the conditions of ‘effects doctrine’ and dismissed the appeal.\(^6^4\)

Currently, Intel has brought the case to the ECJ and it’s still pending.

**Chapter III. Extraterritorial Application of EU Competition Rules in Recent Cases Regarding to Fining Calculation**

Most contentions on the extraterritorial application of EU competition rule arise from the fining calculation issue. It is a hotly debated issue that how does the Commission calculate the fines when dealing with vertically integrated international undertakings and their sales *inter alia* internal sales. One of the typical internal sales is the sales of components between undertakings within the same group for the future incorporation


\(^{62}\) Supra note 47, page 1234.

\(^{63}\) Supra note 61.

\(^{64}\) Supra note 61.
of finished products. Unlike external sales which involve transactions with independent third parties, internal sales might lead to higher fines in the process of calculating fines since some undertakings are active on various levels of the supply chain. When some of those involved undertakings are established outside the EU, questions about extraterritorial application of EU competition rules arise.

The 2006 Guidelines is not clear about the issue of internal sales and leaves uncertainty as to whether internal sales should be calculated during fine setting. This raises certain issues when dealing with international cartels. One of the issues appeared in recent cases is whether internal sales between non-EU undertakings and EU undertakings should be calculated. In practice, the Commission applied different approaches to internal sales since there’s no consolidated practice. Thus, it will be based on case-by-case analysis when deciding whether to include or exclude internal sales in fine calculation. The Point 6 of the Guidelines states that the value of sales and duration of infringement are proxy to reflect the economic situation of the infringement and of the undertakings.

3.1 On Internal Sales and External Sales—Guardian case

In November 2007, the Commission posed variant number of fines on several undertakings in flat-glass sector for price-fixing which consisted infringement of Article 81(1) EC during 20 April 2004 to 22 February 2005. In this case, the Commission didn’t take the internal sales of those vertically integrated undertakings into account. As the only undertaking that is not vertically integrated, Guardian claimed that the decision violated the principle of equal treatment. The appeal to the General

67 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), point 6
Court was dismissed, and then Guardian brought the action to the ECJ. In November 2014, the appeal was upheld by ECJ.

Guardian contested that by not including the internal sales, those vertically integrated undertakings derived an unjustified competitive advantage from both the sale of the goods covered by the cartel and the sales of the final products in which the goods are input. And Guardian was imposed a relatively higher fine compared to other infringers. Guardian argued that external sales and internal sales should be treated the same way and requested a reduction of fine it was imposed upon in order in accordance with principle of equal treatment.

The Advocate General Wathelet pointed out in his Opinion that the Commission’s varying practice in applying the Guidelines, more particularly, of the notion of ‘value of sales’ in its fining policy, oscillating between excluding and including internal sales, runs a risk of being uncertain. Then AG Wathelet supported Guardian by noting that the Commission not only departed from its own guidelines without giving reasons and completely reversed its argument in its former cases.

In the judgment, ECJ first recalled the importance of the principle of equal treatment set out in Articles 20 and 21 of Charter of Fundamental Rights of European Union. Then the court explained the objectives pursued by the scheme of penalties created by Regulation No 1/2003. The fine calculation is an indication of the undertaking’s real economic situation inter alia the size and economic power of the undertaking and the scale of the infringement. Although the Regulation leaves the Commission a discretion, it should limit itself according to its own rules. By referring to Point 13 of the Guidelines which provides the concept of the value of sales and the Team Relocations case, the court stated that the concept should not be understood as

---

70 Case C-580/12 P, Opinion of Advocate General Wathelet in case Guardian Industries and Guardian Europe v. Commission, para 36.
only applying to turnover achieved by the sales of which are already demonstrated as actually affected by the cartel.\textsuperscript{72} Furthermore, such way of calculation would artificially minimize the anti-competition effect of the infringement created by certain undertakings because of their special corporate structures. It would be considered as a reward for being secretive and is contrary to objective of effectively investigating and sanctioning sales that infringed EU competition rules.\textsuperscript{73}

Therefore, the court noted that there should be no distinction drawn between internal sales and external sales of goods relating to the infringement because the amount of sales is best to reflect the economic effect of the infringement. Otherwise, the vertically integrated undertakings would obtain unjustified advantage comparing to those non-vertically integrated undertakings.\textsuperscript{74} It should be noticed that downstream sales of final products in which the goods were incorporated to third parties also benefit from the infringement. If the internal sales are not taken into account, the vertically integrated undertakings can get advantage from two scenarios through horizontal price fixing agreements: either the price increases of the goods will pass onto the final products which result in infringement of EU competition rules, or by not passing on the price increases, the final products receive a cost advantage which also leads to infringement. For that reason, the EU courts have always rejected the plea of excluding internal sales from the turnover calculation by vertically integrated undertakings.

In the end, the court concluded that vertically integrated undertakings and non-vertically integrated undertakings should be treated equally without discrimination. In other words, both internal and external sales should be calculated when determining fines. In addition, the court found that the General Court erred in law and exercised its unlimited jurisdiction by reducing the fine imposed on Guardian by 30 percent.\textsuperscript{75}

\textsuperscript{72} Supra note 68, para 57, citing Case C-444/11 P, Team Relocations NV and Others v. Commission, para 76.
\textsuperscript{73} Supra note 68, para 58.
\textsuperscript{74} Supra note 68, para 59.
\textsuperscript{75} Supra note 68, para 73-80.
Nevertheless, in *Guardian* case, the ECJ only emphasized the importance of principle of equal treatment but still left the discretion to the Commission on when determining the amount of turnovers, whether to take the internal sales into account or not. It’s still up to the Commission to determine the scope of basic amount of sales. How internal sales within international vertically integrated undertaking groups should be treated remained uncertain.

### 3.2 On Sales Made Outside the EU—*LG Display* and *InnoLux* Cases

Soon after the *Guardian* case, in *LG Display* case and *InnoLux* case the ECJ again faced with issues with internal sales under a more complicated background. Both cases concerned the calculation of fines imposed on the undertakings who participated in an international price-fixing cartel of liquid crystal display (LCD) panels.

**a. The Background**

According to the investigation of the Commission, six major international manufacturers of LCD panels, including Innolux, LGD conducted price-fixing practice from 2001 until 2006. Innolux and LG Display (LGD) are Taiwanese and Korean international vertically integrated undertakings respectively. During that period, these undertakings held several multilateral meetings with clearly anti-competitive objective. By fixing the minimum prices, discussing the coordinating the price of LCD panels and exchanging related information, the cartel constituted a single and continuous infringement of EU competition rules. In December 2010, the Commission adopted a decision imposing various amounts of fines on those participants. Based on the Guidelines on the method of setting fines, the Commission identified the direct and indirect sales of the cartelized LCD panels and divided them into three categories.\(^{78}\)

\(^{76}\) Case C-227/14 P, LG Display and LG Display Taiwan v Commission, EU:C:2015:258.


\(^{78}\) European Commission, Decision of 8 December 2010 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, COMP/39.309- LCD Liquid Crystal
1. “direct EEA sales”: sales of cartelized LCD panels to another undertaking within the EEA;
2. “direct EEA sales through transformed products”: sales of cartelized LCD panels within the same company group, which later were incorporated into finished products and then sold to another undertaking within the EEA;
3. “indirect sales”: sales of cartelized LCD panels to another undertaking outside the EEA, which later were incorporated into finished products and then sold within the EEA.

In both cases, the Commission took the view that only the first two categories should be taken into consideration when calculation the basic amount of sales because it was unnecessary to include the third category since the first two were sufficient for the fine calculation to achieve the sufficient level of deterrence.\(^7\) In addition, as to the second category, the Commission only took a proportion of the sales into account to reflect the value of the incorporated cartelized LCD panels. The main concern of LG Display was on the first category, yet InnoLux mainly focused on the second category.

b. **LG Display case**

When dealing with LGD, the Commission took the view that the sales of cartelized LCD panels from LG Display to its parent companies LGE (a company governed by Korean Law) and Philips (a company governed by Netherlands Law) in the EEA should be considered as “direct EEA sales”. Under this circumstance, LGD was fined for 215 million EUR. Hence, LGD lodged an action to General Court in 2011 but was dismissed later which leads to the appeal to ECJ.

LGD argued that such way of calculation was wrong because the sales were not

---

\(^7\) Displays (2010).
\(^8\) Supra note 76, para 21.
affected by the infringement. Moreover, the preferential prices of the sales between LGD and its parent companies were due to internal structure of the undertaking group. Therefore, the sales were not affected by the cartel and did not distort the competition of relevant market. LGD also referred to the Team Relocations case and Guardian case where the Commission excluded the internal sales of the flat glass to support its argument. Nevertheless, the Commission did not consider the LGD and its parent companies as vertically integrated undertaking and thus does not constitute internal sales.

The ECJ first recognized the discretion of determining the amount of fines the Commission has under the Article 23(2) of Regulation 1/2003 and referred to the Guardian case to point out that there are certain limitations. Then the ECJ referred to the same reasoning it used in the Guardian case to illustrate that it would be contrary to objective pursued by point 13 of the Guidelines 2006 if the concept of value of sales were interpreted as only applying to turnover achieved by the sales of which are already demonstrated as actually affected by the cartel. Moreover, the Court reiterated that ignoring the sales to another independent undertaking because the cartel participant has the special structural links with it would give an unjustified advantage to these undertakings. Such sales not only bring profit to the cartel participants but also benefit the undertakings which they have certain structural links with. Furthermore, the sales will entail a distortion of competition affecting the entire relevant market. Thus, the ECJ agreed with the GC that the contested sales should be taken into account according to the objectives set out in EU competition rules and dismissed the appeal.

The LG Display case made some clarification on which kind of sales should be

---

80 Case C-227/14 P - LG Display and LG Display Taiwan v Commission [2015], para 51; Case C-231/14 P - InnoLux v Commission [2015], para 55
82 Case C-227/14 P - LG Display and LG Display Taiwan v Commission [2015], para 60, referring to Case C-580/12 P, Guardian Industries, n 1, at paras 59 and 63.
83 Supra note 76, para 61
84 Supra note 76, para 56-58
taken into consideration when determining fines. Nevertheless, it should be noted that LGD didn’t challenge the founding of the Commission that appellant and its parent companies are not vertically integrated undertakings. What if LGD contested that they are vertically integrated undertakings and should the sales be excluded from the scope of Article 101 TFEU? This situation occurred in InnoLux case and the ECJ made a more significant judgment on scope of extraterritorial jurisdiction under Article 101 TFEU.

c. InnoLux Case

As another participant in the LCD cartels, Innolux was considered as vertically integrated undertaking and the sales of finished products within the EEA were included as the second category of the decision, namely ‘direct EEA sales through transformed products’. Innolux sold some of the cartelized LCD panels to its subsidiaries in Asia, so the internal sales took place outside the EEA. Then transformed products into which the cartelized LCD panels were incorporated were sold to independent third parties in the EEA. This value of sales was taking into account by the Commission and InnoLux was fined of 300 million EUR. The decision was upheld by the General Court. Similarly, InnoLux brought the case to the ECJ.

In its argument, InnoLux first indicates that the sales of finished products were not made on the relevant market. Consequently, such sales could not have anticompetitive effect on the LCD panels market within the EEA and the calculation of them is incompatible with the Guidelines on the method of setting fines. By referring to the Guardian case, InnoLux argued the Court has decided that internal sales and external sales should not be treated differently. The dissimilar methodologies the Commission used to different infringers is unjustified and the methodology it used on Innolux has extended its territorial jurisdiction.

85 Supra note 77, para 58.
In the Opinion of Advocate General, Advocate General Wathelet made a thorough analysis on the competence of the Commission and the territorial scope of EU law. He first recalled his Opinion and the Judgment in Guardian case to demonstrate that to achieve the objective of fines, the calculation of fines must reflect the economic significance of the infringement and the unjustified advantage to vertically integrated undertakings must be avoided. Nevertheless, he noticed that the sales of finished products made by entities in the appellant’s group to independent third parties in the EEA belong to another relevant market. Moreover, unlike the Guardian case where the Commission didn’t take the internal sales of vertically integrated undertakings into account, the Commission used a different methodology in this case notwithstanding that such sales were made completely outside the EEA. Such methodology was simply based on an assumption that the cartel had an impact in the EEA since the finished products were sold to independent third parties within the EEA. Hence, he indicated it is settled in case-law that internal and external sales should be treated in the same way. However, when they were made outside of the EU, they must be excluded.

Regarding to the territorial scope of EU law, Advocate General Wathelet first noted that EU competition rules only apply when the conduct distorted the competition within the internal market. Then he recalled the Wood pulp case that the application of EU competition rules raises no question because it only applies to situations where the conduct related to direct sales of the relevant products within the internal market.

Then he referred to a recent U.S. case, Motorola Mobility v. AU Optronics which has very similar background and raised the question of the extraterritorial application of American antitrust law. The United States Court of Appeal dismissed the appeal

---

88 Opinion of the Advocate General in case C-231/14 P - InnoLux v Commission [2015], para 34.
89 Supra note 31.
90 Motorola Mobility v. AU Optronics (No 14-8003), American company Motorola accused another company for international cartel through selling cartelized LCD panels to subsidiaries of Motorola established outside the United States which then incorporated them into finished products and delivered them to their company in the
by stating that such cartel occurred entirely outside the United States and did not
directly affect the competition on the American market, and the application of Sherman
Act on this case would lead to the risk of enormously increasing the global reach of the
Sherman Act. Similarly, the broad application of EU competition rules on InnoLux
would entail the same risk. It is recognized in the case law that extension of territorial
jurisdiction of a competition authority would entail the risk of concurrent penalties
being imposed on the undertakings under investigation which might be in breach of the
principle *ne bis in idem*. Unless such conduct fulfills the condition of ‘implementation
doctrine’ set out in *Wood pulp* case or ‘effects doctrine’ set out in *Gencor* case, the
application of EU competition law could be unjustified.

Regarding to the ‘implementation doctrine’, as discussed in the chapter of
implementation doctrine, there are several key elements which constitute the
‘implementation’. In *Wood pulp* case, the cartelized products were sold by producers
outside the Community directly to customers in the Community which leads to the
conclusion that such conduct is with the objective of competing in within the common
market and therefore has the effect of restricting the competition of common market. Only when the connection between the cartel and the competition were direct, should the conduct be considered as implemented within the EU. Thus, the starting point of assessing whether the EU competition rules apply, as the Advocate General Wathelet rightly pointed out, is to identify the place where competition relating to the product in question occurs. Firstly, it is undisputed that the relevant markets of finished products were different from the market of LCD panels. In addition, there seems no sufficient explanation being made that sales of finished products have direct link with the EEA. Therefore, in the Advocate General’s view, the sales of finished products didn’t meet the criterion of ‘implementation doctrine’.

---

91 Supra note 39.
92 Supra note 31, para 13.
93 Opinion of the Advocate General in case C-231/14 P - InnoLux v Commission [2015], para 64.
As for the ‘effects doctrine’, this was recognized in the field of merger control since Gencor case and Advocate General was in the view that the application of this test should not be restricted to merger control.\(^94\) Although the ‘effects doctrine’ was not recognized by the ECJ, it was constantly used as a reasoning of the Commission’s decisions, so he still tried to examine the present case under this test. Yet from his view, the Commission failed to demonstrate the ‘immediate, substantial and foreseeable’ effects in the present case. First, point 13 of Guidelines 2006 provided that the Commission will take the sales of goods that directly or indirectly link to the EEA, but base on the definition provided in the footnote of point 13\(^95\), it would be too far-fetched to consider finished products as either directly or indirectly relates to the sales of cartelized LCD panels. The finished products in this case are mainly laptops, PC monitors and LCD televisions which are distinct products compared to LCD panels and cannot be deemed as LCD panels in lower or higher quality. Moreover, the Commission did not provide evidence to demonstrate the effects created by the sales of finished products, instead, it made another category between ‘direct sales’ and ‘indirect sales’ to include the contested sales and reached the conclusion by mere presumption. Advocate General then took the view that the concept of ‘direct EEA sales through transformed products’ was actually a method of artificially changing the location of the transactions into the EEA when they were made in Asia.\(^96\) In conclusion, the Advocate General was alongside with InnoLux and concluded that the Commission has gone too far by taking sales the downstream products into account.

Surprisingly, the ECJ did not concern this case has an extraterritorial issue, nor did it mention the effects tests or the opinion of Advocate General. By recalling the rulings of the Guardian case and LCD Display case, the ECJ held that the Commission has discretion on the calculation of fines which is conferred on by Article 23(2) of

\(^{94}\) Opinion of the Advocate General in case C-231/14 P - InnoLux v Commission [2015], para 51.

\(^{95}\) Footnote of Point 13 of Guidelines on method of setting fines provides that: indirectly refers to the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

\(^{96}\) Opinion of the Advocate General in case C-231/14 P - InnoLux v Commission [2015], para 60.
Regulation 1/2003, but it should be limited under the Regulation and Guidelines on the method of setting fines. On the issue of whether the finished products sold by the vertically integrated undertakings to the independent third parties within the EEA relate to the cartelized LCD panels directly or indirectly, the ECJ took the view that sales of these finished products should be taken into consideration since the Commission has given clear evidence that the price of finished products was affected by the cartelized LCD panels.\(^7\) Therefore, even if the LCD panels and the finished products belong to the upstream market and downstream market respectively, the cartel committed on upstream market may be considered to have had repercussions in the EEA through the sales in the downstream market.\(^8\) Moreover, although the case law\(^9\) has ruled that the concept of the ‘value of sales’ under the point 13 of the Guidelines on the method of setting fines cannot extend to encompassing sales made by the undertaking in question which fall outside of the scope of the infringement, the ECJ held that it is justified to include those sales into account up to the proportion of that value corresponding to the value of the cartelized LCD panels incorporated. With that regard, to best reflect the economic significance of the infringement, all sales that are affected by the infringement must be taken into account, irrespective of through sales of cartelized product or the finished products in which they were incorporated.

Regarding to the jurisdiction issue, the ECJ simply concluded that the ‘implementation doctrine’ was fulfilled because cartel committed by InnoLux has the object and effect of restricting competition within the internal market under the Article 101 TFEU. Meanwhile, the ECJ underlined that the issue of jurisdiction and calculation of the amount of the fine are two separate questions, so where the jurisdiction of EU law is established, the Commission is entitled to determine the value of sales under the EU competition rules and not obliged to consider whether the infringement had already been sanctioned in non-member States.\(^10\)

---

\(^7\) Supra note 77, para 58.
\(^8\) Supra note 77, para 57.
\(^9\) See case Team Relocations para 76, Guardian para 57; LG Display para 53.
\(^10\) Supra note 77, para 75.
As established in *Guardian* case, when determining the value of sales, the Commission may not draw any distinction between internal sales and external sales. However, but under the circumstance like the *InnoLux* case, if a non-EU undertaking sells cartelized products to its vertically integrated undertakings who then incorporate them into finished products and sells them to the EEA purchasers, the sales of these products will be taken into account when calculation fines but up to the value of those cartelized products. In other words, a distinction could be drawn when dealing with the internal sales and external sales outside the EEA if the internal sales eventually will have anticompetitive effects to the internal market.

3.3 On Sales Within an Economic Entity---*LG Electronic* case

In the recent judgment of *LG Electronic* case, the General Court made a clear decision on how parent companies should be liable for their subsidiaries’ infringement.

a. Background

Since 1 July 2001, LGE and Philips, another big CRT producer merged their whole CRT manufacturing business into a joint venture, LG Philips Displays Holding BV (‘LPD Group’). Since then, LGE manufactured computer monitors and television sets containing CRTs by receiving supplies from LPD group and third parties. At first, LGE owned 50% of the shares minus one share of LPD groups and the other half of the shares were held by Philips and its wholly owned subsidiary. From the second quarter of 2004 the shares were owned 50/50 by Philips and LGE Wales (LGE’s wholly owned U.K. subsidiary) respectively.101

In 2007, Base on submission of another CRT manufacturer, Chunghwa Picture

101 Case T-91/13, LG Electronics v Commission [2015].
Tubes Co. Ltd, the Commission investigated the infringement. According to the decision, several CRT manufacturers including LGE and LPD group, held several multilateral meetings with the objective of concerted price-fixing, market sharing and customer allocation, exchange of sensitive commercial information and monitoring of the implementation of collusive agreements.\textsuperscript{102} The duration of cartel was considered between 1 July 2001 and 30 January 2006. In 2012, the commission adopted the decision holding that LGE was not only liable for its own practice but also jointly liable for the practice of LPD group. On 14 February 2013, LGE lodged an action against the Commission seeking partial annulment of the decision.

b. Contested Decision

In 2012, the Commission adopted a decision stating that: Firstly, for the single and continuous infringement in relation to the sector of colour display tubes (‘CDTs’) used in computer monitors, LGE was imposed individually for EUR 116 536 000 and then jointly and severally with Koninklijke Philips Electronics NV (Philips) for EUR 69 048 000; Secondly, for the single and continuous infringement in relation to the sector of colour picture tubes (‘CPTs’) used in colour televisions, LGE was imposed individually for EUR 179 061 000 and then jointly and severally with Philips for EUR 322 892 000.

c. Main Issues

LGE argued in its appeal that the Commission has wrongly included the “direct sales of the finished products within the EEA” without sufficient evidence that the cartelized CRT has affected the price of televisions and computer monitors into which they were incorporated. Meanwhile, LGE contested that the Commission has exceeded its jurisdiction. It also alleged that the Commission has breached the principle of equal treatment by discriminating vertically integrated undertakings. In its seventh plea, LGE

\textsuperscript{102} Supra note 101
claimed that by imputing the liability of LPD’s infringement on Philips and itself, the Commission has artificially increased the limit of the amount of fines.

d. Findings of the Court

The GC first recognized the founding of the Commission that LGE and Philips had exercised decisive influence over the LPD group during the period of infringement. Therefore, LPD group and its parent companies constitute a single economic unit and LGE is liable for the infringement committed by LPD group. Then the GC made an interesting assessment on the seventh plea, namely whether the Commission has breached the principle of equal treatment and of sound administration by imputing the liability on the parent companies instead of current LPD group. LGE alleged that by doing so, the Commission circumvented the limit of 10% laid down in Article 23(2) of Regulation 1/2003. In other words, instead of taking the 10% of LPD group’s total turnover as the limit, the Commission took the 10% of parent companies’ total turnover as the limit. The GC first looked at the purpose of the 10% limit laid down in the Regulation and stated that the objective of setting the limitation is to prevent fines being imposed which it is foreseeable that the undertakings will not be able to pay\textsuperscript{103}, and to ensure that the fines are not excessive or disproportionate. Then the GC considered the purpose of fines, by referring to the Groupe Gascogne case\textsuperscript{104}, the court noted that to achieve sufficient deterrent effect, it is justified to take the size and economic power of the undertaking into consideration, namely the global resources and financial capacity of the infringer. As it was established that the liability is imputed on the parent companies, the total turnover of them would be the best indicator of the financial capacity of the infringer.

On the issue of including the direct EEA sales through finished products in the fine calculation, the GC basically recognized the methodology the Commission adopted by

\textsuperscript{103} Case T-91/13, LG Electronics v Commission, EU:T:2015:609, para 100.
\textsuperscript{104} Case C-58/12 P, Groupe Gascogne v Commission, EU:C:2013:770, para 49-50
relying on the judgment of *Guardian* case and *LG Display* case. To demonstrate the economic significance of the infringement and to avoid unjustified advantage of vertically integrated undertakings, the Commission is entitled to include the sales of finished products. Moreover, the GC took the view that the Commission is not required to prove that the incorporation of cartelized CRTs had an impact on the prices of those finished products because the Commission only took into account the value of cartelized CRTs incorporated in those products.\(^\text{105}\) When examining the jurisdiction issue, the GC referred to the *Wood pulp* case and underlined that the present case has met the condition of ‘implementation doctrine’ since the cartelized products were sold to independent third parties within the EEA, so the Commission has jurisdiction to apply the EU competition rules on the conduct. In its conclusion, the court ruled that the Commission is entitled to do so when the sales are liable to affect the competition on the market of cartelized products even if the market of finished products constitutes a separate market.\(^\text{106}\) The appeal was dismissed by the GC and LGE has brought the appeal to the ECJ which is still in the progress.

**Chapter IV. Proportionality of EU Competition Fining System**

As shortly introduced in Chapter I, imposition of fines is the most powerful instrument of the Commission to tackle anticompetition conducts. In the case of international cartels, cases in Chapter III has showed that, in order to achieve the deterrent effect, the Commission tends to interpret the provisions of Regulation 1/2003 and its own Guidelines broadly. And by doing so, the fines imposed on undertakings usually goes up to the possible highest amount. This wide margin of appreciation of the Commission was also endorsed by the European Courts. However, the methodologies adopted by the Commission reflects several issues of current fining calculation scheme. The expansion

\(^{105}\) Case T-91/13, LG Electronics v Commission, EU:T:2015:609, para 143

\(^{106}\) Ibid. para 150.
of the Commission’s jurisdiction over foreign cartels which have no direct link with the internal market provokes the calls for a convincing reasoning of such assertion. Some authors take the view as Advocate General Wathelte pointed out in *InnoLux* case that the Commission has gone too far when dealing with extraterritorial anticompetition conducts. Disproportionate fines over international cartels would not only undermine the ultimate goals of EU competition rules but also create conflicts in a political sense. In other words, when dealing with international cartels in which activities are usually more complicated than domestic cartels, it is imperative to follow a strict standard of proportionality. Hence, it is necessary to look into the underlying problems of current fining scheme from the aspect of proportionality and ponder the possible solutions.

4.1 Objective of Deterrence

In general, proportionality refers to the legal rule that a state must act through a reasonable means to a permissible end.\(^\text{107}\) In case of EU competition rules, the means would be the fines, and the end is the objective of the competition rules. It is provided in Article 103(2)(a) TFEU that the objective of fines and periodic penalty payments is to ensure compliance with the prohibition set out in EU competition rules. Meanwhile, 2006 Guidelines on method of setting fines clearly stated that deterrence is a legitimate objective of EU competition rules, particularly Regulation 1/2003. This objective is also supported by the European Courts in cases.\(^\text{108}\) In most cases, the European Courts only reviewed the justification of the sanctions imposed by the Commission and the arguments of disproportionality based on different method of calculation in past cases are constantly dismissed. To pursue the goal of EU competition rules, the Commission enjoys a high level of discretion on fine calculation since the Regulation 1/2003 only provides the ceiling on the amount of fines.\(^\text{109}\) In addition, the case law has ruled that

---


\(^{108}\) For example, in *Saint-Gobain Glass France and Others* case, the General Court states that: "deterrence is an objective of the fine and a reference point for the Commission throughout the calculation of the fine".

\(^{109}\) Supra note 4.
to achieve the goal of deterrence, the amount of fine should not just equal to the profits gained through cartel because the fines are not merely intended to compensate the damage incurred but has punitive nature and deterrent effect for future conduct.\textsuperscript{110}

However, the current sanction mechanism of EU competition rules has been questioned by some academics for years. One of the biggest doubts is that whether higher amount of fines will result in stronger deterrence. In order the strengthen the deterrent effect, the Commission has gradually raised up the amount of fines, but frequent recidivism makes the trend of increasing really doubtful.\textsuperscript{111} Some argues that the recidivism results from the fact that the amount of fines is too low to have deterrent effect, but it is infeasible to raise the fines without an end point. Although the current legislation sets a limit at 10% of the undertaking’s annual total turnover, the Commission has adopted different methodologies to enlarge the limit. For example, by considering the cartelist and its parent company as a single economic entity, the 10% limit will be the annual turnover of the whole group, or to take into account more ‘value of sales’ by including the internal sales.

A study shows that the total EU corporate fines had drastically grown from 344 million EUR in the period of 1990-1994 to 9.755 billion EURO in the period of 2005-2009, and the average fines raised up from 2 million EUR to 46 million EUR over the same period.\textsuperscript{112} It should be borne in mind that although such significant increase is attributed to several elements, no evidence has proved that the increase of fines had effectively deterred the infringement. Meanwhile, the increase of fines may be misdirected to other stakeholders, namely the employees, shareholders and consumers etc.\textsuperscript{113} More specifically, employees who didn’t take part in the anticompetitive conducts may bear the burden of financial sanctions through cost reducing scheme

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{111}] Damien Geradin, Christos Malamataris and John Wileur, The EU Competition Law Fining System, Handbook on European Competition Law (Enforcement and Procedure),2013, page 328-361
\item[	extsuperscript{113}] Supra note 111.
\end{enumerate}
\end{footnotesize}
adopted by their employers. Regarding to the shareholders, unlike senior managers, executives or directors, most shareholders don’t have direct influence on the day-to-day management of the undertaking and the behavior or employees. Admittedly, shareholders are unlikely to prevent the cartel conduct since it normally will bring high profits. But in reality, it was their agents, in management and on the board of directors who violated the law or who should have prevented the infringement. In other words, the target of deterrence should be the person who exercised the decisive influence on the infringement. And this is Lastly, the sanctioned undertakings may shift the cost of fines over to the price of products or other compensation methods. It should be recalled that the ultimate goal of competition rule is protecting the interests of consumers. To sum up, the proportionality must be fulfilled when pursuing the goal of deterrence.

4.2 Proportionality

The proportionality principle has been well developed in other fields of EU law, especially in the field of achieving the four ‘free movements’ provided in TFEU. As one of the first landmark cases, the Court established the proportionality principle in Cassis de Dijon case to examine whether the measures adopted by Member State that restrict free movements is proportionate. According to the principle, the measures must fulfill the following conditions: they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. To sum up, the proportionality principle requires some articulable relationship between means and ends, specifically that the means chosen by an administration be suitable or appropriate, and no more restrictive than necessary to achieve a lawful end.

Nevertheless, in respect of calculation of fines, the Commission has been evasive

---

114 Supra note 112.
117 Supra note 105.
in defining the applicable conditions of the proportionality of fines.118 As discussed above, the current EU competition rules set out the goal of deterrence and provide that the amount of fines must reflect the economic significance of the infringement and the cartelists, but there’s no more detailed definition of the proportionality of fining calculation. Meanwhile, this wide range of discretion is also endorsed by European Courts in cases given the fact that the calculation is made on case-by-case basis. Some authors suggested that the general proportionality principle should be used to test out competition fines.119 It can be concluded that taking the duration and gravity of the infringement as proxy of the amount of fines is suitable, but other elements may remain problematic. The turnover of the goods is only a valid and “proportional” proxy when it reflects the economic gain derived from the cartel but in some cases, the effects of cartel may not limit to economic damage but also other results, e.g. accessibility of goods.120 In addition, the adoption of proportionality principle in EU competition rules may also create a policy-oriented effects because when the sanction is perceived as justified and proportionate, the deterrence effect would be strengthened.121

4.3 Liability of Parent Companies

In Akzo Nobel case122, the ECJ laid down the conditions to determine the liability of parent company that the parent companies would be held liable if they’re considered have and exercised decisive influence over their subsidiaries.123 As mentioned above, when parent companies are held liable for infringement of subsidiaries, the 10% turnover cap will base on the annual turnover of parent companies which leads to a significant increase of fines. However, under American antitrust law, parent companies

121 Ibid.
would only be held liable for infringement of their subsidiaries if they directly participated in the conduct or the separateness of parent companies and subsidiaries is apparently a fraudulent structure.\textsuperscript{124}

While the European Courts have expressly rejected the arguments that imputing the liability of subsidiaries’ conduct to parent companies violates the principle of personal liability once they fulfill the conditions, some authors still consider that this approach contradicts the principle of personal liability and may not be proper to achieve deterrence.\textsuperscript{125} Although parent companies can have decisive influence on their subsidiaries, it is impractical for them to involve in decision making of every business strategy and day-to-day management. Parent companies often exert the decisive influence through deciding the strategy and finances but not operational business. Under this circumstance, the main tool at disposal for parent companies to prevent the subsidiaries from infringements is setting up appropriate best practice compliance measures.\textsuperscript{126} Therefore, it should be assumed that the parent companies have fulfilled the duty of supervision if they had delegated the compliance measures sufficiently.\textsuperscript{127} Such factors should be taken into consideration by the Commission when determining the liabilities.

\textbf{4.4 Predictability of the Fining System.}

As can be seen from the foregoing discussion, current EU competition rules are ambiguous on problems like proportionality and parental liability. Some authors had pointed out that this leaves adequate scope for discretion and is for purpose of deterrence, but the lack of predictability on the other hand may hinder the undertakings to comply with the competition rules. Despite the fact that the 2006 Guidelines on

\textsuperscript{124} Supra note 111.
\textsuperscript{125} Supra note 111.
\textsuperscript{127} Ibid.
method of setting fines has created certain amount of transparency and certainty to the
EU competition rules, it still seems insufficiently predictable, in particular, on the 10% turnover ceiling, recidivism and intention of undertakings.\textsuperscript{128} When determining the amount of fines, the Commission also takes into account the effects of the infringement and will make corresponding adjustments on the amount. To enhance the effect of deterrence, the Commission should make sufficient explanation on the calculation of fines in the decisions and clarify the factors it would consider through guidelines in accordance with proportionality principle.

**Chapter V. Extraterritorial Jurisdiction Under Public International Law**

**5.1 Principles of Jurisdiction**

Generally speaking, jurisdiction is exercised in three forms: jurisdiction to legislate (prescriptive jurisdiction), jurisdiction to enforce, and adjudicative (or ‘curial’) jurisdiction.\textsuperscript{129} Prescriptive jurisdiction refers to the powers of a state to regulate activities and persons through legislation. The jurisdiction to enforce relates to the power of a state to enforce or punish noncompliance per laws whether by means of courts or use of executive, administrative, police, or other non-judicial action.\textsuperscript{130} It is well-recognized that under international law, states are independent and possess territorial sovereignty which means authorities of a state may only take actions within another state’s territory when it obtains the express consent of that state.\textsuperscript{131} Therefore, jurisdiction to enforce is generally limited within the territory of the state. The third form consists of application of the legislation by authorities to individual cases.

\textsuperscript{128} Supra note 111.
\textsuperscript{129} Behrens, Peter. The extraterritorial reach of EU competition law revisited: The" effects doctrine" before the ECJ. No. 3/16. Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, 2016.
According to the Article 47 TEU, the European Union has legal personality and therefore is entitled to execute these jurisdictions.

Under public international law, the main grounds of jurisdiction are territorial jurisdiction, personal jurisdiction, protective jurisdiction and universal jurisdiction. The territorial jurisdiction means a state has jurisdiction over all offences committed within its territory.\(^{132}\) The personal jurisdiction confers jurisdiction to the state over its nationals. This principle enables the state to exercise its jurisdiction irrespective of location the offences were committed. Under the protective jurisdiction, a state is able to exercise its jurisdiction over any act made outside its territory if the act has harmful impact on the state. This principle is justified on the ground of protection of the state’s vital interests.\(^{133}\) Lastly, the universal jurisdiction enables a state to exercise its jurisdiction over universally recognized offences which are internationally detrimental.

### 5.2 Extraterritorial Jurisdiction in Public International Law

Aside from these traditional principles of jurisdiction, with the activities increasingly taking on an international basis, more states have found it increasingly necessary to extend their jurisdictions over the allegedly illicit activity. To tackle these activities, the traditional principles have been adopted, and one of them is objective territorial principle.\(^{134}\) Under this principle, a state may exercise its jurisdiction over the activities even only certain elements were carried out in its own territory.\(^{135}\) Moreover, it is also common that states claim their jurisdictions over activities outside its territory committed by non-nationals given the facts that the activities created effects within their territories. Although effects have been used as a ground for exercise the jurisdiction by the EU for a long period, the justifiability and proportionality of such practice is still doubtful since it is based on the ambiguous concept of “effects” which

---

\(^{132}\) Ian Brownlie, Principles of Public International Law 6th edition, p. 299.
\(^{135}\) Supra note 130.
has no clearly fixed definition.

On the jurisdiction issue under public international law, the Permanent Court of International Justice (PCIJ, now replaced by the International Court of Justice) contributed a landmark judgment in *Lotus* case in 1927.\(^\text{136}\) The subject matter of the case concerned the criminal conviction of a French steamer officer made by the Turkish court. The steamer was found responsible for the collision with a Turkish steamer which resulted in the decease of Turkish sailors and passengers. The French government brought the case to PCIJ challenging the jurisdiction of Turkish court. The main argument of the French government is that based on the principle of sovereignty, a state must obtain the consent of another state before it exerts its jurisdiction within the territory of the latter. The PCIJ stated that: “*all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title exercise jurisdiction rests in its sovereignty.*”\(^\text{137}\) Then the court added that this does not mean international law completely prohibits a state to exercise its jurisdiction within its territory over events occurring extraterritorially.\(^\text{138}\)

This decision and the principle established therein have often been challenged in the legal context, but the effects principle developed on this case has become widely accepted. This principle justifies the application of domestic law under the circumstance that the actions taken in foreign territory generate tangible effects domestically.\(^\text{139}\) However, it should be noted that this principle must be assessed on case-by-case basis and the legitimate interests of relevant third countries must be taken into consideration. Hence, under the rule laid down in this case, public international law neither prevent the EU from extending its competition rules to anticompetitive conduct of non-EU undertakings outside its territory nor from applying these rules by way of decisions taken by the Commission or judgment made by the European Courts.

\(^{136}\) *Lotus* case, France v Turkey (1927) PCIJ, Series A, No. 10.
\(^{137}\) Ibid, para 19.
\(^{139}\) Ibid, page 137.
but such practice should be limited by rules of international law, such as prohibition of
abusive practices, principle of non-interference etc. In terms of the principle of non-
interference, this principle restricts a state to exercise its power within the territory of
another state without the consent., but the exercise of jurisdiction does not contradict
this principle since the effects caused make the conduct no longer an exclusively
internal affair of one state. Meanwhile, some authors suggested that the ‘effects
doctrine’ recognized by the General Court in Gencor case is more suitable to establish
the limits, more specifically, the extraterritorial application domestic law can only be
justified when those three thresholds are met.

5.3 Extraterritoriality of EU Competition Rules

In InnoLux case and LGE case, the European Courts seem to construe the
‘implementation doctrine’ very broadly which raises the question that when dealing
with extraterritorial cartels, where is the boundary? It can be concluded from the recent
cases that the both ECJ and GC have taken the view that the Commission has wide
discretion on the determination of calculation of fines and a broad jurisdiction if
cartelized products were sold within the EEA even if they were incorporated into
finished products. Admittedly, as the ECJ rightly pointed out in the InnoLux case, the
issue of jurisdiction and calculation of fines are separate issues, but they are intertwined.
The claim of jurisdiction is the basis of imposing sanctions, and the imposition of fines
derives from the jurisdiction over substantive matters. Although the jurisdiction of the
Commission in the aforementioned cases were recognized by the courts, it seems that
there’s no clear boundary of extraterritorial application of EU competition rules. The
Commission can only sanction the undertakings when it claims jurisdiction over them,
but once the jurisdiction is claimed, the question of appropriate sanction will arise. Case
law has ruled that the Commission is not obliged to take the concurrent penalties made

140 Supra note 129.
141 Supra note 138, page 137.
142 Supra note 138, page 138; As discussed in Chapter 2, the ‘effects doctrine’ requires the effects impute into the
internal market to have ‘immediate, substantial and foreseeable’ effect.
by non-member States when determining the fines by claiming its jurisdiction, but such practice would inevitably cause conflict of sovereignties.

a. Application on Imports from the Third Countries into the EU

In the case of imports from third countries into the EU, case law has ruled that Article 101 TFEU is applicable to the situation where the involved undertakings are established outside the EU as long as the imports have impaired the competition of internal market. The effects could be established in the cases where importing cartelized products into the EU bring cost advantage to the importing undertakings or where the cartel impaired the import of the products through geographic quotas. Therefore, importing state may prohibit such conducts if they significantly affect the internal market. However, the decisions adopted by the Commission on foreign undertakings may cause an issue of the potential concurrent penalties which will be discussed in Section ‘double jeopardy’.

b. Application on Export from the EU to the Third Countries

In regards to the export from the EU to third countries, exports that restrict the trade from EU into third countries are outside the scope of EU competition rules since it only protects competition within the internal market. Nevertheless, EU competition rules may apply to cases where the restriction has repercussions to the internal market. The Commission has exerted its jurisdiction in numerous cases. For instance, the export agreements have the purpose of controlling the price of the products within the internal market through information exchange.\[143\] In addition, EU competition rules also apply to cases where the export agreements are tied to a restriction on re-imports which leads to a distortion to internal market\[144\], or where the EU undertaking abused its dominant position and prevent other EU undertakings from exporting to non-EU undertakings.

\[143\] Supra note 138, page 139; Also see Commission Decision 94/815/EC, OJ 1994 L 343, p. 1 (para 47)—Zement.

\[144\] Supra note 138, page 139; Also see Case C-306/96, Javico/Yves Saint Laurent Parfums, ECLI:EU:C:1998:173, paras 19-26
Similarly, once the effects on the internal market are considered to be immediate, substantial and foreseeable, the Commission is capable of applying the competition rules.

c. Application on Global Conduct

As it can be seen from *Wood pulp* case, some agreements between non-EU undertakings are not specifically targeting the internal market, but the relevant market globally. It should be borne in mind that as a significant component of global market, such agreements can possibly affect the internal market simultaneously. As a result, the EU competition rules are applicable if the economic significance of the undertakings within the EU meet the thresholds and the impairment fulfills the ‘effects doctrine’. Typical agreements are price-fixing or the setting of certain sales quotas for specific markets.145

5.4 Potential Risks of Extraterritorial Application of EU Competition Law

As it can be seen from the cases analyzed in the former chapter, the EU has developed several doctrines to establish its extraterritorial jurisdiction in the Competition law area. Extraterritoriality refers to the situation where a state exercises its jurisdiction outside its territory to non-nationals. Extraterritoriality often creates conflicts. For instance, when two states both exercise their jurisdictions over the same matter, concurrent penalties may be imposed on same subjects. Meanwhile, extraterritoriality would lead to legal uncertainty and conflicts between states. When a serious intervention in another state jurisdiction may occur if a state exercised the enforcement jurisdiction over undertakings established in those state territory.

Under the framework of public international law, a state is prevented from

---

exercising its enforcement jurisdiction over the territory of another sovereign state.\textsuperscript{146} However, the discussed cases have indicated that the Commission has constantly exercised its enforcement jurisdiction. And for sake of economic reasons, the undertakings are likely to follow the decisions to assure the future business practice in the EU. As it is demonstrated in \textit{LCD panels} cases, the Commission considers the imports of finished products in which the cartelized goods were incorporated as part of the infringement even though the sales of cartelized goods were made outside the internal market.

With a view to international law, the practice adopted by the Commission in the \textit{LCD panels} cases and \textit{CRT} case were not entirely consistent with the standard set down therein, in particular, with regard of sales of transformed products. Notwithstanding that the Commission made a distinction of sales to vertically integrated undertakings and third parties, the presumption that vertically integrated undertakings will benefit from the cartels sounds not convincing enough because the cartel might not the only reason of favorable price given to vertically integrated undertakings. Some has pointed out that such sales are not ‘real’ sales on the market therefore could have not distorted the competition. What is more, it is logical to presume that the anticompetitive effects were imposed on the market of third countries since sales were made outside the territory of the EU. Such sales would be likely be investigated and sanctioned by the national competition authorities of foreign states. For instance, the \textit{CRT cartel} was sanctioned by several national competition authorities respectively in recent years which were partly overlapped with the decision the Commission adopted. Consequently, the inconsistency leads to the consideration of the potential risks the EU faces on such practice.

\textbf{a. Power the Investigate and Enforce}

According to the Regulation 1/2003, the Commission is entitled to undertake various investigations. More specifically, the Commission may request the undertakings to provide any necessary information related to the alleged infringement, interview any natural or legal person related to take statements and conduct inspections of the undertakings. But the Regulation does not provide the situation where the investigated undertakings are established outside the territory of the EU. When conducting the investigation of foreign undertakings, relevant principles of international rules should be considered. In such cases, the authorities of the state where the investigated undertakings established must be informed in respect of sovereignty. Meanwhile, the scope of the information requested should be limited to the activities that allegedly had affected the internal market. What is more, the domestic law of the state where the undertakings established should also be respected. For example, the foreign state may restrict the investigation by referring to sovereignty, public interests set out in its domestic law.

Another issue is the how to execute decisions adopted to foreign undertakings. As mentioned above, the application of enforcement jurisdiction in the territory of another state without the latter’s consent is prohibited by public international law. In the case of international cartels, foreign undertakings often possess assets located in the EU, thus the execution of financial sanction usually won’t face problems. However, in the field of merger controls, when the Commission prohibits the merger of two foreign undertakings, the enforcement is considered as executed extraterritorially. For example, in Gencor case, the Commission rejected the merger of two South African undertakings, and this decision is supported by the General Court based on ‘effects doctrine’. As an ex ante measure, the current Merger Control Regulation provides the thresholds of the situation where the undertakings should be subjected to the regulation. Meanwhile,

---

147 CHAPTER V of COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
148 Supra note 138.
Article 24 of the Regulation provides the measures the Commission can take when EU undertakings face difficulties on the concentrations in a third country.

b. Double Jeopardy

As indicated previously, another problem is that extraterritorial application of EU competition rules may result in concurrent penalties. For those undertakings who conduct business at an international level, the cartels or agreements often have the nature that is not just confined to one specific territory. Consequently, they are likely to be investigated and sanctioned by multiple competition authorities. Under these circumstances, the cartelists usually would claim that the principle of *ne bis in idem* should be applied to avoid unreasonably high financial sanctions to be imposed on them. However, such plea has been rejected by the Commission and the EU courts in so far. When applying EU competition rules, the Commission is protecting the competition of the internal market even if it is an international cartel. Meanwhile, the legal interests protected by the Commission and other states are significantly different which means the assessment of the infringement and decision would be significantly divergent.\(^{150}\)

Also, in the Opinion of Advocate General Kokott in *Toshiba* case, she pointed out that: “the EU-law principle of *non bis in idem* certainly does not preclude an international cartel from being prosecuted...This is also indicated by the wording of Article 50 of the Charter of Fundamental Rights, which refers to persons who have already been finally acquitted or convicted ‘within the Union’.”\(^{151}\)

In respect of the possibility of applying Article 50 of the Charter of Fundamental Rights of the European Union,\(^ {152}\) the General Court has made it clear in the *Tokai*
*Carbon* case that the Carter is only intended to apply within the territory of the EU and the Article 50 is limited to cases the first acquittal or conviction was handed down in this territory.\(^\text{153}\) Regarding to the applicable principles of international law, in the aforementioned *InnoLux* case, the ECJ has reaffirmed that neither principle of *ne bis in idem* nor any other principle of law obliged the Commission to take account of proceedings or penalties to which the undertaking has been subject in non-member States by referring to case law.\(^\text{154}\) Thus, the principle of *ne bis in idem* will not be applied to the cases which the undertakings are prosecuted or sanctioned within the territory of non-member States. And neither the Commission nor NCAs of member states are obliged to take into consideration fines imposed by competition authorities of non-member States. Nevertheless, it should be noted that the Commission still has the margin of discretion on whether to take it into account or not. As the examination is made on a case-by-case basis, the decision should be made on grounds of comity, not a strict legal obligation, with the fact that sufficient level of deterrence has been achieved, also considering different sanction available in different regimes.\(^\text{155}\)

Chapter VI. Comity and Cooperation

6.1 Principle of Comity

‘Comity’ refers to the principle that political entities (including states, nations, courts and other public authorities from different jurisdictions) mutually recognize each other’s legislative, executive, and judicial acts.\(^\text{156}\) According to this principle, based on the consideration of international relations, the states should reciprocate the decisions

---

\(^{153}\) Case Tokai Carbon Co. Ltd and Others v Commission, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, ECR [2004] II-1181, para 137


made by each other with deference, mutuality and respect. The underlying jurisprudence of principle of comity is to settle the disputes arising from conflicts of jurisdiction caused by extraterritorial application of domestic law through a courtesy way.

This principle could be distinguished into two types: ‘passive comity’ and ‘positive comity’. The first type is more common and traditional in exercise of judicial jurisdiction where courts of one state are required to restrain their jurisdiction in certain cases considering the important interests of other states. The second one concerns the situation where one state actively requests the other state take necessary measures to protect the interests of the former state. A typical example of the second type is the 1991 EU/US Competition Cooperation Agreement which provides that either party may request the other party to take appropriate measures, under their competition law, against anti-competitive conducts taking place on the territory latter party and affecting important interests of the requesting party. However, the implementation of this principle is based on cooperation between involved parties, which may require lengthy negotiation on balance between the national interests of both parties.

6.2 Bilateral and Multilateral Cooperation

As mentioned above, because of the economic globalization, to keep the global market a playing field, it is imperative for competition authorities dedicated into applying their competition rules beyond the border when it’s necessary. One of the effective solutions to settle the issues arising out of the extraterritorial application of competition rules is through cooperation between states. The EU has been engaging actively in promoting the cooperation with third countries for decades. Some of the cooperation are achieved in form of bilateral agreements dedicated entirely in competition. So far, the EU has

157 Ibid
158 Supra note 22.
159 1991 EU/US Agreement Regarding the Application of Their Competition Laws, Article V.
entered into dedicated agreements with Brazil, Canada, China, India, Japan, Russia, South Africa, Switzerland, U.S. and Bosnia and Herzegovina (interim agreements). The EU also entered into general trade and cooperation agreements (such as free trade agreements, partnership and cooperation agreements, association agreements) with many other countries in which usually contain provisions on competition rules. Meanwhile, cooperation in international organizations is also becoming increasingly active.

a. EU/US Cooperation Agreements

The 1991 EU/US Cooperation Agreement regarding the application of their competition laws is the first cooperation agreement EU entered. This agreement sets out detailed rules for cooperation on various aspects of the enforcement of EU and US competition law under application of principle of positive comity. As mentioned above, Article V of this agreement embodies the notion of positive comity by providing that: “If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities.” Meanwhile, Article VI incorporates the idea of negative comity by requiring both parties to take each other’s important interest into account when enforcing their competition law with the objective of avoiding conflicts in enforcement activities. It also lays down the factors which the parties should take into consideration, such as the relative significance of the conducts to both parties’ territories, the anti-competitive impacts of the conducts on consumers of both parties.

161 The agreement entered into force in 1991, but it was challenged by France in front of the ECJ, and the court found that the Commission had no power the conclude (as distinct from negotiate) agreements with foreign countries. Later, on 10 April 1995, the agreement was rectified by a joint decision of the Council and the Commission. See Case C-327/91, France v Commission [1994] ECR I-3641.
163 Supra note 159.
164 1991 EU/US Agreement Regarding the Application of Their Competition Laws, Article VI.
and the degree of conflict or consistency between the enforcement activities and the other party’s law or articulated economic policies.  

The application of positive comity is further enhanced in the 1998 EU/US Agreement.  

This agreement more clearly sets out the circumstances in which the principle of positive comity can be referred to. Article III provides that: “The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anti-competitive activities in accordance with the Requested Party’s competition laws.” It should be noted that the rules on merger controls are precluded by the agreement according to Article III section 4. Nevertheless, the EU and US has established Best Practices on Cooperation in merger investigations in 2002 and then revised in 2011.  

The EU/US cooperation agreements are considered a significant development in international cooperation since it comprehensively incorporates the principle of positive comity on enforcement of competition laws. However, the disputes are not eliminated by the agreements completely. For example, in Boeing/McDonnell Douglas case, the FTC in the US approved the merger of Boeing and McDonnell Douglas while the Commission requested the FTC to take into account the EU’s important interest in the competition in the market for large civil aircraft based on Article V of 1991 Agreement. Conversely, in GE/Honeywell case, the merger was approved by the FTC but prohibited by the Commission which was later upheld by the General Court. To sum up, irrespective of how sophisticated the cooperation is, when it comes to true conflict, the parties will very likely to disregard comity by claiming significant interests. But the rare cases cannot overshadow the success on cooperation

---

165 Ibid.
167 Ibid, Article III.
168 Available at <http://ec.europa.eu/competition/mergers/legislation/international_cooperation.html>.
the EU and US have accomplished through all these agreements.

b. Multilateral Cooperation

Aside from bilateral cooperation, multinational cooperation also plays an important role in solving the conflicts between competition authorities. Currently, over a hundred countries have adopted competition rules. Thus, to settle the conflicts more efficiently, it is imperative to establish cooperation through multilateral fora. Particularly, when a transnational merger occurs, several related competition authorities will simultaneously launch the investigation from different perspectives.\(^{171}\) To achieve a greater international cooperation, for many years, the EU has been participating actively in international organizations. This section briefly describes some of the main organizations the EU has participated in.

(A) International Competition Network (ICN)

Motivated by the US ICPAC report\(^{172}\) in February 2000, International Competition Network (ICN) was established in October 2001 as an international competition law and policy forum. The ICN provides antitrust agencies from developed and developing countries with a focused network for addressing practical antitrust enforcement and policy issues of common concern.\(^{173}\) The mission of the ICN is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.\(^{174}\) The ICN has five working groups, addressing advocacy, agency effectiveness, cartels, mergers and unilateral conduct. The mandate of those

\(^{171}\) Supra note 1, page 506.


\(^{174}\) Ibid.
working groups including identifying the existing issues of each area and developing recommendations and guidance to members. Meanwhile, the ICN has introduced a curriculum project containing a series of comprehensive curriculum of competition law training materials.

The ICN has been proven as highly effective in harmonizing the international competition policies and providing valuable sources for valuable competition agencies through “soft” ways such as group discussions and annual meetings.\(^{175}\) Although the ICN doesn’t produce concrete cooperation rules, it has become an outstanding platform which provides opportunities for national competition authorities to exchange information and promote consistency of practice. Take the merger working group as an example, in 2015, it released a Practical Guide to International Enforcement Cooperation in Mergers. This document summarized principles which should be respected in the international cooperation and listed several successful cooperative practices between different national competition agencies.\(^{176}\) Other achievements are illustrated in a number of recommendations the ICN has published which can be reflected in legislative changes in several states. By recognizing good practice and sharing experience, the ICN creates valuable guidance to the future cooperation. As a founding member of the ICN, the Commission is a member of the ICN Steering Group and currently co-chair of the Mergers Working Group and of the Cartels working group's Subgroup I in which it takes part in the production of publications and training materials.\(^{177}\) For instance, the Commission had collaborated with the ICN and produced learning module on leniency featuring discussions made by NCAs from around world about all aspect about leniency programme. The Leniency Policy has been well established within the EU and has become an effective toolkit in expediting the investigation on alleged infringements. Thus, this dedication offers significant

---

175 Supra note 47, page 1240.
experience to other members of the ICN.

(B) Organization of Economic Cooperation and Development (OECD)

The OECD has been dedicated in shaping the framework of international cooperation among competition agencies for over 50 years. It published a Recommendation calling for the cooperation of its member states in the enforcement of their national competition laws early in 1967. This Recommendation was later revised in 1995 which calls for the notification, exchange of information, cooperation, consultation and conciliation between member countries in international competition cases.\(^{178}\) In 1998, the OECD Committee of Competition Law and Policy adopted a recommendation concerning effective action against hard core cartels with the purpose of strengthening the cooperation between member countries against cartels.\(^{179}\) In 2006 the OECD published a report on Competition Law and Policy in the European Union as an examination of peer review in which the OECD made a comprehensive overview of the framework of EU competition rules.\(^{180}\) The peer review programme promotes the understanding and cooperation between OECD members.

Currently, the best practice, roundtables, peer reviews, recommendations consist the work of the OECD on promoting and inspiring cooperation. It’s worth noting that aside from promoting cooperation between NCAs of member countries, the OECD also establishes a competition assessment toolkit to help its members to abandon unnecessary restraints on market activities in competition law field. In 2014, the OECD Competition Committee published a report of “challenges of international cooperation in competition law enforcement" which collected empirical evidence of the drastic increase of cross-border cartel cases and necessity of deeper cooperation among NCAs. This statistical study leads to the release of 2014 Recommendation concerning


\(^{179}\) Available at: <http://www.oecd.org/daf/competition/recommendations.htm>.

\(^{180}\) Available at: <http://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm>
international cooperation on competition investigations and proceedings which
substituted the 1995 Recommendation since the global economy has changed
dramatically. The new Recommendation provides several new solutions of cooperation.
For instance, it calls for the adoption of national provisions that allow competition
authorities to exchange confidential information without the prior consent from the
source providers and enhancing of investigative assistance.\textsuperscript{181} In addition, it addresses
issues that have been found in the study such as the restrictive provisions in national
legislation on cooperation between competition authorities and notification mechanism
through new digital technologies.\textsuperscript{182} The Commission actively involves in several
bodies and activities such as OECD Competition Committee, Global Forum on
Competition and OECD Joint Groups including the Joint Group on Trade and
Competition and the Joint Group on Consumers and Competition.

\textbf{(C) United Nations Conference on Trade and Development (UNCTAD)}

In 1980, the United Nation adopted a set of voluntary, non-binding code, “equitable
principles and rules for controlling restrictive business practices” (UNCTAD set).
Except for implementing and following up the code, the UNCTAD is responsible for
maintaining and periodically reviewing the \textit{Model Law on Competition} which is made
as a comprehensively legislative model for countries that intend to introduce or adjust
domestic competition law.\textsuperscript{183} Likewise, the UNCTAD also provides guidelines on
different aspects of competition law and publishes peer review periodically. The main
functions of UNCTAD consist of: 1. Providing a platform of international discussion;
2. Undertaking statistical study and political analysis as materials of discussion; 3.
Offering technical assistance to developing countries.\textsuperscript{184} One of the special features of
the UNCTAD is that it focuses on improving the level of competition protection by

\begin{itemize}
\item \textsuperscript{181} 2014 OECD Recommendation on International Co-operation on Competition Investigations and Proceedings
\item \textsuperscript{182} Ibid.
\item \textsuperscript{184} “Unctad.Org | Mandate and Key Functions”. Available at
\end{itemize}
publishing handbook and providing in-depth assistance to developing countries on legislation of competition law. As one of the main contributors, the Commission engaged actively in reviewing the UNCTAD set and organizing meeting of intergovernmental group of experts.

(D) World Trade Organization (WTO)

As one of the most influential international organizations, the WTO plays an irreplaceable role in ensuring the smooth operation of international trade activities. And the WTO dispute settlement body has achieved great success in solving cross-border trade disputes. Therefore, it seems rational that the WTO law should adopt provisions on competition. The EU is one of the driving forces in advocating the possible multilateral agreement on competition in the WTO since 1990’s. In 1996, a working group on trade and competition was set up for the preparation of the international competition regime. In 2001, “Doha Round” adopted a Declaration containing competition policy. However, considering the disparity of the level of development among member states, the adoption of competition provision was contested by several parties. The opposition resulted in the WTO ministerial meeting at Cancun in 2003 did not reach any agreement regarding to competition negotiations and the progress was suspended after the termination of “Doha Round” in 2004. At the current stage, it is unlikely for WTO to adopt a multinational competition policy in a short term, but the its system of dispute settlement could possibly deal with cases relating to competition law. Compared to the progress made by other international cooperation organizations, it can be concluded that a substantial multinational competition policy is extremely hard to reach due to various reasons, yet the ‘soft law’ will keep playing an important role in this aspect.

186 Supra note 1, page 508.
Conclusion

The foregoing discussion clearly demonstrates that with the business activities becoming increasingly globalized, the activities are no longer be regulated by one state. In order to protect the fair competition of internal market, the European Courts have established a series of legal theories, namely the ‘economic entity doctrine’, ‘implementation doctrine’ and ‘effects doctrine’. But the examination of these doctrines should be based on specific subject matter of each case. In light of recent cases, the Commission has strictly applied the EU competition rules over non-EU undertakings which arouse series of controversy on the extraterritorial application of EU competition rule.

As for the fining calculation process, the Commission will take all sales of infringement-affected products including the finished products they were incorporated into account when determining the value of sales. The Guardian case and LG Display case underlined that both internal sales and sales to entities which have special links to the infringers fall under the scope of point 13 of the Guidelines on method of setting fines. The InnoLux case and LG Electronic case further indicated that sales made by non-EU undertakings to its vertically integrated undertakings will also be considered as part of ‘value of sales’. Even in the case that all undertakings are established outside the EU, the sales of finished products will still be considered as affected the competition of internal market. It is foreseeable that the Commission may face more challenge of dealing with international cartel which in a way eliminates direct link to internal market through structural arrangements. Therefore, it can be concluded that the Commission will interpret the concept of sale broadly with the aim of tackling anti-competitive conducts effectively.

The methodology applied by the Commission also raised the questions on the proportionality of fines. First, increasing the amount of fines does not seem like the
effective enough to achieve the objective of deterrence. The principle of proportionality which had been widely recognized in other areas of EU law should also be applied to competition rules. Moreover, this tendency increases the potential harm toward the interests of other stakeholders, including uninvolved employees, unaware shareholders and customers. Meanwhile, when determining the liability of parent companies, the current method seems insufficient. The article suggests that relevant conducts of parent companies should also be taken into consideration. In addition, the recent cases show that the Commission has adopted extensive approach on the fining calculations. Therefore, certain efforts must be made to enhance the predictability of EU competition rules.

Besides, the current approach used by the Commission also leads up to the discussion about the compatibility of extraterritorial application of EU competition rules under public international law. Traditional jurisdictional theories have become insufficient to the application of competition rules, but the effect based principle can be accepted on extraterritorial application of competition rules. Although the EU has developed several rules to justify the extraterritorial application of EU competition rules in conformity with international law, possible issues like difficulties on investigation and enforcement and double jeopardy.

Lastly, under the circumstance that unilateral exercise of extraterritorial jurisdiction may raise conflicts between states, bilateral and multilateral cooperation have come to play a predominant role in fighting against international anti-competitive conduct. The Commission has established different forms of cooperation with many countries in regard of competition law. The bilateral cooperation has achieved great success in the enforcement of EU competition rules, notwithstanding that the agreements and provisions are concluded in a soft way. In addition, the EU works actively in promoting the cooperation in multinational organizations. Anti-competitive conduct is now increasingly carried out in a global dimension, thus the EU competition rules should be implemented from an international perspective. It can also be envisaged
that international cooperation will be furthermore enhanced with the goal of protecting
competition and consumers in the global market.
Bibliography

Articles:
1. Geradin, Damien and Reysen, Marc and Henry, David, Extraterritoriality, Comity and Cooperation in EC Competition Law (July 2008);
2. Daujotas, Rimantas, Extraterritorial Application of Competition Law: Different Angles – Same Conclusion (April 2011);
18. Rosiak, Przemysław Kamil. "The ne bis in idem principle in proceedings related to anti-competitive agreements in EU competition law." (2012);
Books:
4. Matthias Herdegen, Völkerrecht, 8. Aufl. (München, Beck, 2009);
5. Ian Brownlie, Principles of Public International Law 6th edition;

Cases:
11. Case C-227/14 P, LG Display and LG Display Taiwan v Commission, EU:C:2015:258;
13. Motorola Mobility v. AU Optronics (No 14-8003);
20. France v Turkey (1927) PCIJ, Series A, No. 10;
24. United States v. Aluminum Co. of America (Alcoa) 148 F.2d 416 (1945);
Legislation and Official Documents:
1. COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty;
2. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02);
3. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives;
4. Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004/C 101/81;
5. The European Commission’s 2008 Report on Competition Policy;
8. Regulation (EEC) No 4064/89;
12. Opinion of the Advocate General in case C-231/14 P - InnoLux v Commission [2015];
15. COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation);
16. Opinion of Advocate General Kokott in the case C-17/10 Toshiba Corporation and Others, para. 132;
17. Joined Cases Tokai Carbon Co. Ltd and Others v Commission, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, ECR [2004] II-1181;
18. 1991 EU/US Agreement Regarding the Application of Their Competition Laws;
Websites:
2. https://www.law.cornell.edu/wex/comity;