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EU Competition law and extraterritorial jurisdiction – a critical analysis of the ECJ's judgement in *Intel*

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ABSTRACT

The focus of this piece lies with extraterritorial jurisdiction in the context of the application of the EU competition provisions. Whereas the doctrine of effects has been established in the context of US antitrust law more than 50 years ago, it has not been until recently that the ECJ confirmed such an approach for the establishment of the jurisdiction of the EU competition provisions in its judgement in Intel. However, the latter decision has not been without criticism, as the ECJ put together different sets of abusive conduct and assessed Intel's behaviour in its entirety. For that reason, also conduct with an arguably very tenuous link to the EU/EEA, that is, behaviour between Intel in the US and Lenovo in China was considered in the Court's judgement. Hence, this article aims to critically analyse the ECJ's decision, also taking into account the first-instance ruling of the General Court as well as the AG opinion. It will conclude that considering other concepts developed in the context of the competition provisions, the ECJ's reasoning seems sound. Furthermore, the adoption of the qualified effects test seems also welcome in order to meet the challenges imposed by our global economy and digital markets.

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1. Introduction

The effects doctrine as a means to establish jurisdiction in circumstances of extraterritorial nature has been established in the context of US

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antitrust law more than 50 years ago.[1] With respect to the European Union, though, the Court of Justice of the European Union ("ECJ" or "Court)" seems to have avoided adopting a similar approach in the context of the EU competition provisions[2] by establishing other, creative concepts somehow designed around the principle of territoriality, that is, the *single economic entity* as well as the *implementation doctrine*. However, with its judgement in *Intel*[3] the ECJ clarified that a qualified effects test provides a suitable means to establish EU jurisdiction for the application of the competition provisions.

The facts in *Intel* concerned two different sets of abusive practices, namely, (i) loyalty rebates as well as (ii) compensation payments of Intel paid to its customers for their breaching of contracts concluded with Advanced Micro Devices Inc. ("AMD"), a competitor of Intel on the market for central processing units ("CPUs"). Jurisdiction was appealed with respect to behaviour that was directed from Intel in the US to Lenovo in China being one of Intel's customers and in charge of assembling final products, that is, computers. By means of compensation payments, Intel intended to ensure that "no Lenovo notebook with AMD CPU would be available on the market including the EEA".[4] In principle, the Intel-Lenovo practice lacked any substantial link to the EU/EEA at all. However, as the practice formed part of an overall strategy, it was considered producing foreseeably substantial and immediate effects within the EU territory.

The latter decision of the Court has been subject to criticism as the ECJ arguably applied "a 'qualified effects extension' for ancillary, directly related conduct",[5] that is, "wholly offshore conduct that is part of the same strategy".[6] However, as will be shown in the following, it is the author's view that considering other concepts used in the context of Article 102 TFEU, that is, the concept of conduct forming part of an overall strategy in the context of the effect on trade criterion, the ECJ's reasoning and the application of a qualified effects test to Intel's behaviour in its entirety seems sound.

[1]United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
[2]Peter Behrens, *The extraterritorial reach of EU competition law revisited: The "effects doctrine" before the ECJ*, Discussion paper, No 3/16, Europa-Kolleg Hamburg, Institute for European Integration, 4 (2016).
[3]Case C-413/14 P *Intel/Commission* [2017] ECLI:EU:C:2017:632 (*Intel*).
[4]Intel (n 3) para 52.
[5]Eleanor M. Fox, *Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind*, Volume 42:3 Fordham International Law Journal 981, 982 (2019).
[6]Fox (n 5) 981.

Furthermore, also the well-founded criticism of Advocate General ("AG") Wahl as regards the General Court's ("GC") first-instance decision appears, with respect to the ECJ's reasoning, unjustified, as although in effect similar decisions were issued by both courts, the ECJ chose different but arguably sound reasoning to come to its conclusion. Put differently, whereas AG Wahl's criticism of the GC's ruling and its arguably erroneous reference to the concept of a single and continuous infringement seems substantiated and justified, the ECJ's judgement in *Intel*, however, cannot be criticized by the same token, as it did not refer to the concept of a single and continuous infringement. Rather it referred to the concept of an overall strategy in which the anticompetitive measure at hand was part of. Arguably, the reference to the concept of conduct forming part of an overall strategy seems sound, particularly when considering a holistic perspective and by means of analogy of principles and concepts established in the context of the effect on trade criterion.

Against this backdrop, this piece first provides an overview of the roots of the doctrine of effects in the context of US antitrust law as well as the developed concepts within the EU in order to establish EU jurisdiction for the application of the competition provisions in cases of extraterritorial nature (sections 2 and 3). Second, it aims to analyse the ECJ's judgement in *Intel*[7] also considering the GC's first-instance decision as well as the opinion of the AG. It finally concludes that the decision of the ECJ and its adoption of the qualified effects test as a means to establish jurisdiction for the application of the competition law provisions is appropriate. Moreover, it is the author's view that the articulated criticism with respect to jurisdiction and wholly offshore conduct seems unjustified: Considering, *per analogiam*, the concept of conduct being part of an overall strategy as developed in the context of the effect on trade criterion, the ECJ's reasoning appears to be sound (section 4). Furthermore, the acknowledgement of an *effects doctrine* as standalone means to establish jurisdiction of the EU competition provisions seems also appropriate in light of our global and fast-developing (online) economies (section 5).

2. Jurisdiction in public international law – general principles

In order to establish jurisdiction of a state or a supranational organisation such as the European Union (either of the aforementioned hereinafter

[7]Case C-413/14 P *Intel/Commission* [2017] ECLI:EU:C:2017:632 (*Intel*).

referred to as "State"), there are various principles that have been established in public international law. Basically, a general distinction can be made as regards territorial vs. extraterritorial jurisdiction.[8] According to the former, which constitutes one of the most fundamental bases of jurisdiction,[9] a State may exercise powers over resources and persons within its territory (regardless of the nationality of a person or undertaking). However, according to the Permanent Court of International Justice (the predecessor of the International Court of Justice) in its landmark judgement in *Lotus*,[10] a State can, apart from the principle of territoriality, establish principles to adopt and constitute extraterritorial jurisdiction too.

Examples of principles embodying the idea of extraterritorial jurisdiction provide, for example, the (i) "nationality principle" by which legislation is linked to the nationality of a person (legal or natural) irrespective of where the relevant conduct occurred (within the sovereign borders of a State or not), as well as the (ii) "protective principle" according to which jurisdiction seems justified given "there is a reasonable connection between the act and a state's legitimate interest in protecting its own national security".[11] The idea reflected in the *effects doctrine*, which has initially been applied in the context of antitrust law by Judge *Learned Hand* in 1945 in its landmark judgement in *United States v. Aluminum Co. of America*[12] (*Alcoa*), runs in the same vein. According to the latter "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends […]".[13] Consequently, according to US jurisprudence,[14] jurisdiction in antitrust cases can be extended to conduct outside a state's territory, provided it has a "direct, substantial, and reasonably foreseeable effect"[15] within its territory. Furthermore, since the landmark judgement in *Alcoa,* the effects doctrine has widely been acknowledged in US antitrust law.[16] However, this has not been without criticism as the effects doctrine is prone to interfere with

[8]Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and the European Community Approaches,* 33 Va. J. Int'l L. 1, 2 et seq (1992–1993).
[9]Alford (n 8) 3.
[10]S.S. Lotus (France v Turkey) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
[11]Alford (n 8) 4.
[12]*Alcoa* (n 1).
[13]Id para 443.
[14]Foreign Trade Antitrust Improvement Act, 15 U.S. Code, title 15, chapter 1, §6a clarifying the extraterritorial application of the US Sherman Act.
[15]Ibid.
[16]Behrens (n 2) 8.

foreign sovereignty interests, as it does not consider, arguably to the extent necessary, international comity concerns.[17] Thus, inherent to the nature of comity concerns, the latter position advocates for a restrictive approach as regards jurisdiction and extraterritoriality in the context of public international law.[18]

However, it seems that over time, various competition law regimes have adopted an *effects doctrine* approach in order to establish jurisdiction in cases where other public international law principles fail to establish the adequate link necessary. Take for example the competition laws of Germany,[19] Austria[20] and Switzerland,[21] which all have the principle of the *effects doctrine* explicitly mentioned within its laws. Furthermore, although (of course) not applicable to EU law, but however, to conflicts of national laws, also the Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (ROM II)[22] contains an *effects doctrine* approach.[23] Under the section concerning "Unfair competition and acts restricting free competition", it is explicitly stated that the applicable law as regards the non-contractual obligations arising out of restrictions of competition[24] "shall be the law of the country where competitive relations or the collective interests of consumers *are, or are likely to be, affected*"(emphasis added).

3. Jurisdiction in EU competition law – the *pre-Intel* era

As illustrated above, the effects doctrine has first been established in the US in order to establish jurisdiction and reach aliens abroad "whose conduct occurs beyond the borders of the enforcing State, but has an effect within that State".[25] Although popular in US antitrust law for

[17] Alford (n 8) 4.
[18] Andreas Th. Müller, *EWR-Recht und Extraterritorialität*, 1/20, LJZ 91, 96 (2020); see also Case C-413/14 P *Intel/Commission* [2017] ECLI:EU:C:2017:632 Opinion of AG Wahl ECLI:EU:C:2016:788 (*Opinion of AG Wahl*) para 283.
[19] § 185 (2) German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*).
[20] § 24 (2) Austrian Cartel Law (*Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen – Kartellgesetz*).
[21] Art 2 (2) Swiss Cartel Act (*Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen – Kartellgesetz*).
[22] Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (ROM II) [2007] OJ L199/40.
[23] Neumayr *Article 6 Rom II-VO* in Koziol/Bydlinski/Bollenberger (eds) *Kurzkommentar ABGB* (5th edition, Verlag Osterreich 2017) para 3.
[24] Covering infringements of both national and EU competition law (ROM II [n 22] recital 22) as well as infringements of Articles 101 and 102 TFEU (ROM II [n 22] recital 23).
[25] Najeeb Samie, *The Doctrine of 'Effects' and the Extraterritorial Application of Antitrust Laws,* 14 U. Miami Inter-Am. L. Rev 23, 23 (1982).

more than half a century,[26] it has not been until recently that the ECJ made clear that the *effects doctrine* provides a suitable means to establish jurisdiction also in the context of EU competition law.[27] This is owed to the fact that the Court has, in order to face the issues arising in the context of jurisdiction in cases of extraterritorial scope, pursued and developed other strategies and concepts in the past.

Dyestuffs,[28] for example, was the first case where the Court had to rule on the issue of extraterritoriality and the application of the Treaty competition provisions. The concept developed in this case is the so-called *single economic entity doctrine* according to which a single undertaking might comprise two or more legal persons.[29] The case in *Dyestuffs* concerned a concerted practice of dyestuff producers to increase prices in Europe. The involved British company Imperial Chemical Industries Ltd ("ICI") was – back then (and again) – not located within the territory of the EU. However, it had subsidiaries within the EU, which distributed its products and ensured that the concerted practice was implemented within the single market. As the subsidiaries did "not enjoy real autonomy in determining [their] course of action in the market",[30] their conduct and actions were attributed to the parent company with which they formed an economic unit.[31] Accordingly, the British ICI and its subsidiaries were seen as a *single economic entity* and thus qualified as an undertaking within the meaning of the Treaty competition provisions.

Therefore, in *Dyestuffs* the ECJ abstained from directly ruling on the (non-)existence of effects. However, considering the wording of the Court and, in particular, the fact that ICI "was able to ensure that its [d]ecision was implemented on [the internal] market"[32] as well as the finding of the ECJ that "[t]he increased prices at issue were put into effect within the internal market",[33] which means that "the actions […] constitute practices carried on directly within that market",[34] the implementation of a measure as well as its effects arguably indeed played a role in the ruling by (indirectly) considering it via "the back door". Hence, it seems that the way for the adoption of new concepts to establish EU jurisdiction was paved. Moreover, for the sake of

[26] *Alcoa* (n 1).
[27] *Intel* (n 7) para 46.
[28] Case 48/69 *Imperial Chemical Industries Ltd v Commission* [1972] ECLI:EU:C:1972:70 (*Dyestuffs*).
[29] Richard Whish and David Bailey, *Competition Law* (9th edition, Oxford University Press 2018) 93.
[30] *Dyestuffs* (n 28) para 134.
[31] *Dyestuffs* (n 28) para 134, 135.
[32] *Dyestuffs* (n 28) para 130.
[33] Ibid.
[34] Ibid.

completeness, it is worth mentioning that the ECJ, in its ruling in *Dyestuffs*, did not follow AG Mayras who, following the approach of the Commission, had favoured the acceptance of a qualified effects test.[35]

Another approach was developed in *Wood Pulp*.[36] The case concerned concerted practices of wood pulp producers located outside the EU which lead to fixing of their export prices into the EU. However, different from the facts in *Dyestuffs*, there was no link to EU territory in the form of EU resident subsidiaries. Consequently, the *single economic entity* doctrine did not provide a suitable means to establish jurisdiction. Moreover, although recommended by AG Damon[37] (who was basically following AG Mayras and his opinion in *Dyestuffs*), the ECJ did not apply the qualified effects test. Rather, with respect to the concerted practice or cartel at hand, the ECJ distinguished between the formation and implementation of the latter.[38] The Court further held that "[i]f the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions".[39] The Court, therefore, acknowledged that such an approach would undermine the competition provisions and provide a perfect escape route for anticompetitive behaviour implemented, but however not agreed upon, within its territory. Thus, the ECJ concluded that in order for jurisdiction to be established, "[t]he decisive factor is the place where [an agreement, decision or concerted practice] is implemented".[40] The reference to the implementation of a practice and not to its formation is thus referred to as *implementation doctrine*.

In a later decision in *Gencor*[41] the GC went even further and arguably got closer to the *effects doctrine* as established in US antitrust law. The case concerned a merger of a South African and an English company by acquiring joint control of a South African entity, which exported platinum and rhodium into the EU. The GC, after having referred to the *implementation doctrine* as developed in *Wood Pulp*, it explicitly supplemented the latter by recognizing the applicability of the merger

[35] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (6th edition, Bloomsburry 2018) 662.
[36] Case 89/85 *Ahlström Osakeyhtiö and others v Commission* [1994] ECLI:EU:C:1994:12 (*Wood Pulp*).
[37] Case 89/85 *Ahlström Osakeyhtiö and others v Commission* [1994] ECLI:EU:C:1994:12 (*Wood Pulp*) Opinion of AG Damon ECLI:EU:C:1988:258 para 53 et seq.
[38] *Wood Pulp* (n 36) para 16.
[39] Ibid.
[40] Ibid.
[41] Case T-102/96 *Gencor Ltd v Commission* [1999] ECLI:EU:T:1999:65 (*Gencor*).

regulation when "a proposed concentration will have an immediate, substantial and foreseeable effect in the EU".[42] Although the GC in *Gencor* did not explicitly commit itself to a qualified effects test as a standalone benchmark to establish EU jurisdiction, some voices in the literature have nevertheless seen it as recognition of the doctrine of effects.[43] However, it was only recently, more than 20 years later, that the Court has explicitly clarified that the qualified effects test indeed provides a suitable means in order for EU jurisdiction as regards the application of the competition law provisions to be established.

4. Jurisdiction in EU competition law – the *Intel* saga

4.1. The ECJ's judgement

The case in *Intel*[44] concerned Article 102 TFEU proceedings against Intel. The anticompetitive behaviour of the company consisted of two different sets of abusive practices, namely, (i) loyalty rebates as well as (ii) compensation payments of Intel paid to its customers for their breaching of contracts concluded with its competitor on the market for CPUs, namely AMD. As regards the matter of jurisdiction, the ECJ, basically following the GC's first instance decision,[45] recognized both, the implementation doctrine as well as the qualified effects test as standalone and independent means to establish jurisdiction for the application of the competition provisions. Hence, "[t]he argument put forward by Intel […] that the qualified effects test cannot serve as a basis for the Commission's jurisdiction is […] incorrect".[46]

Moreover, the ECJ clarified that "in order to determine whether the Commission has the necessary jurisdiction to apply […] EU competition law",[47] "it is necessary to *examine the conduct* of the undertaking or undertakings in question *as a whole*"[48] (emphasis added). Consequently, the Court applied the qualified effects test to Intel's conduct in its entirety as it regarded the two sets of practices and, in particular, Intel's conduct vis-à-vis Lenovo arguably lacking any substantial link to the EEA/EU, as part of an overall strategy.[49]

[42] *Gencor* (n 41) para 90.
[43] Müller (n 18) 95 with further references.
[44] *Intel* (n 7).
[45] Case T-286/09 *Intel v Commission* [2014] ECLI:EU:T:2014:547 (*GC Intel*).
[46] *Intel* (n 7) para 46.
[47] *Intel* (n 7) para 50.
[48] Ibid.
[49] *Intel* (n 7) para 52.

Regarding the respective standard of effects required in order for EU jurisdiction to be established, the Court stressed that probable effects of conduct were sufficient to meet the foreseeability criterion.[50] Furthermore, it held that Intel's conduct was capable of producing both, an immediate as well as a substantial effect in the EEA, as it formed part of an overall strategy (i) intended to ensure that no Lenovo notebook with AMD CPU's was available on the market (including in the EEA) and (ii) aimed at foreclosing AMD's access to the most important sales channels.[51] Hence, according to the ECJ, the GC did not err in law taking "into consideration the conduct of the undertaking *viewed as a whole* in order to assess the substantial nature of its effects on the market of the EU and the EEA"[52] (emphasis added).

However, as already mentioned the ECJ's decision has been subject to criticism with respect to the jurisdiction of the EU competition provisions and wholly offshore conduct,[53] that is, the behaviour between Intel in the US and Lenovo in China. However, as will be shown in the following, it is the author's view that the ECJ's reasoning is sound when considering a holistic perspective and, by means of analogy, the concept of conduct forming part of an overall strategy as developed in the context of the effect on trade criterion.

4.2. Conduct forming part of an overall strategy

The ECJ in its reasoning in *Intel* referred to "an overall strategy aimed at foreclosing AMD's access to the most important sales channels".[54] The concept of conduct forming part of an overall strategy has its roots in the context of the effect on trade criterion and the respective Commission Guidelines.[55] However, the use of the latter concept also in the jurisdictional context and the case at hand seems appropriate for the following reasons.

The idea that it is sufficient for a practice to be part of an overall strategy in order to establish a measure's capability of producing effects in the context of Article 102 TFEU can be found in the Guidelines on the effect

[50] *Intel* (n 7) para 51.
[51] *Intel* (n 7) paras 52, 54 and 55.
[52] *Intel* (n 7) para 56.
[53] Fox (n 5) 981.
[54] Intel (n 7) para 23.
[55] Commission Notice, Guidelines on the effect on trade concept in Article 81 and 82 of the Treaty [2004] OJ C101/07 (*Guidelines on the effect on trade concept*) para 17.

on trade concept of the Commission.[56] According to the latter concept, the application of the competition provisions is limited to practices which "may affect trade between Member States".[57] The Guidelines clarify that in case of Article 102 abuses, the fact that such abuse must affect trade between Member States "does not imply […] that *each element* of the behaviour must be *assessed in isolation*"[58] (emphasis added). Rather, "[c]onduct that *forms part of an overall strategy* pursued by the dominant undertaking must be *assessed in terms of its overall impact*"[59] (emphasis added). The clarification of the Commission, goes even further explicitly stating that

> [w]here a dominant undertaking *adopts various practices in pursuit of the same aim*, for instance, practices that aim at eliminating or foreclosing competitors, *in order for Article [102] to be applicable to all the practices* forming part of this overall strategy, it is *sufficient that at least one of these practices is capable of affecting trade between Member States*.[60] (emphasis added)

Arguably, this reasoning seems also valid in the jurisdictional context and cases of extraterritorial scope. Hence, also in the jurisdictional context, it seems reasonable to view and assess behaviour consisting of different sets of abusive conduct as a whole given the respective practices pursue the same aim, that is, they form part of the same overall strategy. Similar to the effect on trade criterion, the qualified effects test is a concept to establish jurisdiction and thus the application of the competition provisions to specific circumstances and facts. Therefore, both concepts pursue a similar objective, namely the determination of jurisdictional limits. The effect on trade criterion defines "the boundary between the areas respectively covered by [EU] law and the law of the Member States".[61] Put differently, if "inter-state trade" is affected, Article 102 TFEU applies, even if only one of the practices implemented by a dominant undertaking is capable of affecting trade between Member States, given the various other practices adopted pursuit the same aim and form part of an overall strategy. The same argument seems valid in the context of the qualified effects test, it being a concept to establish

[56] Commission Notice, Guidelines on the effect on trade concept in Article 81 and 82 of the Treaty [2004] OJ C101/07 (*Guidelines on the effect on trade concept*) para 17.
[57] *Guidelines on the effect on trade concept* (n 56) para 1.
[58] *Guidelines on the effect on trade concept* (n 56) para 17.
[59] Ibid.
[60] *Guidelines on the effect on trade concept* (n 56) para 17.
[61] Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECLI:EU:C:1979:138 para 17.

jurisdiction and define the boundary between the areas respectively covered by EU competition law and other competition laws.

Reading the *Intel* decision, the ECJ has arguably indeed adopted such an approach. Put differently, the Court's ruling can be read in this sense, as in its application of the qualified effects test to Intel's conduct, the Court explicitly referred to the concept of conduct forming part of an overall strategy when assessing the foreseeably immediate and substantial effects of the Intel-Lenovo practice.[62] Hence, the ECJ finally came to the conclusion that the behaviour was capable of producing effects as it formed part of an overall strategy (i) intended to ensure that no Lenovo notebook with AMD CPU's was available on the market and (ii) aimed at foreclosing AMD's access to the most important sales channels.[63] Therefore, according to the Court, the GC was correct taking "into consideration *the conduct* of the undertaking *viewed as a whole* in order to assess the substantial nature of its effects on the market of the EU and the EEA"[64] (emphasis added).

In light of the above, it is the author's view that it seems consistent to apply the concept of conduct forming part of an overall strategy in the jurisdictional context and cases of extraterritorial scope. Therefore, in the context of the establishment of jurisdiction of the EU competition provisions, to view behaviour of an undertaking as a whole, that is, putting together different sets of conduct pursuing the same aim seems reasonable. Arguably, not to follow such approach would lead to an artificial separation of an undertaking's business conduct which, by its nature, might consist of various practices or different elements (all forming part of the very same overall strategy). Furthermore, such reading of the ECJ's reasoning seems also appropriate from a consistency perspective, as it serves the aim of a coherent standard as regards the conduct of an undertaking which is relevant in order for the competition provisions to be applicable, that is, jurisdiction to be established.

4.3. Why AG Wahl's criticism of the GC is justified but does however not apply to the ECJ's reasoning

As argued in the preceding section, it is the author's view that the reasoning of the ECJ is sound. However, although in effect similar decisions were issued by both courts, the GC's line of argument in its first-instance

[62] *Intel* (n 7) paras 52 and 55.
[63] *Intel* (n 7) paras 52, 54 and 55.
[64] *Intel* (n 7) para 56.

decision is slightly different and was criticized by AG Wahl in his opinion. Whereas the AG in principle recognized the necessity to adopt an effects-based approach[65] for the establishment of jurisdiction of the competition provisions, he nevertheless criticized the GC for having applied the jurisdictional criteria incorrectly.[66] Although the GC did refer to the concept of an overall strategy,[67] it mainly built its argument on the concept of a single and continuous infringement thereby arguably mingling the latter concepts. Hence, one interesting point of criticism raised by AG Wahl was the fact that the GC's argument as regards the effects being immediate as well as substantial lay with the respective anticompetitive conduct forming part of a single and continuous infringement.[68] As AG Wahl noticed, by applying a criterion which constitutes a procedural rule,[69] that is, the concept of a single and continuous infringement, whose "underlying rationale is to ensure effective enforcement in cases where infringements are composed of a complex of anticompetitive practices that can take different forms and even evolve over time"[70] the GC committed an error in law.[71] The AG's argument seems valid. The criticism raised by the AG concerned the fact that the single and continuous infringement criterion as a procedural rule was inappropriate to be applied in the jurisdictional context,[72] as the concept "cannot […] extend the ambit of the prohibitions under the Treaties".[73] In other words, the GC arguably applied a procedural rule to facts of non-procedural nature and thereby erred in law.

It is the author's view that the reasons for the AG's argument being convincing are twofold. Firstly, as stressed in the opinion, the concept of a single and continuous infringement is "merely a procedural rule aimed at alleviating the evidentiary burden of competition authorities".[74] Therefore, it can and should consequently not be used to extend the ambit of the competition provisions.[75] Secondly, the concept has – as far as the author is concerned – exclusively been applied in the context of Article 101 TFEU in order to deal with "complex cartel arrangements

[65] *Opinion of AG Wahl* (n 18) para 296.
[66] *Opinion of AG Wahl* (n 18) para 306.
[67] GC Intel (n 45), in for example, paras 184, 587, 876 etc
[68] *Opinion of AG Wahl* (n 18) para 319.
[69] *Opinion of AG Wahl* (n 18) para 182.
[70] *Opinion of AG Wahl* (n 18) para 181.
[71] *Opinion of AG Wahl* (n 18) para 318.
[72] *Opinion of AG Wahl* (n 18) para 319.
[73] Ibid.
[74] *Opinion of AG Wahl* (n 18) para 319.
[75] Ibid.

that involve different levels of cooperation".[76] Therefore, the Commission may in the context of Article 101 TFEU rely on the concept of a single continuous infringement as it "is not required to establish the exact level of participation of each cartel member".[77] Yet, in the context of Article 102 TFEU the GC's referral to the concept of a single and continuous infringement in its decision in *Intel* seems inappropriate.

However, as illustrated in the preceding section, it is important to stress that the ECJ, in its reasoning in *Intel,* did not refer to the concept of a single continuous infringement at all. Rather, it referred to "an overall strategy aimed at foreclosing AMD's access to the most important sales channels",[78] a concept which in the jurisdictional context of the case at hand, seems appropriate for the abovementioned reasons.[79]

In a nutshell, the criticism of the GC's reasoning of AG Wahl in his opinion seems legitimate. However, as the ECJ ignored the GC's error in law by skipping analysis of the GC's reasoning and avoiding the erroneous reference to the concept of a single continuous infringement, the ECJ's judgement cannot be criticized by the same token. Rather, considering a broader perspective, the path chosen by the ECJ and its reference to the concept of conduct forming part of an overall strategy seems to contribute to an overall coherent framework as regards conduct to be assessed and its respective effects in the context of the establishment of jurisdiction and the application of the EU competition provisions.

5. The *qualified effects test* and our global and online economy

Needless to say, the adoption of a qualified effects test seems also well suited to offset challenges imposed by modern global and online economies. Hence, the application of competition law should, considering the broader picture, not exclude "offshore"[80] practices forming part of an overall strategy and capable of having an impact on the single market, however lacking the necessary jurisdictional link according to established concepts and principles within EU law, that is, namely, the *single economic entity* as well as the *implementation doctrine*.

[76]Ezrachi (n 35) 59.
[77]Ibid.
[78]Intel (n 7) para 23.
[79]See section 4.2.
[80]Fox (n 5) 992.

This argument is particularly strong in a globalized world with global markets and economies. In this respect, new phenomena and changes in the economic environment due to digitisation, such as for example the internet and online markets, are of particular significance. Therefore, the aforementioned concepts linking jurisdiction to the notion of undertaking or the actual implementation of a measure within a respective national or supranational market, can – in a competition law context – arguably be qualified as being "old-fashioned" in the sense that they had been developed during times, where our economies functioned differently. At the time, when the *single economic entity*, as well as the *implementation doctrine* were developed, the notion of globalization just had a different meaning as economies worldwide were marked by brick and mortar activities.

Furthermore, also the internet had not yet been a market and distribution channel. A fact which has definitely changed considering the fast-growing online markets and industries nowadays. In light of this, one could arguably doubt the aforementioned principles providing a suitable toolkit for the establishment of jurisdiction with respect to measures adopted and implemented in a globalized online world. However, a different picture is drawn considering the qualified effects test. Such a test seems capable to face the challenges as imposed by a globalized world and (online) markets that are globally interconnected.[81]

6. Concluding remarks

In light of the above, it is the author's view that the ECJ's judgement in *Intel* is sound. Firstly, because it seems consistent to apply the concept of conduct forming part of an overall strategy in the jurisdictional context and cases of extraterritorial scope. Put differently, to view behaviour of an undertaking as a whole, that is, putting together different sets of conduct pursuing the same aim for the establishment of jurisdiction of the EU competition provisions seems reasonable. Arguably, not to follow such an approach would lead to an artificial separation of an undertaking's business conduct which, by its nature, might consist of various practices or different elements all forming part of the very same overall strategy. Furthermore, such reading of the ECJ's reasoning seems also appropriate from a consistency perspective: It serves the aim of a coherent standard as regards the relevant conduct of an undertaking to be

[81] Arguing similarly, Fox (n 5) 993.

assessed in order for the competition provisions to be applicable, that is, jurisdiction to be established. Furthermore, also within the system of the competition provisions and in particular, when considering the concept of conduct forming part of an overall strategy in the context of Article 102 TFEU and the effect on trade criterion, the recognition of an effects doctrine approach in order to establish EU jurisdiction seems valid (as both criteria pursue the same aim). Moreover, the qualified effects test seems to provide a "jurisdictional response" to challenges imposed by our globalized world and economies. In other words, such an effect-based approach seems to be capable of facing the challenges imposed by globalization. Arguably, the judgement in *Intel* can therefore be read accompanied by the underlying tenor that new challenges might call for new ways of thinking and conceptualizing.

Disclosure statement

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