



# Developing Countries' Experience with Extraterritoriality in Competition Law



UNITED NATIONS



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Geneva, 2021

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UNCTAD/DITC/CPLP/2021/3
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eISBN: 978-92-1-001077-1

## NOTE

Considering the important role of research and policy analysis in the development of appropriate policies and legislation in the areas of competition and consumer protection, UNCTAD created the Research Partnership Platform (RPP) in 2010. The UNCTAD RPP is an initiative that aims at contributing to the development of policies and best practices to promote effective law enforcement for competitive markets and inclusive development. The RPP is coordinated by Ebru Gökçe, under the general guidance of Teresa Moreira.

The RPP brings together research institutions, universities and civil society, and provides a platform for joint research and exchange of ideas amongst scholars and practitioners on the issues and challenges in the area of competition and consumer protection faced particularly by developing countries and economies in transition.

The role of UNCTAD is to facilitate and provide guidance on the research and analysis to be undertaken by members of RPP. UNCTAD benefits from the research findings in responding to the challenges faced by developing countries through its technical assistance and capacity-building activities.

This paper is written by Dr. Marek Martyniszyn, Senior Lecturer in Law, Queen's University Belfast. It benefited from guidance of Ebru Gökçe, RPP Coordinator, and overall supervision of Teresa Moreira, Head, Competition and Consumer Policies Branch, UNCTAD. This research project was conducted in the framework of the UNCTAD Research Partnership Platform.

## ACKNOWLEDGMENTS

The author gratefully acknowledges the support and assistance of the RPP's Coordinator, Ebru Gökçe, and numerous colleagues from competition agencies without whose input this study would not have been possible. Any mishaps and omissions remain the sole responsibility of the author.



# CONTENTS

<b>NOTE .....</b>	<b>III</b>
<b>ACKNOWLEDGMENTS .....</b>	<b>III</b>
<b>INTRODUCTION .....</b>	<b>1</b>
Methodology and scope .....	1
Embracement of extraterritoriality .....	2
Enforcement experience .....	7
Identified hurdles .....	9
Conclusions .....	11
<b>ANNEX 1: THE QUESTIONNAIRE .....</b>	<b>13</b>

## LIST OF FIGURES

Figure 1: Countries participating in the study .....	2
Figure 2: The embracement of extraterritoriality by the developing countries across time (number of adopters over time, cumulatively) .....	3

## LIST OF TABLES

Table 1: Is domestic competition law applicable to the conduct of foreign entities which are not present in your jurisdiction but whose conduct harms local consumers or producers? .....	3
Table 2: Timing of extraterritoriality's adoption .....	3
Table 3: Examples of jurisdictional provisions in selected developing countries .....	4
Table 4: Participating countries with some experience of transnational enforcement .....	7



## INTRODUCTION

This study addresses the question of extraterritoriality (extraterritorial jurisdiction) in the area of competition law. That is, it examines whether or not domestic competition legislation applies to foreign entities that may not be present in the forum<sup>1</sup>, but whose conduct harms or may harm local consumers or producers. It also analyzes existing enforcement track record and hurdles involved in such cases. Transnational conduct can take the form of price-fixing among foreign producers, an abuse of dominant position, or a merger between foreign firms.

Transnational violations of competition law cause significant harm. Connor estimates that between 1990 and 2016, the private international cartels that were detected affected sales of over \$51 trillion worldwide.<sup>2</sup> The overcharges exceeded an estimated \$1.5 trillion globally.<sup>3</sup> While inflated margins are endemic to cartels, international cartels overcharge much more than similar domestic arrangements.<sup>4</sup> Furthermore, unlike in a domestic setting, such competitive harm is not just a matter of redistribution of resources between producers and consumers. It also constitutes an extraction of wealth from the affected state to the state hosting violators. Given most transnational enterprises are located in the global North, competitive harm can be seen as illegal transfers of wealth to shareholders in developed states. Hence, transnational anticompetitive conduct may be further deepening the divide between developing and developed countries, which the international community endeavours to address.

Hitherto, extraterritorial enforcement of competition law was analyzed mainly from the perspective of well-established competition law systems,<sup>5</sup> hence

predominantly developed states, which were the first to use extraterritoriality to protect their markets. Broader comparisons of legal systems were made from only limited perspectives, largely due to the lack of empirical data.<sup>6</sup> This study contributes to narrowing the gaps in our knowledge of the nature and gravity of challenges involved in dealing with transnational anticompetitive practices in transition economies. It examines existing frameworks and practices of developed countries and transition economies<sup>7</sup> and provides an overview of the key practical and systemic challenges faced by enforcers in such countries.

These empirical findings support the design of workable solutions that can be implemented to strengthen domestic competition systems. They also help identify areas requiring further collective efforts. The gathered data is qualitative in nature and suffers from the usual related limitations, for example it is not comprehensive. However, it provides a unique examination of the situation on the ground across the developing world.

## METHODOLOGY AND SCOPE

This study relied on a short semi-structured questionnaire to gather the data under analysis (see Annex 1). The questions focused on: (1) acceptance of extraterritoriality in competition law systems, (2) experience with extraterritorial enforcement, (3) differences between transnational

Effects, and the Third Kind', 42 Fordham International Law Journal 981 (2018); Florian Wagner-von Papp, 'Competition Law Enforcement in Developing Countries: A Comparative

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