Parallel enforcement of international cartels and its impact on the proportionality of overall punishment

Huizing, P.J.F.

4. CHAPTER 4: THE JURISDICTIONAL IMPLICATIONS OF THE ECJ'S ACCEPTANCE OF THE QUALIFIED EFFECTS TEST

This chapter is based on the article 'The ECJ finally accepts the qualified effects test: now was that so hard?', 38 European Competition Law Review 1, 2018.

4.1 Introduction

In the *Intel* judgment of 6 September 2017, the European Court of Justice (ECJ or the Court) at last confirmed that the qualified effects test can be used on a standalone basis for asserting jurisdiction over foreign conduct infringing European competition law.[1] This is but one of the many interesting outcomes of the *Intel* appeal, but quite a remarkable one given that the Court had dodged this particular issue for decades. One would therefore have expected the Court to support its ruling on this point with an elaborate and nuanced reasoning on the territorial limits of the Commission's jurisdiction. Disappointingly, the Court spent just a few sentences to explain that the qualified effects test could serve as a basis for the Commission's jurisdiction.

The ease with which the Court has now placed the test on equal footing with the implementation test stands in stark contrast to the painstaking efforts taken in the past to avoid even having to address the qualified effect test. Moreover, the Court's substantive interpretation of the qualified effects test was surprisingly lenient, seemingly allowing the Commission a lot of leeway to determine its own jurisdictional boundaries. So one might justifiably wonder: Why all the legal meandering? Was it really so difficult to acknowledge the qualified effects doctrine?

This chapter describes the long journey that the qualified effects test has travelled to reach this stage and discusses its implications for future competition enforcement. This forms an important part of the response to the second research sub-question on jurisdictional limitations, as it shows the status-quo and the evolution of legal doctrine in Europe on this front.

4.2 What is the qualified effects test?

The qualified effects test or the qualified effects doctrine refers to the assessment whether the domestic effects of certain foreign conduct are sufficient to justify asserting jurisdiction over that conduct. The word *qualified* reveals that the mere existence of any effects is not enough. Rather, such effects need to have certain significance, likelihood, predictability, directness and/or occur within a sufficiently short period of time.

The qualified effects test can be considered a member of the family of jurisdictional tests falling under the territoriality principle, albeit a distant family member.[2] It does not rely on any territorial link existing with the location of the conduct or the offenders, only with the effects of the conduct. This is why most refer to enforcement based on an effects test as *extraterritorial* enforcement.[3]

The use of the effects doctrine in the context of competition law enforcement originated in the United States and is ascribed to the judgment of Judge Learned Hand in the 1945 *Alcoa* case.[4] He ruled that the Sherman Act could be applied to agreements concluded abroad "*if they were intended to affect imports and did affect them*". Since the *Alcoa* case, U.S. courts have continued to apply the effects test, but in different ways, with effects required to be "*intended and substantial*", "*direct and substantial*"

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1 ECJ judgement of 6 September 2017 in case C-413/14 *Intel*, ECLI:EU:C:2017:632.

2 See e.g. the opinion of AG Wahl in *Intel*, ECLI:EU:C:2016:788, para 297, and IBA, *Report of the Task Force on Extraterritorial Jurisdiction*, 2009, p. 11-13.

3 Some contest this terms to be misplaced unless there truly is no territorial link between the conduct and the enforcing state, also not through adverse domestic effects. See e.g. Cedric Ryngaert, *Jurisdiction In International Law: United States and European Perspectives*, 2007, para 8.

4 *United States v. Aluminium Co of America*, 148 F.2d 416 (2d Cir. 1945).

or merely "*direct or substantial*".[5] With the adoption of the Foreign Trade Antitrust Improvement Act (FTAIA) of 1982, the U.S. legislature settled on the phrase "*direct, substantial, and reasonably foreseeable*".[6]

The confirmation of the extensive application of U.S. laws on the basis of the effects doctrine caused quite a lot of controversy at the time. But in the context of competition law, there is nowadays a "*fair degree of consensus*" internationally that an effects based doctrine can be applied for asserting jurisdiction over foreign conduct.[7]

The qualified effects test was properly introduced in European competition law in the early 1970s, in the context of the *Dyestuffs* case.[8] Since then, it has been relied upon by the Commission, the General Court and Advocates General, but until *Intel* not endorsed by the ECJ. The qualified effects test has certainly not been the primarily used jurisdictional test in EU competition law. That honour goes to the implementation test that was adopted by the ECJ in the *Woodpulp* case.[9] This test assesses whether foreign conduct was *implemented* within the Union. The qualified effects test is generally considered to offer a more expansive basis for establishing jurisdiction than the implementation test.[10] A foreign agreement to cease exports into the EU or boycott certain European customers may for example satisfy the qualified effects test while it would be difficult to demonstrate the implementation of such an agreement within the Union.[11] However, some have argued that an *unqualified* implementation test could *prima facie* have more far-reaching repercussions than the qualified effects doctrine.[12]

4.3 The Commission's reliance on the qualified effects test

For its 1964 Grosfillex & Fillistorf decision, the very first decision relating to what is now Article 101 of the Treaty on the Functioning of the European Union (TFEU), the Commission had to consider whether European competition law could be applied to companies incorporated in third countries. In this decision, the Commission gave negative clearance to an exclusive distribution agreement between the French producer Grosfillex and the Swiss distributor Fillistorf.[13] Seemingly without hesitation, the Commission applied European competition law to the agreement, finding that it was not contrary to Article 101(1) TFEU to prevent Fillistorf from selling any Grosfillex products or any competing products in one of the Member States. The Commission later stated that with the jurisdictional approach underlying its Grosfillex & Fillistorf decision, "[t]*he Commission was one of the first antitrust authorities to have applied the internal effect theory to foreign companies*".[14]

In its second decision on competition law, Bendix & Mertens et Straet, also dating from 1964, the Commission expressly stated that European competition law was applicable on the basis of the effects resulting from the relevant agreement within the common market, despite one of the parties to the agreement being incorporated outside the common market.[15]

The EC further addressed the issue of jurisdiction in the Dyestuffs cartel case, the first case in which the Commission imposed cartel fines on companies incorporated in third countries.[16] In justifying its jurisdiction over Swiss and British companies, the Commission simply stated that it was not necessary

5 Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws', 14 *U. Miami Inter-Am. L. Rev.* 23 (1982), p. 23-24.
6 15 U.S.C. § 6a.
7 IBA, *Report of the Task Force on Extraterritorial Jurisdiction*, p. 13; Opinion of Wahl in *Intel*, para 297.
8 Judgement of the Court of 14 July 1972 in case 48/69, *Dyestuffs*, ECLI:EU:C:1972:70.
9 Judgement of the Court of 27 September 1988 in joined cases 89, 104, 114, 116, 117 and 125 to 129/85, *Woodpulp*, ECLI:EU:C:1988:447.
10 See e.g. Ryngaert, para 326; OECD, Roundtable on Cartels Involving Intermediate Goods, submission by the United Kingdom of 27 October 2015, DAF/COMP/WP3/WD(2015)25, para 24.
11 Opinion of Wahl in *Intel*, para 294; Ryngaert, para 326.
12 Ryngaert, para 324; See also Lukas Ritzenhoff, 'Indirect Effect: Fine Calculation, Territorial Jurisdiction, and Double Jeopardy', 6 *JECLAP* 10 (2015), p. 698.
13 Commission decision of 11 March 1964, case IV/A-00061, OJ 58, p. 915-916.
14 Commission, *Eleventh Report on Competition Policy*, 1981, para 35.
15 Commission decision of 1 June 1964, case IV-A/12.868, OJ 92, p. 1426-1427.
16 Commission decision of 24 July 1969, case IV/26.267, OJ L195/11.

to consider the country of incorporation, given that according to the text of what is now Article 101(1) TFEU, the cartel prohibition applies to all restrictions of competition that produce the effects referred to in this provision. The Commission further substantiated its position before the Court in the appeal proceedings brought by the British Imperial Chemical Industries (ICI) and the Swiss companies Geigy and Sandoz. As its first line of defence, the Commission submitted that it had jurisdiction over these foreign companies because the conduct of their subsidiaries established within the European Community could be attributed to them (the economic entity doctrine).[17] As a secondary argument, the Commission argued that jurisdiction could be asserted on the basis of the effects to competition within the common market resulting from the conduct of the foreign companies. In respect of this secondary argument, the Commission argued in favour of "*a prudent application of the doctrine of economic effects, taking into account the extent of the direct economic effects resulting from the conduct of the applicant*".[18] The Commission argued that a reasonable compromise had to be found between the U.S. approach adopted in *Alcoa*, namely that competition laws could be applied to foreign conduct no matter how indirect, distant or negligible the connexion or effects to domestic competition, on the one hand, and on the other hand a strict application of the objective territorial principle, requiring at least part of the relevant conduct occurring within the Community.

In the 1984 Woodpulp cartel case, the Commission had to justify fining foreign companies, some of which did not have any subsidiaries, branches or agents within the Community. The economic entity doctrine hence not being available, the Commission solely relied on the qualified effects test to assert jurisdiction. In its decision, it stated that "[t]*he effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices*".[19]

The Commission embraced the alternative implementation doctrine after its introduction by the ECJ in its *Woodpulp* judgment. But the Commission did not drop the qualified effects test. Rather, it considered the two tests to be supplementary. In its 2004 Guidelines on the effect on trade concept, the Commission stated that "*Articles* [101] *and* [102] *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*".[20] In various cases, the Commission has expressly taken the position that jurisdiction could be based on the implementation test as well as the qualified effects test.[21]

4.4 Endorsements by Advocates General

Over the past several decades, at least four different Advocates General (AGs) have pleaded for the adoption of the qualified effects, each time following careful deliberation. In 1972, AG Mayras gave his opinion in the appeal lodged by ICI against the fined imposed on it in the Dyestuffs cartel. He dismissed the Commission's primary reliance on the economic entity doctrine as unconvincing, but he endorsed the qualified effects doctrine.[22] Mayras found sufficient support for this doctrine under international law and under laws of most national legal systems within the Community. Borrowing from the U.S. development of the qualified effects test, he accepted an effects test based on the conditions that the effects of foreign conduct on competition within the Community must be (i) *direct and immediate* (i.e. not "*only having effects at one stage removed by way if economic mechanisms themselves taking place abroad*"), (ii) *reasonably foreseeable* and (iii) *substantial*.[23]

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17 *Dyestuffs*, p. 627 and further; Opinion of AG Mayras in *Dyestuffs*, ECLI:EU:C:1972:32, p. 693.
18 *Dyestuffs*, p. 629.
19 Commission decision of 19 December 1984, case IV/29.725, OJ L85/1, para 79.
20 Commission, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, 2004, OJ 101/81, para 100.
21 See e.g. Commission decisions of 8 December 2010 in COMP/39.309 (LCD), para 238 and of 9 November 2010 in COMP/39.258 (Airfreight), para 1035.
22 Opinion of AG Mayras in *Dyestuffs*, p. 691-693.
23 Ibid., p. 694.

The next pleading for recognition of the qualified effects test was delivered by AG Darmon in 1988, in his opinion on the appeals brought by Ahlström Osakeyhtiö and others against the Commission's decision in the Woodpulp cartel case.[24] After a thorough assessment of state practices, opinions on international law and academic writings, Darmon recommended the adoption of the qualified effects test as suggested by AG Mayras.[25] He could not identify any prohibitive rule under international law against the qualified effects test, nor a need to reject it in view of international comity considerations.

AG Wathelet expressed his support for the application of the qualified effects to the Court in 2015, in his opinion on InnoLux's appeal against the LCD cartel decision.[26] In this decision, the Commission had tried to justify its ability to take into account sales into the European Economic Area (EEA) of finished products that incorporated cartelised LCD panels where the incorporation had taken place outside the EEA but intra-group. It relied on both the implementation test and the qualified effects test. Wathelet found that neither test was met in respect of the relevant sales and submitted that the Commission had overstretched the territorial limits of EU competition law by taking these sales into account. First, the implementation test was not met because (i) the actual internal sale of cartelised LCD panels by InnoLux took place outside of the EEA and (ii) the subsequent sale within the EEA of transformed products incorporating the cartelised LCD panels did not concern products that were the subject of the infringement. Second, Wathelet submitted that the Commission had clearly failed to present the evidence necessary to demonstrate that the qualified effects test was met, as it had merely stated that the effects could be "*reasonably assumed*".[27] The AG called for greater jurisdictional restraint by the Commission and warned that "*a broad interpretation of the territorial scope of EU competition law would entail the risk of conflicts of jurisdiction with foreign competition authorities and of double penalties for undertakings*".[28]

The *Intel* appeal led AG Wahl to examine the qualified effects test in context of Article 102 TFEU. The Commission had found Intel to have abused its dominant position, *inter alia* by awarding conditional rebates and conditional payments to four OEMs. One of these OEMs, Lenovo, was a Chinese company purchasing microprocessors from Intel outside the EEA, for incorporation into computers manufactured in China. Intel claimed that the agreements with Lenovo were neither implemented in the EEA, nor had any foreseeable, immediate or substantial effect on competition in the EEA. Wahl politely noted that this provided the Court with a welcome opportunity of clarifying and fine-tuning the line of case-law devolving from *Dyestuffs* and *Woodpulp*. He asked the Court to explicitly address the jurisdictional issue and adopt the effects-based approach as suggested by AGs Mayras, Darmon and Wathelet.[29] Wahl emphasised the importance of exercising restraint in asserting jurisdiction on the basis of effects, in particular given that in the currently globalised economy, conduct taking place anywhere in the world will almost inevitably have some sort of effect within the EU.[30] Applying the qualified effects test to the relevant conduct in question, he found that "*far from being immediate, substantial and foreseeable, any anticompetitive effect resulting from the Lenovo agreements appears rather hypothetical, speculative and unsubstantiated*".[31]

4.5 Use of the qualified effects test by the General Court

The General Court (then the Court of First Instance) relied on the qualified effects test for the first time in *Gencor v Commission*.[32] In this case, the South African company Gencor asked for annulment of the Commission's decision to block Gencor's intended acquisition of joint control over certain other

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24 Opinion of AG Darmon in *Woodpulp*, ECLI:EU:C:1988:258.

25 Ibid, paras 53-58.

26 Opinion of AG Wathelet in *InnoLux*, ECLI:EU:C:2015:292, para 53. Wathelet stopped short of actually recommending the application of the test by the Court, as he found that the Commission had in any event failed to demonstrate the test was met in this case.

27 Ibid., para 58.

28 Ibid., para 42.

29 Opinion of Wahl in *Intel*, para 296.

30 Ibid., para 299-300.

31 Ibid., para 324.

32 Court of First Instance judgement of 25 March 1999 in case T-102/96, ECLI:EU:T:1999:65.

South African companies. One of its pleas alleged a lack jurisdiction over the concentration. The General Court rejected this plea, holding that the application of the Merger 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*".[33] It considered that the concentration would have had an immediate and substantial effect in the Community and that it was in fact foreseeable that the effect of the concentration would also be to impede competition significantly in the Community.

The General Court also seemed to rely on the qualified effects doctrine in the 2006 case *Haladjian Frères v Commission*.[34] But in *InnoLux*, the General Court chose to solely focus on the implementation test.[35] This was surprising given that the Commission had relied on both the implementation test and the qualified effects test in its decision. Also, as demonstrated by the later opinion of AG Wathelet, it was hardly evident that the Commission's exercise of jurisdiction in the LCD cartel case could be justified merely on the basis of the implementation test.

In *Intel*, the General Court addressed and applied both tests, and confirmed that "*in order to justify the Commission's jurisdiction under public international law, it is sufficient to establish either the qualified effects of the practice in the European Union or that it was implemented in the European Union*".[36] In respect of the qualified effects test, the General Court held that the three criteria of immediate, substantial and foreseeable effects did not require the effects to be actual. Otherwise, the Commission would be barred from intervening in cases where the adverse effects of an infringement had not (yet) materialised. The General Court therefore assessed whether the relevant agreements entered into between Intel and OEMs were "*capable of having*" substantial and immediate effects and whether these effects were foreseeable. Importantly, the General Court held that it was wrong to assess the criteria of the qualified effects test for each instance of conduct that was part of the alleged single and continuous infringement. Rather, it had to be determined whether the potential effects of the infringement "*as a whole*" were substantial, immediate and foreseeable.[37]

4.6 The ECJ's past efforts of evasion

The Court arguably came very close to adopting an effects test in the early days of European competition law. In the 1971 *Béguelin* case, the Court dealt with a dispute between two exclusive distributors appointed by a Japanese manufacturer. It considered that European competition law could be applied to an exclusivity agreement even where one of the contracting parties was situated in a third country. In the English translation of the judgment, what is now Article 101 TFEU was held to apply to such an agreement "*since the agreement is operative on the territory of the common market*".[38] However, in French, the authentic language of the case, this section reads: "*dès lors que l'accord produit ses effets sur le territoire du marché commun*".[39] This clearly seems to support an effects-based jurisdictional test.[40] But it soon became apparent that this judgment was not a precursor for full recognition of a (qualified) effects doctrine.

Half a year later, in *Dyestuffs*, the Court had an easy opportunity to act on the suggestion of AG Mayras to set aside the questionable economic entity doctrine in favour of the qualified effects test. But despite the elaborate argumentation of the AG, the Court decided to go along with the Commission's primary argument. It confirmed the Commission's jurisdiction on the basis of the "*unity of conduct*" between a foreign parent company and a subsidiary located within the Community, pursuant to which the parent

33 Ibid., para 90.

34 Court of First Instance judgement of 27 September 2006 in case T-204/03, ECLI:EU:T:2006:273.

35 General Court judgement of 27 February 2014 in case T-91/11, ECLI:EU:T:2014:92, paras 61-65.

36 General Court judgement of 12 June 2014 in case T-286/09, ECLI:EU:T:2014:547, para 244.

37 Ibid., paras 251, 268-271, 280 – 290.

38 Judgement of the Court of 25 November 1971 in case 22/71, ECLI:EU:C:1971:113, para 11.

39 The English version of the opinion of AG Mayras in *Dyestuffs* refers to the phrase: "once the agreement produces effects on the territory", see p. 692.

40 But see the opinion of AG Darmon in *Woodpulp*, which states that "*the fact must not be altogether disregarded that that case concerned an agreement granting an exclusive concession and that one of the parties to it was established within the Community*", see para 13.

company could be considered to have "*brought the concerted practice into being within the Common Market*".[41] The Court did not even mention the qualified effects test.

The next good opportunity to adopt the qualified effects test came with *Woodpulp*. The economic entity doctrine could not be relied upon because some of the foreign cartel members had no establishments within the Community, which was why AG Darmon solely applied the qualified effects test. As noted by Ryngaert, "[e]*ven more than in* Dyestuffs*, it was expected that the ECJ could no longer circumvent the effects doctrine if it were to uphold jurisdiction*".[42] But the ECJ still found a way and instead of adopting the qualified effects test, the Court went in an entirely new direction. The Court reasoned that cartel infringements are made up of two elements, the formation of the cartel agreement and the implementation thereof. It considered the location of implementation to be "*the decisive factor*" for the applicability of European competition law, given that it would be too easy to evade the cartel prohibition if its application were to depend on the place where a cartel agreement was concluded. The Court considered the foreign producers of woodpulp to have indeed implemented their pricing agreement in the common market by directly selling woodpulp at cartelised prices to customers in the Community.[43]

Since *Woodpulp*, it was the implementation test rather than the qualified effects test that was considered to determine the Commission's jurisdictional reach. Then came *InnoLux*, a case involving intra-group sales of component products outside the EEA for incorporation in finished products to be sold within the EEA (so-called "*Direct EEA Sales Through Transformed Products*"). AG Wathelet had argued that these sales could only be brought within the Commission's jurisdiction through proper examination of the effects of these sales on competition within the EEA. But also these circumstances did not bring the ECJ to apply the qualified effects test. The Court found the arguments raised by InnoLux in respect of the territorial jurisdiction of the Commission to be "*irrelevant*" as it held these arguments to concern not the territorial scope of the Commission's jurisdiction but the separate question of which sales the Commission was entitled to take into account in the calculation of the fine.[44] According to the Court, it was not disputed that the Commission had jurisdiction to apply Article 101 TFEU to the LCD cartel because the cartel members, including InnoLux, had implemented the worldwide cartel in the EEA by selling affected products to independent third parties in the EEA. The Court did not consider it necessary for all sales taken into account for the fine calculation to fall within the territorial scope of the Commission's jurisdiction, as long as there were at least some direct sales in the EEA.

4.7 *Intel*: recognition at last

So after all its past efforts to avoid even addressing the qualified effects doctrine, what made the ECJ accept the test in *Intel*? First, it is questionable whether it would have been credible for the Court to apply the implementation doctrine to the agreements between Intel and Lenovo in upholding the General Court's confirmation of the jurisdiction of the Commission. AG Wahl had found the General Court's reasoning in respect of the implementation test to be unconvincing for it focused not on any implementation by Intel but instead on Lenovo's behaviour in a downstream market in order to establish a link to the EEA territory.[45] Also, the General Court had primarily relied on the qualified effects test, and had merely assessed whether the implementation test was met "*for the sake of completeness*".[46]

Second, it was not possible for the Court to take a similar approach as it had taken in *InnoLux*. It was not in the context of the sales taken into account for the fine calculation that the Commission's

41 *Dyestuffs*, paras 125-142.
42 Ryngaert, para 319.
43 *Woodpulp*, paras 13-17. See Ryngart, para 321 and footnote 1006; Opinion of AG Wahl in *Intel*, paras 291-293.
44 *InnoLux*, paras 73-74.
45 Opinion of AG Wahl in *Intel*, paras 311-312.
46 General Court judgement in *Intel*, para 297.

jurisdiction was challenged by Intel. Instead, Intel pleaded that the Commission had wrongly included certain foreign conduct within the scope of the infringement. The agreements between Intel and Lenovo were considered to be standalone abuses of Intel's dominant position, as well as elements of the overall single and continuous infringement of Article 102 TFEU.[47] The Commission's jurisdiction therefore also had to cover these agreements in particular.

A third reason explaining the Court's acceptance may be that it felt less external pressure to continue holding off on recognising the qualified effects doctrine. In the 1970s and 1980s, formal acknowledgement of the qualified effects test would have been more controversial than it is today. It is perhaps mainly due to the development of the globalised economy that it has become accepted legal practice for states to apply their laws to foreign conduct affecting their domestic markets. The use of effects-based jurisdictional doctrines is nowadays commonplace in the world, seemingly without this resulting in general violations of comity considerations or significant international conflicts. These considerations may well have played a part in the Court's decision, although these same considerations apparently were not sufficient to make the Court comfortable to use the doctrine in *InnoLux*.

The Court itself has hardly given any explanation for its acceptance of the qualified effects test. It confirmed that this test could serve as a basis for the Commission's jurisdiction merely because it "*pursues the same objective* [as the implementation test], *namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market*".[48] Given the Court's long evasion of the qualified effects doctrine, this can rightfully be called an anti-climax.

Moreover, one would have expected an acceptance by the Court of the doctrine to be accompanied by an elaborate reasoning on its conditions and limitations. But the Court's first application of the qualified effects test was surprisingly lenient. The Court acknowledged the forward looking approach of the General Court in *Gencor*, namely to examine whether "*it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union*".[49] It also followed the General Court in ruling that the qualified effects test should be applied to the relevant conduct "*viewed as a whole*".[50] In examining the effects of Intel's agreements with Lenovo, the Court held that these agreements formed part of an overall strategy aimed at foreclosing Intel's main rival and that it was this overall conduct that was capable of producing an immediate and substantial effect in the EEA. The Court therefore did not take on board Wahl's criticism that the General Court had wrongly focused on the effect of the agreements on Lenovo's behaviour rather than the effect of the agreements on competition within the internal market.[51] Finally, in respect of the condition of foreseeability, the Court agreed with the General Court that it is sufficient to take account of the "*probable effects of conduct on competition*" in order for the foreseeability criterion to be satisfied.[52]

4.8 Implications

The first responses to the Court's recognition of the qualified effects test by the parties involved have been mixed. EU Competition Commissioner Vestager stated that on the point of jurisdiction the *Intel* ruling was "*a very clear win for the Commission*".[53] But Jean-François Bellis, representing intervener ACT in the proceedings, nuanced the importance of the ruling. He believed that the Commission's "*jurisdictional overreach*" in respect of Lenovo may have been inadvertent and that it seemed that the Court did not consider this relatively minor aspect of the case to be sufficient to question the Commission's jurisdiction.[54] According to Bellis "[s]*een in this specific context, the judgment should*

47 Commission decision of 13 May 2009, COMP/37.990 (Intel), paras 1747-1748.
48 *Intel*, paras 45-46.
49 Ibid., para 49.
50 Ibid., para 50.
51 Opinion of AG Wahl in *Intel*, paras 318-324.
52 *Intel*, para 51.
53 Matthew Newman and Lewis Crofts, 'Intel ruling is 'clear win' for reach of EU law, Vestager says', *MLex*, 18 September 2017.
54 Lewis Crofts and Richard Vanderford, 'Intel ruling gives DOJ food for fought on reach of antitrust law', *MLex*, 15 September 2017.

not be read as opening the floodgates of extraterritorial overreach in cases where the effects of the EU of the infringing conduct as a whole are only indirect".[55]

It is difficult to predict whether the acceptance of the test will result in more expansive enforcement by the Commission. Indeed, in most cases it may still be easier to simply rely on the implementation test on the basis of direct imports into the EEA. That avoids the need to examine whether the effects of foreign conduct were immediate, substantial and foreseeable. It has in the past been noted that the Commission will only use the qualified effects test as *ultimum remedium* and this may well still be the case going forward.[56] But in any event, *Intel* has widened the horizon of possibilities for the Commission and it is likely that the Commission will feel more comfortable to pursue cases that lack significant sales within or into the EEA.

The Court's ruling is likely to accelerate the further development of the qualified effects test under EU law. In their authoritative opinions, AGs Mayras, Darmon, Wathelet and Wahl have consistently and rightly emphasised the need for restraint in applying the conditions of immediate, substantial and foreseeable effects. The General Court and ECJ in their *Intel* judgments seem to demand little such restraint. But future cases will surely shed further light on the correct application of the test, all the more so if the Commission will use the test to explore new boundaries of its territorial reach.

Finally, the formal recognition by the ECJ of the qualified effects doctrine highlights the growing importance of international principles to prevent overlapping enforcement and disproportional punishment. With commercial activities becoming more and more globalised and an increasingly wide number of authorities around the globe being able to easily grasp foreign conduct, defendants in international competition cases will be faced with a growing number of enforcers. Andrew Finch, acting Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, confirmed that the adoption of the qualified effects test in the *Intel* ruling and the expansion of extraterritorial enforcement of competition laws in general are an increasingly important subject to discuss among authorities.[57]

4.9 Final considerations

Looking back at the long road towards final acceptance travelled by the qualified effects test, how sensible was it for the Court to dodge ruling on the legality of this doctrine for decades? One could say that it is admirable for the Court to avoid the acknowledgment of the more controversial test for so long, while still being able to confirm the Commission's jurisdiction in particular cases. But I would say that it is regrettable from the perspective of legal certainty that during this entire time the Court failed to draw a clear line in the sand to define the jurisdictional limits applicable to European competition law. All parties affected by competition law enforcement generally benefit from increased legal certainty on the jurisdictional reach of the Commission. AG Wahl rightly pointed to the need to ensure that undertakings can operate in a foreseeable legal environment, which is a growing challenge given that there are now well over 100 jurisdictions with active competition law enforcement.[58] While the core mission of the European courts may be to ensure compliance with EU law, an essential aspect of the Court's function is to clarify legal boundaries. In this context, it is not very helpful for the Court to seek the easiest way out of fundamental questions. Without arguing for the Court to start ruling on hypothetical questions or matters beyond the scope of particular disputes, I would believe that the development of our European legal system is best served by a Court that not only confirms whether a line has been crossed but also dares to say where the line actually is.

It is doubtful that the *Intel* ruling will significantly change the Commission's enforcement policies, given that it already applied the qualified effects test in absence of the ECJ's acknowledgement. But

55 Ibid.
56 Ryngaert, para 328, footnote 1035.
57 Crofts and Vanderford, 'Intel ruling gives DOJ food for fought on reach of antitrust law'.
58 Opinion of AG Wahl in *Intel*, para 300.

irrespective of the practical implications on enforcement, the key importance of the ECJ's acceptance of the qualified effects test for the research of this dissertation is that it clearly reveals the direction of the reach of European competition law enforcement. One may expect that the increasingly crowded competition enforcement arena would justify a move towards greater jurisdictional self-restraint. This would be in line with the stance of the AGs who have called for the acceptance of the qualified effects test. They have clearly advocated for a restrained application to avoid concerns of jurisdictional overreach and overlapping enforcement. But the ECJ has ignored these considerations or at least has apparently not felt that these considerations justified the shaping of more restrictive jurisdictional boundaries for the Commission.

The assessment in this chapter complements the response to the second research sub-question, in describing the choices that are made in Europe in respect of the exercise of the Commission's jurisdictional discretion. The previous chapter already showed that the Commission and European courts displayed little jurisdictional self-restraint in the LCD cartel case. But even in that case, the ECJ did not go as far – or perhaps did not need to go as far – as to confirm that there was no need for sales into the EEA in order for the relevant conduct to fall within the Commission's jurisdiction. The *Intel* ruling shows that the ECJ now felt comfortable enough to embrace the qualified effects test, and to even do so with very little substantive reasoning.

Three levels of potential jurisdictional self-restraint were identified in Chapter 3: (i) the basis for asserting jurisdiction, (ii) the scope of the cartel conduct that is being sanctioned and (iii) the methodology for calculating the cartel fine. The ECJ's ruling in *Intel* applies to the first/highest level, but it also impacts the second and third levels. The confirmation of the Commission's identification of the Lenovo agreements as a standalone infringement (second level) and inclusion of the relevant turnover (third level) was likely even part of the reason why the ECJ now felt the need to take a new position in respect of the first level. Importantly, by allowing effects to be substantial, immediate and foreseeable when viewed "as a whole", the European courts accept that conduct not meeting the jurisdictional test in itself can be part of the conduct to be sanctioned and can be relevant for the turnover used to determine the fine. This is in line with the approach already taken in *InnoLux*, but this time relating to a jurisdictional test that expands the Commission's reach even further. In summary, *Intel* has further extended the EU's legal doctrine on extraterritorial competition enforcement compared to the already expansive approaches taken in *InnoLux*.