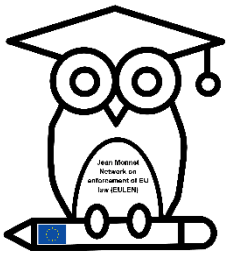

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Intel, iiyama and *Air Cargo*:
Far-Reaching Extraterritorial Application of EU Competition Law

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Abstract

Recently, there has been a flurry of cases expanding the scope of the extraterritorial application of EU competition law. The European Union (EU) courts have provided important clarifications and 'firsts'. In effect, extraterritorial assertions reach further and are better attuned to deal with more complex scenarios of modern commerce, especially supply chains. This note looks, in particular, into *Intel*, *iiyama* and *Air Cargo* cases.

In *Intel* the implementation and qualified effects tests were recognised as alternative ways of asserting jurisdiction. The necessary criteria were met, following analysis of the conduct in question (offshore dealings of Intel with non-EU entities) as a part of an overall strategy, not in isolation, pushing jurisdictional boundaries further. Post-*Intel*, in *iiyama*, in the context of private enforcement and long supply chains, UK's Court of Appeal recognised that EU competition laws apply to offshore global cartels without direct sales of cartel-affected products. In *Air Cargo* the General Court applied EU competition law to an input services cartel in a scenario involving indirect sales, analysing the conduct both in isolation and as a whole.

Keywords:

Extraterritorial Jurisdiction, Extraterritoriality, Woodpulp, Gencor, Intel, iiyama, Air Cargo, Competition Law, Competition Policy

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I. Introduction

Recently, there has been a flurry of cases expanding the scope of the extraterritorial application of EU competition law. The European Union (EU) courts have provided important clarifications and 'firsts'. In effect, extraterritorial assertions reach further and are better attuned to deal with more complex scenarios of modern commerce, especially value chains. This note looks, in particular, into *Intel*, *iiyama* and *Air Cargo* cases.

The *Intel* case received much attention in relation to the use of financial incentives, such as rebates, by a dominant firm and the appropriate allocation of burden of proof in the context of administrative proceedings. On these grounds the original decision of the European Commission of 2009[1] was set aside by the Grand Chamber of the Court of Justice of the European Union (CJEU), in 2017,[2] and ultimately was quashed on remand by the General Court (GC), in January 2022.[3] That may not yet be the end of *Intel's* saga. However, it has somewhat escaped attention that the judgments in *Intel* provide significant expansion of the extraterritorial reach of EU competition law and the clarification of, until now, separate strands of caselaw. Overall, *Intel* places the EU at the forefront of extraterritoriality in competition law globally. It sets an important precedent which is likely to influence the practice of courts and other enforcers.

Intel has already informed further development of the reach of EU law in the context of private actions for damages in the UK—in *iiyama.* The UK's Court of Appeal (CoA) built on the policy space created by the CJEU in *Intel*, possibly expanding EU jurisdiction to cover long supply chains and scenarios up to where there are no direct dealings between cartelists and plaintiffs within or outside the EU.

The GC's judgments in *Air Cargo*, from March 2022, expanded on *Intel* further. It is now clear one can rely on the conduct's effects on a downstream market and that effects directness is not affected by sales taking place outside the EU and the involvement of a third party. Overall, meeting of the qualified test criteria seems easier. For example, the proportion of the relevant cartel-affected inputs in the overall service appears lower. More broadly, the analysis of the conduct 'as a whole'—initiated in *Intel*– continues, and the implementation test seems shelved.

These recent judgments point to an expansive approach with considerable potential of reaching foreign violators in novel factual scenarios. They create scope for tightening the existing regulatory gaps.

II. The *Intel* case

Intel, a US firm, was dominant on the world market for computer chips (market share of 70%), an important input. Its only competitor was another US firm—AMD. Intel devised a strategy to foreclose AMD. It began offering financial incentives to its key customers, downstream entities. The incentives were in the form of exclusivity rebates and payments to breach on the already concluded contracts with AMD and delay use of AMD's chips (naked restrictions). The key customers were non-EU laptop makers and an EU computer distributor.[4]

The Commission found that Intel violated its dominant position. The EU courts were asked to consider application of EU competition law in a fully offshore context, without direct dealings between the alleged culprit (Intel) and entities in the EU.[5] Intel challenged the decision on various grounds. While not raising any such concerns during the proceedings before the Commission, during the written procedure before the GC Intel argued the Commission did not have jurisdiction over five non-EU laptop makers, with the agreements

[1] European Commission Decision of 13 May 2009 Relating to a Proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, COMP/C-3/37.990- Intel (2009).
[2] Case C-413/14 P, Intel v Commission (CJEU judgment).
[3] Case T-286/09 RENV, Intel v Commission.
[4] These were original equipment manufacturers (OEMs): Dell, HP, Acer, NEC, IBM and Lenovo as well as Media-Saturn-Holding, the largest desktop computer distributor in Europe.
[5] For the sake of the ease of reading this text refers to the EU, but the holdings apply to the European Economic Area.

and conduct in question taking place outside the EU.[6] At the hearing, Intel limited its plea to two of them—Acer and Lenovo.[7] When the case reached the CJEU, the argument was narrowed down to Lenovo only.[8]

While the decision did not clarify its jurisdiction basis,[9] before the GC the Commission argued that EU jurisdiction was justified on the basis of both the implementation and qualified effects tests.[10] Both terms were coined by EU courts—in *Woodpulp*[11] and *Gencor*.[12] Without much deliberation the court found that both tests are alternative, not cumulative ways of asserting jurisdiction.[13]

The GC then turned to scrutinise the challenged application of the individual criteria of the qualified effects test, that is: the substantiality, directness and foreseeability of effects. At the onset, the GC clarified there is no need to show any actual effects. Showing of possible, probable effects was sufficient.[14] The incentivisation of laptop makers to delay introduction of products with competing chips met that requirement.[15]

In terms of substantiality, the number of finished products (that is, laptops which—but for Intel's strategy—would have incorporated competing chips) was 'modest', in low thousands. Moreover, it was unclear how many would have actually reached the EU.[16] However, the Commission argued the conduct was part of an overall strategy and a single and continuous infringement and distinguishing separate elements of it was inappropriate.[17] The court accepted this argument, noting that, in general, the EU market need not be more affected than other regions.[18] Specifically, the GC found the conduct in question to be part of a single and continuous infringement and, seen so the threshold was met.[19]

Turning to directness, the GC found that the conduct was intended to and capable of producing immediate effects. The incentivisation had 'a direct effect and not merely a knock-on effect'.[20] Moreover, the fact the incentivisation concerned relationships outside the EU (that is, there was no direct sales by Intel to entities in the EU) did not make the conduct's effects indirect.[21]

In terms of foreseeability, it seems not to have been any issue. The conduct in question was not only foreseeable, but also intended.[22]

These findings, made in relation to dealings between Intel and Acer applied *mutatis mutandis* to Lenovo.[23] In Lenovo's case the GC considered also exclusivity rebates. These were found to have had direct effects. The fact Intel did not sell laptops, but only chips—an input used in them—did not change the effects' nature.[24] The conduct was not only foreseeable, but also intended,[25] and also substantial—due to it forming part of a single and continuous violation.[26]

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[6] Case T-286/09, Intel Corp v Commission ECLI:EU:T:2014:547 (GC judgment), para 224.
[7] Ibid, para 225.
[8] CJEU judgment (n 2), para 31.
[9] GC judgment (n 6), para 249.
[10] Ibid, para 235. The Commission referred to the qualified effects test by calling it the effects doctrine. For broader discussion of past caselaw see Marek Martyniszyn, 'Extraterritoriality in EU Competition Law' in Nuno Cunha Rodrigues (ed), Extraterritoriality of EU Economic Law (Springer, 2021), available at <https://ssrn.com/abstract=3977153>.
[11] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v Commission (Woodpulp), [1988] ECR 5193.
[12] Case T-102/96, Gencor Ltd v Commission, [1999] ECR II-753.
[13] GC judgment (n 6), paras 236 and 244.
[14] Ibid, paras 251-2.
[15] Ibid, paras 254-5.
[16] Ibid, paras 259-260, 286-90.
[17] Ibid, para, 260.
[18] Ibid, para 261.
[19] Ibid, paras 267-72.
[20] Ibid, paras 277-8.
[21] Ibid, para 279.
[22] Ibid, paras 281-2.
[23] Ibid, para 291.
[24] Ibid, para 293.
[25] Ibid, para 294.
[26] Ibid, para 295.

Hence, the GC found extraterritorial jurisdiction over Intel justified on the qualified effects test's basis. Having done so, it also analysed meeting of the implementation test 'for the sake of completeness'.[27] The lack of direct sales by Intel to entities within the EU (that is, to subsidiaries of Acer and Lenovo in the EU) did not mean implementation in the EU was missing.[28] The GC established that granting of a financial incentive by a dominant entity to have the launch of products with competing inputs worldwide, including in the EU, postponed constituted implementation within the EU.[29] For the GC, in this context it was necessary to consider the conduct of customers incentivised by Intel, not just of Intel.[30] When it comes to exclusivity rebates, acting on them by Intel's customers—that is, selling worldwide (hence also in the EU) laptops only with Intel's chips—constituted the necessary implementation.[31] Thereby, EU law applied extraterritoriality also on the basis of the implementation test.

On appeals before the CJEU, the court and the broader legal community benefits from an advisory option of an advocate general (AG).[32] In *Intel* the opinion was delivered by AG Nils Wahl (now, since October 2019, a Judge of the CJEU).[33] Overall, in AG Wahl view the GC failed to duly establish that the jurisdictional tests were met.[34] In general, the presented view was conservative. For example, the AG opined the implementation test could not be satisfied by a negative act, an omission (such as refusals to deal or boycotts).[35] More broadly, AG Wahl called on the court to adopt an effects-based approach to jurisdiction,[36] which—in fact—has been used for quite some time. In more specific terms, for the AG the GC committed a cardinal error of focusing on wrong conduct—of a downstream customer (Lenovo), rather than on that of Intel itself. For this reason, the implementation test has not been met.[37] AG Wahl also found the GC misapplied the qualified effects test.[38] In particular, the GC should have considered the effects of the challenged specific types of conduct, unbundling them from the remainder of the case.[39] Also, the notion of a single and continuous infringement could not, in AG Wahl's view, be used to extend the scope of application of EU law, to facilitate meeting the necessary jurisdictional criteria.[40]

On appeal, the CJEU dismissed Intel's jurisdictional plea in entirety.[41] It approved the GC's clarification regarding the relationship of both jurisdictional tests.[42] Satisfaction of either of them would suffice for the extraterritorial application of the EU competition rules. Likewise, the GC was found to be correct in considering probable effects of the conduct in relation to the 'foreseeability' criterion.[43] The criterion of immediacy of effects was fulfilled by seeing the conduct within the framework of an overall strategy of Intel.[44] The same lens (of an overall strategy) made the conduct pass scrutiny in light of the substantiality requirement.[45] Lastly, the CJEU did not consider application of the implementation test, given the GC examined it only for the sake of completeness.[46]

III. The significance of *Intel*

Overall, *Intel* brings a significant expansion of the extraterritorial reach of EU competition law. The CJEU provided some useful clarifications. Firstly, there are no differences in extraterritorial reach in different areas of competition law. *Intel* was the first abuse of dominance case in the EU where extraterritorial jurisdiction

[27] Ibid, para 297.
[28] Ibid, para 303.
[29] Ibid, paras 305 and 307.
[30] Ibid, para 306
[31] Ibid, paras 311-2.
[32] AGs are high-profile lawyers appointed to this advisory role for a six-year term. An AG delivers an opinion in every case before the CJEU to assist the court with its own deliberations.
[33] Case C-413/14 P, Opinion of Advocate General Wahl in Intel v Commission.
[34] Ibid, para 327.
[35] Ibid, para 294.
[36] Ibid, paras 295-6.
[37] Ibid, paras. 309-13.
[38] Ibid, para 318.
[39] Ibid, para 320.
[40] Ibid, para 319.
[41] CJEU judgment (n 2), para 65.
[42] Ibid, para 45.
[43] Ibid, para 51.
[44] Ibid, para 52.
[45] Ibid, paras 54-8.
[46] Ibid, para 62-3.

was recognised. Previous cases concerned restrictive agreements and a merger. Secondly, the earlier formulated jurisdictional tests (the implementation and qualified effects tests) were recognised as alternative ways of asserting jurisdiction. This is positive. As the GC noted, under international law extraterritorial jurisdiction can be asserted by various means—there is no one single way of doing so. Both EU's approaches are versions of the effects doctrine—the principle enabling assertion of extraterritorial jurisdiction on the basis of economic effects (that is, competitive harm) caused from abroad. The doctrine is now widely-accepted and ubiquitous.[47] Different systems formulate it differently and controversies continue, for example, in relation to the limits of doctrine's permissible reach—as in this case. The fact the domestic formulations are called by different names is immaterial—the paradigm remains the same. *Intel* operates within this framework.

The CJEU judgment in relation to meeting the jurisdictional tests is very brief, providing little guidance. This approach is not out of synch with the past. In fact, in *Woodpulp* the court devoted to the jurisdictional question just a few paragraphs.[48] In *Intel* the CJEU's application of the qualified effect test was most succinct. Both criteria of immediacy and significance were met thanks to the conduct in question (Intel's dealings with Lenovo outside the EU) being seen as a part of an overall strategy, the fact earlier recognised by the GC. This approach has considerable potential. By not analysing in isolation different activities, actions or relationships, the CJEU narrowed the scope for possible gaming of EU rules by foreign perpetrators. That is welcome, especially in light of the currently internationally fragmented way of dealing with cross-border competitive harm. Moreover, the CJEU approach is not particularly controversial.

The court is pushing jurisdictional boundaries in its application of the qualified effects test. Through bundling the offshore dealings of Intel with Lenovo with other elements of the case,[49] jurisdiction is asserted more broadly than to date. No other competition system has ventured that far in their enforcement, while remaining within the main territorial paradigm, with harm to consumers in the enforcing forum constituting the jurisdictional link. Thereby an important precedent has been set. Its potential influence on the future practice of other systems should not be underestimated. A way of asserting extraterritorial jurisdiction is not 'just' an EU matter. That said, context is king. In *Intel* jurisdiction had not been challenged before the Commission and on appeals this plea has been gradually limited just to the Intel-Lenovo relationship. Therefore, it may be that the links with the EU regarding the reminder of the Intel's overall strategy were more straight-forward, meeting the jurisdictional threshold based on the pre-existing case law.

It is also noteworthy that this expansion of the extraterritorial reach of EU competition law met with no formal governmental protest. It was unopposed. In the past, controversially far jurisdictional assertions met with representations made by foreign governments[50] or introduction of domestic measures aimed at curbing allegedly overly-far-reaching assertions.[51] That was not the case in *Intel*. It is likely to matter going forward.

The CJEU's approach is both pragmatic and clever. It logically builds on the pre-existing caselaw while securing a very board reach of EU law in appropriate cases. Afterall, there may not be many cases involving global anticompetitive strategies, in which scope the EU market of over 400 million consumers would not play an important role. However, it remains open whether the court would follow such reasoning should an overall strategy in question include no direct dealings (or their abandonment) of a foreign alleged violator with entities in the EU. The challenge before the CJEU concerned an indirect relationship: Intel incentivised a non-EU laptop maker to adopt a specific course of conduct in its dealings with its EU customers, within the context of Intel's broader strategy involving relations with entities in the EU. Hence, we are looking at indirect

[47] See, for example, Marek Martyniszyn, 'Competitive Harm Crossing Borders: Regulatory Gaps And A Way Forward', 17(3) Journal of Competition Law & Economics 686 (2021), available at <https://doi.org/10.1093/joclec/nhaa034>; Marek Martyniszyn, Developing Countries' Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development, UNCTAD/DITC/CPLP/2021/3 (2021), available at <https://pure.qub.ac.uk/files/264759041/Developing_Countries_Experience_with_Extraterritoriality_in_Competition_Law_Report.pdf>.

[48] Woodpulp (n 11), paras 16-7.

[49] The other elements were: the Intel's overall strategy, including—as it seems, because the court opted not to clarity it—direct dealings of Intel with entities in the EU.

[50] See, for example, Marek Martyniszyn, 'Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases', 61(4) Antitrust Bulletin 611 (2016).

[51] See, for example, Marek Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order', 37(1) World Competition 103 (2014).

withdrawal (laptops with competing chips are not sold in the EU by non-EU's Lenovo) in a boarder context involving direct dealings of Intel with entities in the EU.

Also, how would the logic of *Intel*, an abuse of dominance case, apply in a restrictive agreements' framework? In particular, would non-EU cartelists' foreign sales of inputs to a non-EU third party, with only finished products being subsequently sold in the EU bring them within the remits of EU law? Most likely yes. The CJEU's judgement, with its succinctness, could, but did not rule out such a broader interpretation, and the GC signalled willingness to adopt it and has already done so (see discussion of *Air Cargo* below). This leaves plenty of space for the extraterritorial application of EU competition law. The Commission has a track record of availing of it to deter foreign violators. It is worth recalling that, for example, already in the 1970s the Commission was publicly claiming to be relying on the effects doctrine, clearly overstretching EU court's position back then.[52] More recently, in 2015—still before *Intel*, during an OECD Roundtable the Commission claimed it would have jurisdiction over foreign cartelists on the basis of indirect sales only.[53] As further discussed below, we have already seen first attempts of private claimants to build on *Intel* and seek further development of law in this very direction.

In more general terms *Intel* also points to existing power imbalances affecting capacity of different systems to safeguard their markets and deal with foreign anticompetitive conduct. As noted elsewhere,[54] extraterritoriality does not offer the same potential to all. In this case, EU law applied because the EU market constituted a significant part of the world market and indeed the non-EU Intel duly paid the initially imposed fine of 1.06 billion euro, back then the largest such fine ever imposed. Authorities of a much less significant market might not have a similar possibility. Even if discontinued thanks to enforcement in other systems, domestic harm would often remain unaddressed. That is, there would be no retrospective transfer of extracted wealth (by means of fines) and no deterrence would be generated, potentially leaving the market open for anticompetitively exploits.

IV. *iiyama* and the *Intel*'s first application

iiyama is the first case of a then EU member state's court to address extraterritorial reach of EU competition law post-*Intel*, in the context of private enforcement and long supply chains. The UK's Court of Appeal judgment confirmed that, in principle, the EU competition laws apply to offshore global cartels without direct sales of cartel-affected products.[55] Thereby the further reach of EU law has been recognised in the important context of private actions for damages, albeit by the English courts, before Brexit.

The case arose out of two related private suits brought by iiyama. The Japanese iiyama produces electronic products. It purchased monitors in Asia and then distributed them within its group onwards—mainly to its subsidiaries in the EU. These products incorporated cartel-affected inputs. Hence, the sale of cartel-affected inputs took place in Asia. These were mainly transactions between cartelists and monitor producers (that is, third parties), not the allegedly harmed iiyama. Inputs account for about 70% of the cost of monitors. Both relevant CRT and LCD cartels were sanctioned by the European Commission.[56] Afterwards, iiyama's EU subsidiaries brought follow-on actions for damages in the UK (then still in the EU), arguing they were cartels' victims.[57] In both cases, the defendants challenged the jurisdiction. In the case concerning the CRT cartel, the High Court found the conduct at stake beyond the reach of EU law, as neither the implementation, nor the qualified effects test were found to be met. The key issue was lacking immediacy of effects— 'some end of the road effect … does not mean that the cartel was implemented [in the EU]'; not immediate, but a 'knock-on effect'.[58] In the case relating to the LCD cartel, the High Court found that the plaintiffs had a pleadable

[52] See Martyniszyn, 'Extraterritoriality in EU Competition Law'… (n 10), p 39.
[53] OECD Working Party No. 3 on Co-operation and Enforcement: Roundtable on Cartels Involving Intermediate Goods, DAF/COMP/WP3/M(2015)2/ANN2/FINAL (October 2015), p. 6.
[54] See, for example, discussion and further sources in Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15(1) Journal of International Economic Law 181 (2012).
[55] The LCD Appeals [2018] EWCA Civ 220.
[56] COMP/39.309 LCD- Liquid Crystal Displays, 8.12.2010, C(2010) 8761 final; COMP/39437 - TV and Computer Monitor Tubes – TV and Computer Monitor Tubes. 5.12.2012, C(2012) 8839 final.
[57] Note: iiyama's claims pre-dated the EU Damages Directive, which—per its Art. 14—codified court's findings in *Manfredi*, providing that indirect purchases in the EU have a right to recover the suffered harm. This approach differs from the US rules, which—per the US *Illinois Brick* doctrine—prevent claims of indirect purchasers.
[58] iiyama Benelux v Schott [2016] EWHC 1207 (Ch), at 140 and 148.

case, albeit with various reservations, and the court permitted it to proceed to trial.[59] These conflicting orders, delivered prior to CJEU's *Intel* judgement, were determined by the CoA already with the benefit of *Intel*.

The CoA recognised that the scope of application must be the same across all areas of EU competition law, hence findings in *Intel*—an abuse of dominance case—are equally relevant in, for example, the restrictive agreements context.[60] Moreover, the CoA acknowledged that *Intel* supports an argument that 'a worldwide cartel which was *intended* to produce substantial *indirect* effects on the EU internal market may satisfy the qualified effects test for jurisdiction [emphasis added]', with such a fact-specific analysis taking into account the totality of the cartel's operation.[61] Furthermore, the CoA noted that, in a supply chain context, a sale of a cartel-affected input to a third party outside the EU need not rule out the fulfilment of the immediacy criterion.[62] Hence, the CoA recognised possible extraterritorial jurisdiction two steps removed. Similarly, the foreseeability criterion was given a wide reading. The CoA found that 'what matters is that the cartel was always intended to have worldwide effect, including in the EU, and it must have been contemplated that the supply chains whereby cartelised goods ended up being purchased within the EU might include intra-group transactions.'[63]

Further appeal in *iiyama* was denied by the UK Supreme Court.[64] The case did not progress further because, in February 2020, the claims were withdrawn,[65] possibly due to an out-of-court settlement.

Overall, the CoA's judgment in *iiyama* is significant. It arose out of private actions for damages for harm allegedly caused in the EU by foreign cartel conduct in the context of long supply chains and the plaintiffs purchasing products incorporating cartel-affected inputs from third parties outside the EU. The recognition of a possible EU extraterritorial jurisdiction in such a setting uses the policy space created by the CJEU in *Intel*, extending the reach of EU law further. While *iiyama* does not bind the Commission or courts in other EU member states, it is likely to be persuasive when similar issues arise. That said, two practical aspects of the case matter. Firstly, the case concerned a global cartel and the CoA underlined the need to analyse the cartel conduct as a whole, echoing the CJEU's recognition of the importance of the defendant's overall strategy in *Intel*. Secondly, the CoA was dealing with applications for summary judgment. In the UK's framework, at that stage, plaintiffs have to show they have a real prospect of success, i.e. that their case is better than arguable. However, the court is not resolving complex questions of law and fact. It is not a very high threshold.

V. *Air Cargo* and extraterritoriality back in the General Court

In March 2022 the General Court issued a series of judgments relating to the air cargo cartel, dismissing most appeals and changing the amounts of some of the imposed fines.[66] In 2010 the Commission found that a number of entities (the carriers) ran a worldwide cartel on the airfreight market affecting the EU market, in violation of EU competition law.[67] The air carriers conspired on the levels of fuel and security surcharges, constituting a significant proportion of the freight service, and paid commissions. The price-fixing affected intra-EU, inbound and outbound routes. The original Commission's decision was annulled on the procedural grounds,[68]

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[59] iiyama (UK) Ltd v Samsung [2016] EWHC 1980 (Ch), at 99.
[60] The LCD Appeals (n 55), para 91.
[61] Ibid, para 95.
[62] Ibid, para 98.
[63] Ibid, para 100.
[64] Refused on 24 July 2018. The UK Supreme Court, Permissions to appeal results, p 4, available at: <https://www.supremecourt.uk/docs/permission-to-appeal-2018-0607.pdf>. Following the denial the competition issued were transferred to the Competition Appeal Tribunal. See the Transfer Order of the High Court, 10 October 2019, available at: <https://www.catribunal.org.uk/sites/default/files/201910/1333_liyama_Transfer_Order_HC2014001980_141019.pdf>.
[65] Order of the Chairman, Withdrawal of Claim, 2 March 2020, available at: <https://www.catribunal.org.uk/cases/13335719-t-iiyama-uk-limited-others>.
[66] Cases T-323/17 Martinair Holland v Commission, T-324/17 SAS Cargo Group and Others v Commission, T-325/17 Koninklijke Luchtvaart Maatschappij v Commission, T-326/17 Air Canada v Commission, T-334/17 Cargolux Airlines v Commission, T-337/17 Air France-KLM v Commission, T-338/17 Air France v Commission, T-340/17 Japan Airlines v Commission, T-341/17 British Airways v Commission, T-342/17 Deutsche Lufthansa and Others v Commission, T-343/17 Cathay Pacific Airways v Commission, T-344/17 Latam Airlines Group and Lan Cargo v Commission, T-350/17 Singapore Airlines and Singapore Airlines Cargo v Commission.
[67] European Commission, Decision of 9 November 2010, Case COMP/39258 – Airfreight, C(2010)7694 final.
[68] Cases T-9/11 Air Canada, T-28/11 Koninklijke Luchtvaart Maatschappij, T-36/11 Japan Airlines, T-38/11 Cathay Pacific Airways, T-39/11 Cargolux Airlines International, T-40/11 Latam Airlines Group and

and later, in 2017, re-adopted in an amended form.[69] The GC's bundle of 13 judgments arise from appeals by the carriers, alleging inter alia lack of EU law jurisdiction in relation to inbound flight services.

The way the market operates is that carriers sell their air cargo services to freight forwarders who, in turn, deal with shippers. The cartel included EU and non-EU entities and it affected diversity of routes. On appeal various cartelists—including those established within the EU—argued EU jurisdiction was lacking over inbound fright services, that is services from outside the EU into airports within it. In essence: when it comes to this category of flights the carriers sold their services outside the EU (at the point of origin of the relevant flights) to freight forwarders mostly established outside the EU, who only then contracted with shippers, based outside or within the EU. Hence, these flights were seen as an input services cartel: flights being an input to the subsequently sold freight forwarding service, with the sale of the cartel-affected element (the flights) taking place outside the EU.

The GC's judgments in *Air Cargo* are very similar when it comes to jurisdictional matters.[70] It was claimed that the Commission lacked jurisdiction over inbound fright services, among others, due to the misapplication of the two jurisdictional tests: the qualified effects and implementations tests.[71] Given both tests are alternative, the GC underlined that meeting the criteria of the qualified effect test renders reliance on the implementation test unnecessary.[72] In its analysis the GC followed the Commission's approach and analysed the conduct both in isolation and as part of the cartel's overall strategy—in forming part of a single and continuous infringement taken as a whole.[73]

At the onset, the GC clarified—following *Intel*—that showing of probable, not actual effects is sufficient, with this approach remaining unchanged by classification of the conduct at stake as a by-object violation.[74] Thereby the GC helpfully ruled out reading into the jurisdictional test a showing of actual effects, called for by the cartelist. Moreover, the GC also noted that when applying the qualified effects test it is appropriate to rely on the air carriers conduct's effects on a downstream market.[75] In the case at hand it was appropriate to look into the inflated prices shippers were charged by freight forwarders, leading to higher prices of goods imported into the EU, due to the cartel's operation on the upstream market.[76]

The GC outlined that establishing effects' foreseeability presupposes that those effects in question could have been reasonably considered by cartelists on the basis of practical experience, rather than being a 'result from an entirely extraordinary train of events'.[77] In the case at hand, the GC found the foreseeability criterion to have been met. The cartelists could have reasonably expected that the increased cost of freight services they charged freight forwarders would be passed on to shippers.[78] As implicitly noted in some of the other *Air Cargo* judgements,[79] the indirect sales of such specific non-portable services could hardly lead to a different conclusion. Unlike in input goods cartels—where, say, a cartel-affected computer chip sold outside the EU could be used in a laptop sold in diverse locations, not necessarily in the EU—the freight forwarders could not have sold shipping of goods into the EU to a buyer who was interested in sale of cargo shipping into, say, Peru. The destination of the sold services, subsequently packaged and sold by freight forwarders, was firmly set by cartelists.

In terms of substantiality of effects, the GC noted that in the case of input cartels the proportion of the price of the input within the finished product or service plays a role.[80] In *Air Cargo* the conduct was of considerable duration, general in application (on world-wide basis), of significant nature (price-fixing) with the cost of

Others, T-43/11 Singapore Airlines and Others, T-46/11 Deutsche Lufthansa and Others, T-48/11 British Airways, T-56/11 SAS Cargo Group and Others, T-62/11 Air France-KLM, T-63/11 Société Air France and T-67/11 Martinair Holland v Commission.

[69] European Commission, Decision of 17 March 2017, Case COMP/39258 – Airfreight, C(2017)1742 final.

[70] This note refers mainly to Case T-323/17 Martinair Holland v Commission, the first of *Air Cargo* judgments, with appropriate references to relevant points made in other judgments in the bundle.

[71] Ibid, para 81.

[72] Ibid, para 105.

[73] Ibid, paras 118-20.

[74] Ibid, paras 126-32.

[75] Ibid, paras, 136-42.

[76] Ibid, para 142.

[77] Ibid, para 145, referring to AG Kokott Opinion in C-557/12 *Kone and Others*, para 42.

[78] Ibid, para 156-63.

[79] For example, in T-334/17 Cargolux Airlines v Commission, para 170.

[80] Martinair (n 70), para 165.

cartel-affected input services at stake representing a significant proportion of the total bills paid by freight services (that is, amounts in lower double-digits).[81] Thereby, the substantiality requirement was met.

When it comes to immediacy, the GC clarified that directness does not rule out involvement of a third party in the process.[82] The chain of causation need not be broken. In the case at hand, the criterion was satisfied—the cartelists' overcharging of freight forwarders contributed to the effects in question—shippers being charged more.[83]

Hence, the criteria of the qualified effects test were met, making reliance on the implementation test unnecessary.[84] These conclusions were reached by the GC when looking at the conduct in isolation. Hence, taking a pre-*Intel* approach. However, the court considered the effects also in the context of the single and continuous violation taken as a whole, following *Intel*. It has been refuted that this approach applies only to foreclosure scenarios, as was the case in *Intel*.[85] Unsurprising this approach similarly confirmed meeting of the qualified test threshold.[86] In this context, it was observed that a worldwide cartel could have been undermined should freight forwarded had been able to circumvent it by using indirect routes. Therefore, the conduct relating to the inbound routes constituted integral part of the single and continuous infringement.[87]

Air Cargo provides a number of significant clarifications. In more general terms, it is the first contested case of extraterritoriality applied in relation to services, not goods. The GC provided no analysis in light of the implementation test. This may indicate its demise, after the CJEU shelved it in *Intel*. Turning to qualified effects, we learn that it is satisfactory to rely on effects on a downstream market for jurisdictional purposes. While given *Intel* this is not new, the language used is very clear. Secondly, the GC somewhat timidly followed the CJEU approach of considering the conduct at stake taken as a whole, only after finding that the challenged conduct in question—not the overall conduct as such—met the jurisdictional criteria. Is this a bridging case, getting us used to the new 'as a whole' approach, or is the analysis of the challenged conduct 'in insolation' provided to make it clear that indirect sales qualify for jurisdictional purposes even in the absence of some broader strategy by the cartelists? The answer may be 'yes' to both. The issue of substantiality is noteworthy. The cartel-affected price components accounted for about one-fourth of the total price paid by the freight forwarders, and these inflated costs were capable of, in turn, affecting shipping costs and, later, the actually sold products. These findings show the criterion of substantiality can be met when a cartel-affected price element—while significant— is not, proportionally, major or key. Clearly, we are looking at a sliding scale and a movement towards limiting the gaps in the system, that is, towards growing exposure of foreign cartelists to EU competition rules in the context of indirect arrangements.

While *Air Cargo* is akin to an input goods cartel and an indirect foreign sales scenario, there are significant factual differences. In case of input goods, a foreign cartelist could argue that a non-EU sale of cartel-affected inputs could have led to sales of finished products somewhere outside the EU. In this case, while carriers' services were sold outside the EU, the carriers were flying their planes into specific EU airports and, in that regard, their services were fixed by them. The freight forwarders, who purchased carries' services for subsequent resale to shippers, were unable to sell cargo space offered by carriers from, say, Marrakesh to Madrid as cargo space from Marrakesh to Tunis.

In more general terms, *Air Cargo* reminds us of some fundamental jurisdiction points. Analysing only the challenged inbound services *Air Cargo* involved carriers partly operating in the EU.[88] Why do we then speak of 'extraterritoriality'? The answer is that the policy choice was made—internationally, not just in the EU—for competition law to be very territorial in nature when it comes to conduct's impact. In a typical domestic case the issue of jurisdiction is not raised. It is presumed the effects of the conduct in question will be local. However, transnational cases are trickier. Only conduct harming the EU market is prohibited. Hence, an export cartel arranged by EU entities affecting only foreign markets would be perfectly legal under EU law, like in

[81] Ibid, paras 167-71.
[82] Ibid, para 176.
[83] Ibid, paras 177-8.
[84] Ibid, para 197.
[85] Ibid, para 187-8.
[86] Ibid, para 195.
[87] Ibid, para 191, citing Commission Decision, recital 1046.
[88] Duly noted in the Commission in its 2017 Decision, para 1043.

other jurisdictions.[89] In this vein, in *Brugg Kabel*, another recent transnational cartel case involving market sharing, the GC observed that EU entities' agreement not to compete on Asian markets had not been implemented within the EU.[90] The EU does not mind being an exporter of competitive harm and benefiting from it. At the same time, EU law safeguards against inbound competitive harm, against EU market being affected—hence, cases such as *Intel* and *Air Cargo*. That is also why it does not matter what was the nationality of the culprit or where did the conduct take place. What matters is where the brunt was bore. That is the widely recognised territorial paradigm.

On appeal in *Air Cargo* some of the carriers raised also the *ne bis in idem* and international comity principles, arguing these would be violated by extraterritorial assertions.[91] Pointing to the broader point made above, the GC noted that the principle *ne bis in idem* does not apply when competition agencies of different states take action to safeguard their markets.[92] More specifically, the court found that the carrier did not prove it had already been punished in relation to conduct which was being sanctioned by the Commission.[93] Again, this is unsurprising—in the current regulatory framework each competition system aims to sanction only the harm affecting their market. Hence, by definition double jeopardy is unlikely. Another carrier failed to substantiate their claim that by bringing its action the Commission prevented various non-EU competition agencies from penalising them.[94] More broadly, the GC recalled that 'there is no principle of public international law that prevents public authorities of different States from trying and convicting the same natural or legal persons on the basis of the same facts as those for which that person has already been tried in another State'.[95] In terms of international comity, the court pointed that that the Commission is not obliged to take account of proceedings and penalties potentially affecting the investigated entities elsewhere.[96]

V. Conclusions

Recent years show numerous instances of extraterritorial enforcement of EU competition law. These were jurisdictionally contentious cases. The recent courts' pronouncements provide numerous clarifications and expansive development of the law, facilitating its further reach, also in more complex, nuanced scenarios, better reflecting the realities of today's commerce. Post *Air Cargo*, those interested in extraterritoriality should remain seated. It is likely to be a long-haul adventure and turbulence is expected.

[89] See further, Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15(1) Journal of International Economic Law 181 (2012).
[90] T-441/14 Brugg Kabel and Kabelwerke Brugg v Commission, para 103.
[91] T-343/17 Cathay Pacific Airways v Commission, para 105.
[92] Ibid, para 172, citations omitted.
[93] Ibid, para 176.
[94] T-344/17 Latam Airlines Group and Lan Cargo v Commission, paras 160-7.
[95] T-342/17 Deutsche Lufthansa and Others v Commission, 121.
[96] Cathay Pacific (n 91), para 178.

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