Intergovernmental Group of Experts on Competition Law and Policy

Meeting of the UNCTAD Research Partnership Platform

10th SESSION

Room XVII, Palais des Nations, Geneva

Wednesday, 10 July, 2019

Developing Countries’ Experience with Extraterritoriality in Competition Law

Dr Marek Martyniszyn, Queen’s University Belfast

This material has been reproduced in the language and form as it was provided. The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.
Developing Countries’ Experience with Extraterritoriality in Competition Law

Dr Marek Martyniszyn

10th Meeting of the UNCTAD Research Partnership Platform
Geneva, 10th July 2019
Project’s focus

• Extraterritoriality: applicability of domestic competition law to foreign entities which are not present in the forum, but whose conduct harms/ may harm local consumers or producers (eg, foreign price-fixing cartels, or foreign-to-foreign mergers)

Aims

• to fill the gaps in our knowledge about the existing frameworks and practices of developing countries and transition economies in relation to such conduct
• to identify the relevant key challenges faced by the enforcers
• to consider and formulate feasible, workable solutions to address these challenges

Method

• a short questionnaire
• doctrinal research
40 jurisdictions took part in the project

Albania*, Argentina, Armenia*, Belarus*, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, El Salvador, Guyana, Honduras, India, Indonesia, Jamaica, Kenya, Malawi, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russia*, Saudi Arabia, Serbia*, South Africa, Swaziland, Tanzania, Turkey, Ukraine*, Viet Nam, Zambia, Zimbabwe

* economies in transition
Can your competition law apply to the conduct of foreign entities which are not present in your jurisdiction but whose conduct harms/ may harm local consumers or producers?

<table>
<thead>
<tr>
<th>Yes: 34</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania, Argentina, Belarus, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, Honduras, India, Kenya, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russia, Saudi Arabia, Serbia, South Africa, Swaziland, Tanzania, Turkey, Ukraine, Viet Nam, Zambia, Zimbabwe</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>No: 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armenia, El Salvador, Guyana, Indonesia, Jamaica, Malawi</td>
</tr>
</tbody>
</table>
What’s the formal position?

• extremely wide recognition of in-forum effects of foreign conduct as a sufficient jurisdictional nexus for the sake of assertion of forum’s jurisdiction over foreign conduct

• all but for Chile provide for extraterritoriality based on statutory provisions; Chile relies on a court’s interpretation

• a gradual process:
  • early adopters: Brazil, Costa Rica & Turkey – 1994
  • recent adopters: Nigeria & Viet Nam – 2019
  • about to adopt: Indonesia

<table>
<thead>
<tr>
<th>Decade</th>
<th>Jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990s</td>
<td>7</td>
</tr>
<tr>
<td>2000s</td>
<td>17</td>
</tr>
<tr>
<td>2010s</td>
<td>10</td>
</tr>
</tbody>
</table>
What about enforcement?

- providing for extraterritoriality ≠ having experience in enforcement
- however, **at least 22 participating jurisdictions have some such enforcement experience**
  - 17 jurisdictions – foreign-to-foreign mergers
  - 13 jurisdictions – multi-party conduct (such as transnational cartels)
- jurisdictions without such experience refer to:
  - domestic procedural difficulties
  - inadequacy of existing international instruments in this area
  - novelty of such a possibility (e.g. Nigeria & Viet Nam)
Challenges faced by the agencies

• Domestic procedural rules problematic (esp. related to service)
• Collection and gathering of evidence
• Domestic rules making seeking and rendering assistance in relation to evidence impossible
• Insufficiency of currently existing international instruments re cooperation in enforcement
• More demanding domestic rules
• Enforcement/execution of rendered decisions/judgements (when no in-forum assets), lack of cooperation in this regard

• Time
• Knowhow/experience differences between agencies
• Lacking cooperation agreements
• Trust
Challenges at different stages of the chain of enforcement

- Domestic procedural rules problematic (esp. related to service)
- Collection and gathering of evidence
- Domestic rules making seeking and rendering assistance in relation to evidence impossible
- Insufficiency of currently existing international instruments re cooperation in enforcement
- More demanding domestic rules
- Enforcement/execution of rendered decisions/judgements (when no in-forum assets), lack of cooperation in this regard

Note: one cannot move down the chain if an issue earlier up is not dealt with
Challenges at different stages of the chain of enforcement

- Domestic procedural rules problematic (esp. related to service)
- Collection and gathering of evidence
- Domestic rules making seeking and rendering assistance in relation to evidence impossible
- Insufficiency of currently existing international instruments re cooperation in enforcement
- More demanding domestic rules
- Enforcement/execution of rendered decisions/judgements (when no in-forum assets), lack of cooperation in this regard

**Note:** one cannot move down the chain if an issue earlier up is not dealt with

Some issues are internal matters – they can be addressed domestically
Systemic issues remain

- Collection and gathering of evidence
- Insufficiency of currently existing international instruments re cooperation in enforcement
- Enforcement/execution of rendered decisions/judgements (when no in-forum assets), lack of cooperation in this regard
- Knowhow/experience differences between agencies
- Lacking cooperation agreements
- Trust

- Further collaborative efforts needed
- Robust bilateral / regional frameworks needed to address specific enforcement related problems
- Usefulness of such platforms like UNCTAD corroborated
You may find useful:


'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law' (2012) 15(1) JIEL 181, available freely at: https://ssrn.com/abstract=2012838

All comments are gratefully received at m.martyniszyn@qub.ac.uk
Access my research via SSRN, LinkedIn, or Google Scholar