Journal of Competition Law & Economics, 17(3), 686–707
https://doi.org/10.1093/joclec/nhaa034
Advance Access publication 14 January 2021

COMPETITIVE HARM CROSSING BORDERS: REGULATORY GAPS AND A WAY FORWARD

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ABSTRACT

This article analyses the current regulatory framework governing transnational restrictive business practices. It identifies key gaps that provide room for anticompetitive practices to flourish, causing cross-border transfer of wealth, typically from less affluent states. The economic harm caused by cross-border anticompetitive conduct is significant; international cartels alone caused overcharges exceeding $1.5 trillion in the period 1990–2016. This article offers a series of pragmatic policy recommendations that could narrow existing regulatory gaps. The proposals require no international negotiations and can be implemented domestically. They call for enabling of more assertive and robust extraterritorial enforcement of domestic competition laws and facilitation of positive externalities in that context.

I. INTRODUCTION

Progressing the integration of national economies into a global system has delivered a variety of benefits in recent decades, especially faster economic growth. However, current regulatory frameworks are inadequate when it comes to transnational anticompetitive conduct. Despite the development of a robust regulatory regime facilitating international trade, restrictive business

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practices continue to be dealt with domestically, except for some instances of regional integration (such as the European Union [EU]).[1]

Although the concept of illegal transnational conduct may seem distant or even abstract, it often affects everyday items. For example, a price-fixing cartel was discovered among producers of refrigeration compressors—the devices producing the cooling effect in fridges and freezers. In this case the violators were fined in the United States,[2] Canada,[3] the EU,[4] New Zealand,[5] Chile,[6] Mexico,[7] and Brazil,[8] indicating how widespread their operations were. However, due to the variety of challenges and limitations involved, such conduct frequently escapes scrutiny, or worse, escapes liability even when uncovered, often hiding behind a false pretence of ungovernability. The economic harm in question is significant. Connor estimates that, between 1990 and 2016 the discovered private international cartels alone affected sales of over $51 trillion worldwide.[9] The estimated global overcharges exceeded $1.5 trillion.[10] In fact, international cartels overcharge much more than similar domestic arrangements.[11] Furthermore, unlike in a domestic setting, such competitive harm is not just a matter of distribution of resources between producers and consumers. It constitutes an extraction of wealth from the affected state to the state hosting violators.

This article, in Part II, analyses the current regulatory regime governing anticompetitive conduct, showing that it is composed of a patchwork of rules and instruments of diverse origin and nature. These are both hard and soft laws. Some are domestic, others are international. The analysis, in Part III,

[1] In the latter cases, the issue is addressed insofar as such approaches provide for effective enforcement of competition laws, and generally only within the given group of countries.

[2] US Department of Justice, 'Panasonic Corp. and Whirlpool Corp. Subsidiary Agree to Plead Guilty for Role in Price-fixing Conspiracy Involving Refrigerant Compressors', 30 September 2010.

[3] Competition Bureau Canada, Panasonic Corporation pleads guilty to price-fixing conspiracy, 3 November 2010; Competition Bureau Canada, Embraco North America Inc. pleads guilty to price-fixing conspiracy, 27 October 2010.

[4] European Commission, IP/11/1511, Commission fines producers of refrigeration compressors €161 million in fifth cartel settlement, 7 December 2011.

[5] Commerce Commission, High Court hands out $3million penalty in refrigerator compressor industry cartel case, 22 December 2011.

[6] Fiscalía Nacional Económica, Corte Suprema confirma acusación de la FNE en primer caso de Delación Compensada, 24 September 2013

[7] Comisión Federal de Competencia Económica, Multa COFECE a Red Global De Fabricantesde Compresores Para Refrigeracón, COFECE-005-2014, 25 February 2014.

[8] Administrative Council for Economic Defence, CADE condemns cartel in the international market of refrigerator compressors, 18 March 2016.

[9] John M Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990- July 2016, 2nd ed.' (2016), at 24.

[10] Ibid, at 30.

[11] John M Connor and Yuliya Bolotova, 'Cartel overcharges: Survey and meta-analysis', 24(6) International Journal of Industrial Organization 1109 (2006); Florian Smuda, 'Cartel overcharges and the deterrent effect of EU competition law', 10(1) *Journal of Competition Law and Economics* 63 (2013).

identifies some of the key gaps within this regulatory framework, which creates enforcement lacunae and provides room for transnational anticompetitive practices to flourish at the expense of consumers, principally in the less resourceful and less developed states. Many states have introduced competition laws[12] and an international consensus has emerged as to the harmful nature of some of the most damaging types of anticompetitive arrangements. Yet gaps persist that were not addressed by the significant growth in contacts and cooperation between competition law enforcers all over the world. This article shows that the current regime *de facto* works for the select few, principally developed states, but offers little recourse to other countries affected by transnational violations of competition law. In doing so, it identifies the issue of wealth transfer, which should inform any approaches to rectifying violations.[13]

The current system of competition law enforcement requires a realignment to recognize and overcome some of its pitfalls. Part IV proceeds with a series of clear policy recommendations addressed principally to competition agencies and their respective constituencies. The proposals are underpinned by pragmatism, calling for incremental changes and fine-tuning within the existing regulatory framework, rather than a major overhaul. They focus exclusively on pursuing international cartels, which constitute the most rampant example of anticompetitive conduct and which are virtually universally condemned. The emphasis is principally on public enforcement, given that private enforcement is nascent or non-existent in most competition systems. Implementation of these proposals requires no international negotiations and most carry little, if any, inherent extra cost. If implemented by a sufficient number of states (a bottom-up regulatory change), these proposals would importantly readjust the currently sub-optimal system of enforcement, which gives violators ample opportunities to extract wealth from less affluent states.

II. PART II: CURRENT REGULATORY FRAMEWORK

A. Conduct Causing Competitive Harm Abroad—Free from Domestic Scrutiny

In the 1950s, fewer than 20 states had competition laws. By 1990 that number nearly doubled. In the last three decades the number of jurisdictions that introduced domestic competition laws increased to well over 120.[14]

[12] For the sake of simplicity this piece refers to 'competition laws' while acknowledging that in different parts of the world such legislation is also called 'antitrust laws' or 'anti-monopoly laws'.

[13] For theorisation in the similar context see Ariel Ezrachi, 'Cross Border Transfer of Wealth–Reflections on Competition Law and Developing Economies', University of Oxford Centre for Competition Law and Policy Working Paper 32 (2012).

[14] The International Competition Network—a virtual network of competition agencies in May 2019 had 139 member agencies from 126 jurisdictions. International Competition Network, ICN's 18th Annual Conference. News Release (17 May 2019), available at

Anticompetitive conduct harming the domestic market is prohibited in virtually all states that introduced competition legislation. That is the raison d'être of such legislation. Conduct harming only foreign markets (causing outbound competitive harm) is virtually never proscribed. Arrangements causing competitive harm abroad are legal under most domestic competition laws. For example, in the United States the 1982 Foreign Trade Antitrust Improvement Act 'cut back the reach of the Sherman Act [the key U.S. competition law statute] ... principally to protect U.S. sellers from challenges ... for their activity abroad.'[15] Export cartels, for example, are permitted in virtually all jurisdictions.[16] Hosting states— which are best positioned (in terms of the relative ease of enforcement) to deal with such anticompetitive conduct—wash their hands of it. Essentially, states care about national, not global, welfare.

In the long-term this is problematic. If conduct that causes harm abroad is not illegal, law enables businesspersons involved in transnational commerce to develop skills and mindsets that may be later used to cause competitive harm on the domestic market, which—in turn—will be costly and difficult to uncover and remedy. From a normative perspective, it sends contradictory signals to the public, undermining the credibility of the law, especially in those jurisdictions that envisage the severe sanction of imprisonment for some violations of competition law, such as cartel conduct or bid rigging (rigging public tenders). At a minimum, a policy of 'you'll go to jail if you do it here, but we do not mind if you do it elsewhere' is unlikely to reinforce a belief in the serious nature of any such violations.

Moreover, there is now an international consensus as to the harmful nature of hardcore cartels, which entail horizontal agreements between competitors aiming, in particular, to fix prices, submit rigged bids, set output quotas, and share or divide markets. This consensus was solidified internationally by means of a soft law instrument. As early as 1998 the Council of the Organisation for Cooperation and Economic Development (OECD) adopted a recommendation that called for an effective prohibition of such arrangements.[17] This

<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/AC2019PressRelease.pdf>. See further Umut Aydin, 'The International Diffusion of Competition Laws' (APSA Annual Meeting Paper 2010), available at <https://papers.ssrn.com/abstract=1657456>; Anu Bradford, et al., 'Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets', 16(2) *Journal of Empirical Legal Studies* 411 (2019).

[15] Eleanor M Fox and Daniel A Crane, *Global Issues in Antitrust and Competition Law* (St. Paul: Thomson/West, 2010) 455.

[16] Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15(1) *JIEL* 181 (2012), at 191–92.

[17] Interestingly, the OECD definition removed from the prohibition's ambit arrangements implicitly or explicitly permitted under domestic law (hence, arrangements harming only foreign markets, such as export cartels). OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL (1998), I(A)2(b). Recently the OECD's

prohibition was echoed and built upon in various broader fora since then.[18] The widespread recognition of the harmful nature of hardcore cartels is in stark contrast to the acceptance of and indifference towards such conduct causing outbound competitive harm.

Two facts help to understand the passive acceptance, if not encouragement, of conduct causing outbound competitive harm. First, such conduct creates a transfer of wealth from the affected market to the state hosting violators. The economy of the latter benefits from the harm to foreign consumers. This may also explain why some states with well-established competition agencies seem to tolerate conduct that causes harm in the domestic market also. If the extraction of wealth from abroad is considerable, it may be outweighing the domestic harm, which is, after all, principally distributional in character (that is, from a wealth distribution perspective, anticompetitive conduct distorts allocation of resources within an economy). For example, Canada is the world's leading producer of potash, over 95 per cent of which is sold via an export cartel (which is legal under Canadian law) on foreign markets. Overall the Canadian economy benefits greatly, even if the domestic economy is adversely affected by inflated prices of potash.[19] Second, law enforcement is costly. It can be argued that any enforcement against conduct causing outbound competitive harm comes at the cost of enforcement aimed at protecting the domestic market. If that is a true trade-off, focusing exclusively on domestic harm may be rational. However, one should also factor in the already mentioned possible adverse consequences for the domestic economy of creating conditions conducive to development of anticompetitive attitudes within the business community. Nevertheless, conduct causing only outbound competitive harm is currently legal in virtually all states. Domestic competition laws do not prohibit it. Anticompetitive conduct that harms the domestic market only tangentially is likely to be seen as a low priority matter.

B. Lack of a Satisfactory International Response

The issue of transnational anticompetitive conduct could be addressed at the international level. Despite numerous efforts, the international community has so far failed to develop any binding multilateral mechanisms to deal

Council adopted a revised recommendation. See OECD, Recommendation of the Council concerning Effective Action Against Hard Core Cartels, OECD/LEGAL/0452 (2019).

[18] See, for example, UNCTAD, The United Nations Set of Principles on Competition, TD/RBP/-CONF/10/Rev.2, (2000); WTO Working Group on the Interaction between Trade and Competition Policy, Provisions on Hardcore Cartels. Background Note by the Secretariat, WT/WGTCP/W/191 (20 June 2002).

[19] For discussion see Frederic Jenny, 'Export Cartels in Primary Products: The Potash Case in Perspective' in Simon J Evenett and Frederic Jenny (eds), *Trade, Competition, and the Pricing of Commodities* (London: Centre for Economic Policy Research, 2012).

with public or private anticompetitive conduct.[20] This is so even in case of hardcore cartels, which—as mentioned earlier—are universally condemned. Public anticompetitive conduct, in some circumstances, could be challenged within the framework of the World Trade Organisation (WTO),[21] but as yet such actions have been few and largely unsuccessful.[22] While no progress has been achieved on the multilateral level when it comes to binding instruments, a number of valuable initiatives and platforms have emerged, allowing for interactions and experience sharing between domestic competition agencies.[23] While useful, none of these frameworks offers practical help in ongoing investigations.

C. Struggle to Apply Domestic Laws

Given that hosting states generally do nothing about outbound anticompetitive conduct and that there are no mechanisms to deal with it at the international level, the affected states are left to deal with conduct harming their markets by applying domestic laws. In the most challenging cases, they have to address harm arising from foreign conduct of foreign entities (that is, to deal with

[20] First discussions on how to govern transnational anticompetitive conduct date back to the League of Nations proceedings in the 1920s. The newly created United Nations continued investigating these matters. See, for example, D H MacGregor, *International Cartels* (Geneva: The League of Nations, International Economic Conference, 1927); United Nations Department of Economic Affairs, *International Cartels: A League of Nations Memorandum* (Lake Success, 1947). Competition law was meant to be included in the framework of the International Trade Organisation, under Chapter 5 of the Havana Charter, but this effort failed. United Nations Conference on Trade and Employment, 'Havana Charter' (1948), available at <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf>. The issue returned to the multilateral forum around the time of the creation of the WTO, in 1995. In 1996 a special working group was constituted to consider the issues on the interface of trade and competition. Singapore Ministerial Declaration, WT/MIN(96)/DEC (13 December 1996), para 20, available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>. However, this effort failed largely due to opposition of the developing countries. Ultimately, in 2004 competition law was dropped from the WTO agenda. Decision Adopted by the General Council on 1 August 2004, WT/L/579 (2 August 2004), para 1(g). See further David J Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford: OUP, 2010).

[21] For example, Article XI of the General Agreement on Tariffs and Trade (GATT) prohibits WTO Members imposing or maintaining import or export restrictions. WTO, *The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge: CUP, 1999) 423. In a WTO case *Japan—Trade in Semi-Conductors* it was established that a governmental scheme restricting exportation of goods below certain prices falls under prohibition of Art. XI:1. GATT Panel Report, *Japan—Trade in Semi-Conductors* (Japan—Trade in Semi-Conductors), L/6309, adopted 4 May 1988, BISD 35S/116. State-endorsed export cartels could fall into the scope of application of that provision. Similarly, Article 11.1(b) of the Agreement on Safeguards prohibits ordering or encouraging of voluntary export restraints, potentially covering some of the state-created cartels. WTO, at 275.

[22] For discussion see Eleanor M Fox, 'The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition', 9(2) *JIEL* 271 (2006).

[23] See below notes 37–46 and accompanying text.

purely off-shore arrangements). They must apply their competition laws extraterritorially.[24]

Asserting jurisdiction over foreign entities has been practiced in competition law for decades. The United States spearheaded extraterritoriality in this area.[25] Its persistence, despite considerable international protests and opposition,[26] led to the development of international law and a gradual recognition, through increasing usage and fading objections,[27] of a new jurisdictional principle—the effects doctrine. This principle enables states to assert jurisdiction over foreign entities based on the in-forum economic effects of their anticompetitive conduct, regardless of the location of the culprits or the conduct itself. Hence, it enables states to apply domestic law to foreign activities causing competitive harm on the domestic market. It is *prescriptive* in scope. It does not legitimize extraterritorial *enforcement jurisdiction*. That is, it does not allow for performance of any acts of authority on foreign soil (such as collection of evidence or conduct of any other investigative or enforcement acts).

Within these prescriptive limits, extraterritoriality in competition law is no longer contentious. A growing number of jurisdictions adopted the effects doctrine under different names and in various forms. For example, in the EU two jurisdictional tests emerged,[28] both based on the interpretation of pre-existing provisions. First, jurisdiction over foreign entities in relation to their foreign conduct can be asserted if that conduct was implemented in the EU (the implementation test).[29] Second, jurisdiction over foreign entities can be asserted on the basis of the qualified effects of the investigated conduct (the effects test). If such conduct has immediate, substantial and foreseeable effect

[24] The terms 'extraterritoriality' and 'extraterritorial jurisdiction' are used interchangeably to describe a 'competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory'. Menno T Kamminga, 'Extraterritoriality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, online ed. (OUP, 2010).

[25] In the ground-breaking *Alcoa*, a case dealing with an international cartel of aluminium producers, Judge Learned Hand famously stated it was 'settled law' that states may apply their laws to foreign entities for their foreign conduct if it affects the domestic market, thereby setting a precedent and allowing for a far-reaching transnational enforcement of US antitrust laws. *United States v. Aluminium Company of America (Alcoa)*, 148 F.2d 416 (2nd Cir. 1945).

[26] The protests and opposition took various forms—diplomatic notes filed with the US government, amicus briefs submitted by foreign governments in cases before the US courts, and enactment of domestic legislation aimed at curbing the extraterritorial reach of US competition laws. See, respectively, Marek Martyniszyn, 'Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases', 61(4) Antitrust Bulletin 611 (2016); Marek Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order', 37(1) World Competition 103 (2014).

[27] In this vein Martyniszyn, Foreign States'... (n 27), at 630–31.

[28] Both tests were recognized by the Court of Justice of the European Union. See *Case C-413/14 P, Intel v. Commission*, paras 40–46.

[29] *Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v. Commission (Wood Pulp)*, [1988] ECR 5193.

in the EU, the test is satisfied.[30] Various other jurisdictions enacted textual bases allowing for extraterritorial application of their domestic laws in similar circumstances.[31]

Although thus far no uniform jurisdictional test has emerged, the doctrine is very much alive. The limits of the acceptable reach of domestic law continue to be tested in new cases. For example, in the recent *Motorola Mobility* case, U.S. plaintiffs sued foreign cartelists for fixing prices of components that were incorporated by plaintiffs' foreign affiliates (their foreign subsidiaries) into products subsequently sold by the plaintiffs in the United States. The US Court of Appeal for the seventh Circuit found against such an expansive jurisdictional reach.[32] However, an assertion of jurisdiction based on direct and non-negligible sales by foreign violators into the forum is most unlikely to be contested.

The effects doctrine enables states to pursue foreign violators, but it does not make transnational cases easier in practice. Such cases remain challenging because the evidence will often be located abroad, making any investigation more difficult. Moreover, transnational cases are likely to be more resource-intensive, disincentivising enforcement by agencies that are facing growing pressure to repeatedly legitimise their activities and show success. Furthermore, should the violators have no assets in the forum, the prospects of enforcement of any decisions or judgments may be limited[33]—yet again discouraging enforcement.

There are also extra-legal considerations. Foreign violators may threaten to exit the affected market if any action were brought against them. Should the violators' goods or services not be readily substitutable, their exit may be worse for consumers than the anticompetitive conduct itself. The less significant the market in question from the violators' perspective, the more credible their threat of abandonment. Furthermore, given that transnational anticompetitive conduct leads to a transfer of wealth from the harmed state to the home state of violators, it is not surprising that the latter may protest or even actively oppose, by legal and extra-legal means, any actions against the violators based therein. For example, when India challenged operation of the U.S. Soda Ash Export

[30] *Case T-102/96, Gencor Ltd v. Commission*, [1999] ECR II-753.

[31] Compare, for example, Sec. 5 of the Australian Competition and Consumer Act 2010, Art. 2 of the Brazilian Law N° 12.529, Sec. 46(1) of the Canadian Competition Act, Art. 2 of the Chinese Anti-Monopoly Law, Art. 3(2) of the Russian Federal Law №135-FZ on Protection of Competition, or Art. 3(1) of the South African Competition Act.

[32] *Motorola Mobility LLC v. AU Optronics Corp.*, 746 F.3d 842 (7th Cir. 2014).

[33] For example, in 2014 the Lithuanian competition agency imposed a fine of over 35 mln euro on Gazprom, a Russian gas exporter, for its failure to comply with earlier imposed merger conditions. The fine was subsequently upheld by Lithuanian courts, yet so far the recovery has not been successful. In fact, a day after the fine was imposed, Gazprom sold all its remaining assets in Lithuania. 'Lithuanian anti-trust body says recovering fine from Gazprom is difficult', *The Baltic Times*, 19 April 2019, available at <https://www.baltictimes.com/lithuanian_anti-trust_body_says_recovering_fine_from_gazprom_is_difficult/>.

Cartel, the U.S. Trade Representative intervened with the Indian government. Among other actions, he announced a review of the U.S. Generalised System of Preferences for India, which could have cost India a significant amount of money. Ultimately, the Indian Supreme Court found the relevant jurisdiction provision disallowed extraterritorial application of Indian competition law.[34] This outcome was considered by the U.S. Trade Representative as a 'success story'.[35]

Optimists may argue that the harmed states need not deal with transnational cases on their own due to various cooperative instruments. To be sure, many states concluded cooperation agreements that enable and facilitate enforcement.[36] Some agencies can now exchange publicly available information or information created in-house; enter into consultations; or even coordinate enforcement (for example, coordinate execution of unannounced inspections in cartel cases simultaneously investigated by agencies in the affected states[37]). These are positive developments. However, not all states were able to invest resources to develop an extensive network of cooperation agreements, which are typically only bilateral. Their existence and comprehensiveness should not be assumed, especially if agencies are not well established. Moreover, the decisive majority of such instruments do not provide for assistance in collection and exchange of evidence, which is normally the key practical obstacle in transnational cases.[38] To illustrate, the EU—a leading competition regime—concluded bilateral cooperation agreements with only 11 jurisdictions and

[34] *Haridas Exports v. All India Float Glass Manufacturers' Assn.*, 6 SCC 600 (The Supreme Court 2002).

[35] 'International Trade and the Impact on the US Soda Ash Industry, Hearing before the Subcommittee on International Trade of the Committee of Finance, US Senate, 15 April 2004, HRG 108–527', 2004, available at <http://finance.senate.gov/library/hearings/download/?id=f0148a8a-1c78-4e76-9776-485ffbf2ec7a>.

[36] For example, OECD accounts for 15 more comprehensive co-operation agreements and 145 memoranda of understanding between agencies (which tend to be less detailed than formal inter-governmental agreements). Compare: OECD, International Co-operation and Enforcement: List of Fifteen Co-operation Agreements (2015); OECD, International Co-operation and Enforcement: List of 145 Agency-to-Agency Memoranda of Understanding (2015).

[37] The first such coordinated inspections were conducted only in February 2003 by the EU, US, Canadian and Japanese enforcers in relation to suspected cartel activities among producers of heat stabilisers and impact modifiers. European Commission, MEMO/03/33, Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids—International cooperation on inspections (13 February 2003).

[38] In particular, outside the EU context OECD notes only four agreements allowing agencies to seek assistance in securing evidence located in their counterpart's jurisdiction and only a few agreements allowing for the exchange of confidential information. OECD, Working Party No. 3 on Co-operation and Enforcement: Inventory of Co-operation Agreements. Note by the Secretariat, DAF/COMP/WP3(2015)12/REV1, 15 June 2015, 13–15.

exchange of confidential information may be possible in only one case (the 2014 agreement with Switzerland).[39]

More advanced cooperation, for example in relation to exchange of evidence, may be possible among states that concluded mutual legal assistance treaties and that impose criminal sanctions for violations of competition law.[40] However, there are relatively few states that find themselves in these circumstances. Most states do not impose criminal sanctions for violations of competition law.[41] The same applies to possible cooperation under extradition treaties. The first extradition on cartel charges occurred in 2014, when Romano Pisciotti, an Italian national, was extradited from Germany to the United States for his involvement in the marine hose cartel.[42] However, this was a unique case. Most countries, including Germany, do not extradite their own nationals. Moreover, most extradition treaties require dual criminality, that is, the conduct in question must be a violation of criminal law of both counties for the extradition to occur. In the Pisciotti case, extradition was possible because bid-rigging is a criminal offence in Germany. Had that case involved any other type of cartel conduct, extradition would not have been possible.[43]Hence, while valuable, such instruments carry rather limited potential.

Furthermore, even when such sophisticated cooperation is possible, recognition and enforcement of foreign decisions and judgments in competition law is currently non-existent (apart from money judgments, that is, awards in private cases which may be enforceable, subject to various conditions). In the majority of states, decisions and judgments in competition cases arising

[39] See the EU's listing of 'Bilateral relations on competition issues' available at <https://ec.europa.eu/competition/international/bilateral/#s>.

[40] For review of frameworks allowing for exchange or sharing of evidence between competition agencies see Marek Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement', 19(1) International Journal of Evidence and Proof 11 (2015). A few states, such as Australia, took a progressive step forward and provide for evidence sharing with foreign counterparts unilaterally via so-called information gateways. This is a welcomed development.

[41] Out of over 120 jurisdictions with competition laws, over 30 countries criminalized some form of cartel conduct. In civil law countries criminalization has often been limited to bid-rigging. Gregory C Shaffer, et al., 'Criminalizing cartels: A global trend?' in John Duns, et al. (eds), Comparative Competition Law (Edward Elgar, 2015).

[42] Gianni De Stefano, 'Meet the First Extradited Businessman on Cartel Charges', 8(5) Journal of European Competition Law & Practice 281 (2017). In 2007 the US sought extradition of a UK national, Ian Norris, in relation to his involvement in carbon parts price-fixing in the 1990s. This proved impossible because price-fixing became a criminal offence in the UK only in 2003. Norris ended up being extradited to the US in 2010 on obstruction of justice charges. James A Wilson, 'Extradition: The New Sword or the Mouse that Roared?',(4) Antitrust Source 1 (2011).

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from public enforcement will be considered as public in nature and as such are generally non-enforceable abroad. Certainly, no such obligation arises from international law. No international agreements have been concluded to facilitate it in this area of law. Not even between the United States and the EU.

In more general terms, cooperation is voluntary and it works best when it is a two-way street, especially in cases of parallel investigations of the same conduct. When the mutual interest is missing, assisting others takes away scarce resources that the requested agency would otherwise devote to its own core activities. Hence, it is always a big ask, even if the legal framework allows for it.

Beyond the bilateral ties, a great deal of collaboration in competition law and policy occurs in the multilateral fora. The key platforms are the virtual International Competition Network (ICN) and two inter-governmental organizations—the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Developments (UNCTAD).[44] There are also various regional networks of competition agencies, such as the African Competition Forum.[45] Often the membership of these platforms overlaps. Largely thanks to these fora, competition agencies now have various opportunities to interact and engage with foreign counterparts. These platforms offer space for fostering of mutual understanding and experience sharing. They help to build consensus and achieve convergence, where appropriate. In that regard, they rely on soft law. They also allow trust to develop and ease any tensions relating to unilateral transnational enforcement. Yet none of these fora offers any practical, hands-on assistance in the ongoing investigations. Therefore, despite the growth in formal and informal ties between competition law enforcers, the enforcement gaps persist.

In effect, transnational anticompetitive conduct is governed by a patchwork of rules and instruments of diversified provenance. These are predominantly domestic rules (hard law); cooperation agreements among states and competition agencies; bilateral instruments not specific to competition law (typically

[44] Mitsuo Matsushita, 'International Competition Network (ICN)' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar, 2017); Robert D Anderson and Nivedita Sen, 'The Role of the OECD in Competition Policy' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar, 2017); Marek Martyniszyn, 'The Role of UNCTAD in Competition Law and Policy' in Thomas Cottier and Krista Nadakavukaren Schefer (eds), *Elgar Encyclopedia of International Economic Law* (Edward Elgar, 2017).

[45] For analysis of multilateral competition law platforms see Imelda Maher and Anestis S Papadopoulos, 'Competition Agency Networks Around the World' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Cheltenham: Edward Elgar, 2012); D Daniel Sokol, 'International Antitrust Institutions' in Andrew T Guzman (ed), *Cooperation, Comity, and Competition Policy* (OUP, 2011).

with little biting force[46]); voluntary cooperation; and informal interactions between competition agencies.

The reality is significant under-enforcement and under-deterrence of transnational anticompetitive conduct. For example, the OECD analysis, based on Connor's database of private international cartels, shows that over half of transnational cartels discovered since 1983 have been fined in one jurisdiction only.[47]

III. PART III: SHORTCOMINGS OF THE STATUS QUO

The current regulatory patchwork works relatively well for the key developed countries. The established competition agencies could overcome the hurdles of transnational cases if they so choose.[48] They have the necessary financial and human resources and expertise. This state of affairs may explain why the developed world stopped investing efforts in finding a multilateral solution to the problem of transnational anticompetitive conduct such as international cartels.

Even when foreign violators do not have assets in the developed states, they are unlikely to react to unfavourable enforcement outcomes by exiting the market because such markets are too important. The economic weight of a market helps to realize the potential of extraterritoriality. Economies that are less important from the violators' perspective face a particularly uphill and unequal battle when challenging anticompetitive conduct.

In this regulatory context, the smaller and less developed countries are advised to focus their enforcement on domestic violations.[49] When it comes

[46] As in cases of competition chapters of preferential trade agreements. D Daniel Sokol, 'Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', 83(1) Chicago-Kent Law Review 231 (2008).

[47] OECD, *OECD Business and Finance Outlook 2017* (2017) 146.

[48] In the US context, with its advanced criminal enforcement program, foreign nationals are now often willing to voluntarily travel to the US to admit guilt and serve jail time for their involvement in cartel conduct. Until 1999 the US was willing to offer 'no-jail deals' to foreign citizens for submitting to the US jurisdiction, admitting guilt and cooperating, but that practice was discontinued. In 1999, for the first time, a foreign citizen agreed to plead guilty and to accept a four-month prison sentence in relation to his involvement in the international vitamins cartel. Plea Agreement, United States v Sommer, Crim. No. 3:99-CR-201-R (N.D. Tex. 1999). See further Scott D Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Last Two Decades' (The 24th Annual National institute on White Collar Crime, Miami, 25 February 2010).

[49] The advice would typically go along the lines: 'global cartels should not be the priority of emerging economies ... developing countries [should] focus on domestic cartels first and do so carefully so as not to challenge innocent conduct'. NYU School of Law, Antitrust in Emerging and Developing Countries. Conference Summary (24 October 2014), 6, available at <https://www.law.nyu.edu/sites/default/files/upload_documents/conference%20summary.pdf>.

to transnational violations, such as international cartels, they are often recommended to rely on the enforcement efforts of developed regimes.[50] That is, they are to depend on what can be called 'trickle-down enforcement'. The implicit argument is: should an international cartel be investigated and sanctioned by one or more developed agencies, it will be disbanded and cause no further competitive harm. In other words, enforcement by more developed agencies can generate positive externalities, or spill-over effects for other regimes. Hence, there is an opportunity for enforcement free-riding. While this certainly happens, this proposition assumes that transnational violations affect developed and developing countries in a similar manner. This may be true when it comes to violations affecting virtually all world markets; in such casesprosecution effectively deals with the totality of the underlying anticompetitive conduct. For example, in the case of the Southeast Asian cartel of LCD screen manufacturers, enforcement by a number of agencies led to the restoration of competition.[51] Similarly, the operation of the vitamins cartel was global and attracted significant attention of enforcers in several jurisdictions.[52] However, not all transnational violations are omnipresent with sufficient impact on key economies to provoke vigorous enforcement and a complete discontinuation of the harmful practice. For example, the American Soda Ash Export Cartel (ANSAC), a U.S.-based export cartel, was found in breach of EU competition law in 1990.[53] However, this decision did not lead to its abandonment. ANSAC reorganized its activities in relation to the EU and continued operating in a business-as-usual manner in other markets. In 1996 it was challenged in India. The case failed due to the lack of an explicit textual basis in Indian law allowing for extraterritoriality. The judgment was rendered under severe pressure exerted by the United States. In 1999 the same cartel was challenged in South Africa, where—after nearly ten years of litigation—ANSAC settled.

Enforcement in the EU, India and South Africa did not lead to the break-up of ANSAC, which continues operating in various markets. This case underlines the gaps in the current regulatory framework. It shows that enforcement free-riding will not necessarily work. There may be no trickle down benefit to countries that forego domestic enforcement.

Moreover, reliance on enforcement activities of developed countries by other states is not always an option. While some transnational violations are

[50] See, for example, Pierre Horna, 'David & Goliath: How young competition agencies can succeed in fighting cross-border cartels', The University of Oxford Centre for Competition Law and Policy Working Paper (L) 45 (2017), at 9.

[51] The cartel was investigated and sanctioned, for example, in the US, EU, Brazil, China, Japan and South Korea. For an overview see Avantika Chowdhury and Robin Noble, 'Estimating Damages from the Global LCD Cartel: The Role of Economics', 12 Competititon Law Journal 468 (2013), at 468–70.

[52] Harry First, 'Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law', 68 Antitrust Law Journal 711 (2001).

[53] For analysis of the Indian and South African ANSAC case see Martyniszyn (n 17) at 199–208.

truly global, many types of anticompetitive conduct are more limited in scope, depending on the nature and characteristic of the goods or services involved. There may be regional arrangements (for example, a regional cement cartel) or arrangements that affect only a specific group of countries (for example, a cartel concerning a good which is no longer sold in the developed economies, but which is still offered in developing countries). In such cases there would be no enforcement by developed agencies to piggy-back on and therefore no trickle-down benefit, given that markets in developed economies would not be affected.

Due to the existing gaps in the regulatory framework, the recommendation to focus on domestic violations has had perhaps unintended, and somewhat perverse, consequences. Domestic infringements—which typically do not lead to transfer of wealth abroad—are pursued while transnational violations escape scrutiny, despite generally causing much greater harm[54] and often leading to outflow of wealth from the domestic economy. Even in cases of successful reliance on enforcement by agencies of other states (for example, in cases of truly global cartels) the transfer of wealth is not remedied. The rents extracted through supra-competitive prices are not even partially remedied by fines imposed on the violators, given that no sanctions are imposed in relation to the harm to the domestic market. Rather, the benefit is the prevention of future harm. This is only a partial success, but even this is not present in cases in which the foreign enforcement is either not robust enough to lead to discontinuation of the anticompetitive conduct in question or when such enforcement is simply missing. Hence, passive reliance on trickle-down enforcement is unsatisfactory.

Furthermore, even if free-riding on enforcement by other states can prevent future harm, this setup provides no deterrence, which is considered crucial in modern competition law. Transnational violators can feel safe and act with impunity. Any sanctions they may face will relate only to harm caused in the enforcing jurisdictions. Hence, there is no reason for them not to continue with existing—and not to create new—anticompetitive arrangements that extract wealth from markets in states that do not challenge transnational violations.[55] The situation is particularly grim in the case of anticompetitive practices that do not affect any major jurisdiction enforcing competition law robustly, since there will be no agency to piggy-back on and no possibility of a trickle-down benefit. The violation may remain completely off the radar should domestic agencies focus solely on domestic conduct. Moreover, even if the viability of a particular anticompetitive arrangement requires it to be global in scope,

[54] For example, the meta-analysis of Connor and Bolotova shows that overcharges of international cartels are 14 percentage points higher than those of domestic cartels. Connor and Bolotova (n 12) at 1134.

[55] In fact, Connor and Bolotova show that international cartels' overcharges in North America and the EU, where antitrust enforcement is more robust, were lower than overcharges of the same or similar cartels in Asia and Latin America, where they face less scrutiny. Ibid.

prospective violators may still find it profitable, even after taking into account any sanctions they may face in the key jurisdictions that actively challenge such transnational violations. Profits extracted from the non-enforcing jurisdictions may offset 'related' costs, that is sanctions imposed in the relatively few jurisdictions which do pursue such cases. This argument was made before the US Supreme Court in *Empagran*.[56] Such sanctions—especially if only financial in nature—can be seen as no more than just a selectively imposed tax on transnational anticompetitive activities. The availability of individual criminal sanctions in the form of imprisonment in some countries changes that dynamic, but does not fundamentally resolve the problem.

Therefore, reliance on trickle-down enforcement should not be readily accepted as a solution to the problem presented by transnational anticompetitive practices. Public enforcement of competition law typically aims to: (1) deal with the prohibited conduct in question so that it does not continue (prevention of further harm); (2) punish violators in the instant case; (3) deter other entities from engaging in any prohibited conduct (general deterrence). Trickle-down enforcement can, in some cases, help to prevent further harm, but under the current regulatory patchwork, violators are neither adequately punished nor deterred. Private enforcement is aimed at: (1) compensating the victims and (2) strengthening deterrence. Trickle-down enforcement does not contribute to these two goals. Moreover, transnational violations lead to transfer of wealth and, without any domestic enforcement, this phenomenon is not remedied in any manner. Therefore, trickle-down enforcement provides limited positive externality.

IV. PART IV: NARROWING THE GAPS

A realignment of the current system of enforcement relating to transnational anticompetitive conduct could help address its weaknesses. These proposals explicitly focus on international hardcore cartels, which constitute the most flagrant example of anticompetitive conduct. They do not extend to other areas of competition law, in which significant differences among jurisdictions persist (and, in effect, a broad consensus is missing as to what conduct should be prohibited). Most of the recommendations can be implemented without significant inherent costs and require no international negotiations. Hence, they can be of relevance to competition systems which particularly suffer from resource constraints.[57] While not eliminating the existing enforcement gaps,

[56] *Brief of Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag in Support of Respondents, F. Hoffmann- La Roche Ltd v. Empagran SA*, 2004 WL 533934 (15 March 2004); *Brief for Certain Professors of Economics as Amici Curiae in Support of Respondents, F. Hoffmann- La Roche Ltd v. Empagran SA*, 2004 WL 533930 (15 March 2004).

[57] For further exploration of such challenges see Pierre Horna, Fighting Cross-Border Cartels: The Perspective of the Young and Small Competition Authorities (Bloomsbury, 2020).

such realignments should significantly narrow them for the ultimate benefit of consumers.

First, domestic competition laws need to explicitly provide for extraterritorial jurisdiction.[58] Preferably, a clear textual basis for extraterritoriality should be adopted, drawing from the experience of the key jurisdictions. Moreover, the relevant rules pertaining to investigation, adjudication, and sanctioning have to be considered in a holistic manner. It is vital to recognize that, while dealing with separate issues, these different elements form a chain of enforcement. If necessary, they need to be adjusted to enable proper handling of transnational cases. For example, rules on service of process need to permit service by publication if foreign entities are themselves not present and do not have any authorized agents in the country. Development of the Japanese competition regime serves as a good illustration. While the Japanese competition agency has been willing to bring cases against foreign violators since the late 1990s, domestic rules originally did not allow for service of process. In 2002 they were changed, enabling service of process abroad either by diplomatic staff or by publication.[59] Similarly, provisions dealing with sanctions should not allow violators with no in-forum assets or turnover to avoid punishment. For example, a cartelist participating in a market-sharing agreement under which it agrees not to enter a particular market should not avoid sanctions simply because it has no in-forum turnover in the very market harmed by the agreement.[60]

The preparation of a domestic regulatory framework is an essential first step, signalling eagerness to challenge transnational violators. It should be followed by a change in regulatory approach, informed by the deficiencies of reliance on trickle-down enforcement. In particular, agencies should not shy away from bringing transnational cases and they should publicly signal that attitude. They should accept the related risks and use these opportunities to develop their capacity and to identify further regulatory improvement needs. There are no shortcuts when it comes to learning-by-doing.

The fact that transnational cartels often affect more than one jurisdiction means that there may be, potentially, more expert pairs of eyes searching for them. Therefore, it is important for competition agencies to establish and nourish relationships with counterparts in neighbouring countries and closely follow their enforcement efforts. Simultaneously, agencies should publish,

[58] This should not be assumed. For example, Indonesian competition legislation—Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition, introduced in 1999, does not provide for jurisdiction in cases involving parties without any in-forum presence, despite Indonesia being a large, G20 economy.

[59] Marek Martyniszyn, 'Japanese Approaches to Extraterritoriality in Competition Law', 66(3) International and Comparative Law Quarterly 747 (2017), at 757–58.

[60] That used to be the case, for example, in Japan. In the Marine Hose cartel case involving four foreign and one Japanese entity, foreign violators avoided penalties due to not having any local turnover. Ibid, at 758.

preferably also in English, information about their own enforcement actions to enable others to learn from them. In the current fragmented regulatory patchwork, the gaps in communication between enforcers allow violators to avoid liability. These gaps persist despite the overall growth in interactions between agencies, suggesting that not all agencies participate in these processes to the same extent. The existing international cooperation platforms, such as ICN, OECD, and UNCTAD, continue to play an important role. However, there still seems to be a need for information clearing houses, which could collect and distribute information about cartel enforcement activities among interested agencies, for example, by drawing from the experience of dissemination of information within the European Competition Network. A major information clearing house would streamline the process, narrow the information gap, and offer significant time-savings for all involved. UNCTAD is particularly well-placed to assume such a role, given its all-embracing membership (including both developed and developing states), permanent staff, and experience in working with agencies at different stages of their life-cycle.

When it comes to enforcement, currently, the existence of an international cartel affecting markets in numerous countries needs to be proven in each and every state that attempts to sanction it. This applies equally to relatively small cross-border arrangements and to truly global cartels. It is one of the most striking features of the present regulatory patchwork. It causes significant waste of resources due to multiplicative costs. It importantly contributes to under-enforcement against transnational cartels because many of the affected states may not have the capacity or be able to prove the allegations. In fact, the LIBOR cartel, the most broadly investigated global cartel, faced scrutiny in just over ten jurisdictions.[61] In addition, sanctions in the effectively enforcing jurisdictions reflect only domestic harm.[62] Hence, from a global perspective, they have proved ineffective as a deterrent.

This patchwork approach should be abandoned. Instead, agencies should be permitted to rely on judgments, decisions and settlements in competition cases of other jurisdictions and use them as prima facie evidence of the existence of the cartel in question. There is no reason why the fact of an existence of a cartel, established in proceedings in one state, should not be introduced and recognized in a follow-on case in another jurisdiction by means of judicial notice.[63] In fact, a similar solution has been introduced in the EU to facilitate private follow-on actions.[64] Agencies should be obliged to

[61] Connor (n 10) at 33, fn 78.

[62] See below notes 72–74 and accompanying text.

[63] For a similar proposal see Michal S Gal, 'Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance', 51 Virginia Journal of International Law 57 (2010).

[64] Under the Damages Directive, the EU member states are obliged to ensure that a final decision of a competition authority or a review court in one member state may be used in courts of

show only the domestic link—to assert that the harm was likely to have been caused on the domestic market by the cartel. This procedural step would then shift the burden of proof, requiring the alleged violators to prove that their activities did not, in fact, harm the local economy. Such a possibility has been discussed at the OECD forum, which recognized its potential to both reduce overall enforcement costs and increase the level of deterrence against international cartels.[65] It was also presented in the UNCTAD's framework.[66] The United States considered it promising, noting its own experience of sharing guilty pleas in criminal cartel cases with foreign counterparts to facilitate prosecutions elsewhere.[67] There already are instances of reliance on this approach. For example, in South America's first transnational conduct case—Mexico's investigation of the international lysine cartel—the materials from the US provided circumstantial evidence of damage to the Mexican market.[68] Similarly, Brazil's first transnational conduct case—the investigation of the international vitamins cartel—relied on the EU decision and guilty pleas from the United States to prove the cartel's existence, allowing investigators to focus on the cartel's effects in Brazil.[69]

This change in approach can be introduced unilaterally (that is, without any need of intergovernmental negotiations). For example, domestic legislation could list jurisdictions whose judgments, decisions, and settlements in competition law can be relied on. The violators would still have their day in court (or its equivalent as provided for under domestic rules). They would be able to present their defence as to the existence of harm on the domestic market.

other member states as at least prima facie evidence that an infringement of EU competition law has occurred. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 1–19 (2014), Art. 9(2). Some countries in the EU went beyond that minimal requirement. For example, finding of a violation of EU competition law by competition agencies or courts in any EU member states are binding on German courts. *Gesetz gegen Wettbewerbsbeschränkungen (GWB)*, Art. 33(4).

[65] OECD, Working Party No. 3 on Co-operation and Enforcement: Executive Summary of the Hearing on Enhanced Enforcement Co-operatoin, DAF/COMP/WP3/M(2014)2/ANN3/FINAL (14 June 2014), 6–9.

[66] UNCTAD, Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures. Note by the UNCTAD Secretariat TD/B/C.I/CLP/44 (2017), 59–60.

[67] US Department of Justice and Federal Trade Commission, Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures. Contribution to the Proceedings of the UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy (5 July 2017), 6, fn 10.

[68] Communication from Mexico to the WTO Working Group on the Interaction between Trade and Competition Policy (14 August 2002), WT/WGTCP/W/196, 7.

[69] Eduardo M Gaban and Juliana O Domingues, Antitrust Law in Brazil: Fighting Cartels (Kluwer, 2012), at 8.3.1.2.

Hence, no special due process concerns would be raised.[70] This systemic realignment would help to overcome one of the key problems of transnational cases—the difficulty of accessing foreign-based evidence. This mechanism should apply in cases of both public and private enforcement, if the latter mode of enforcement is provided for in domestic law. There is no reason why private parties harmed by transnational cartels should be disadvantaged and prevented from seeking appropriate damages.

In this context, the leading competition agencies which investigate transnational violations, and the courts that hear cases in these states, have a special and important role to play. They can facilitate this positive externality by exploring the extent of any investigated transnational cartels' operations and by recording their findings in a clear and unambiguous manner in judgments, decisions, or settlements. While this can be a great service to competition agencies elsewhere, the economy of the enforcing state would also benefit without incurring extra costs. Facilitating enhanced international enforcement acts as a deterrent within their own system. The enforcing state sends a strong message: 'If you harm this market, we will challenge you domestically and we will also help our counterparts hold you liable elsewhere.'

Furthermore, international cartelists should face more severe sanctions for their violations. Despite the increasing interest in criminalization and individual liability more broadly, the most common sanctions for cartel conduct are corporate fines. The prevalent fining methodology is to impose fines that are benchmarked to the relevant in-country turnover of the culprits.[71] Given the nature of the present regulatory regime, this practice is friendly to cartelists. Assuming, for the sake of argument, that corporate fines and fine-setting methodology are both sufficient and just, an international cartel would face appropriate sanctions only if it were to be held responsible in each and every affected jurisdiction. That is virtually impossible. Moreover, the common practice is to introduce maximum limits on fines. Quite often fines cannot exceed either a specific monetary amount, provided for in the relevant domestic rules, or a fixed percentage of the violator's last year-relevant in-forum turnover, typically ten per cent.[72] There is no theory or empirical evidence supporting such thresholds. Even if there were, in practice such thresholds are never met. The imposed fines are set at astonishingly low levels

[70] This article presumes operating within the rule of law paradigm. For examination of possible procedural fairness concerns from a comparative perspective see Daniel D Sokol and Andrew T Guzman (eds), Antitrust Procedural Fairness (OUP, 2019).

[71] For comparison on fine-setting methodologies see International Competition Network, Setting of Fines for Cartels in ICN Jurisdictions. Report to the 7th ICN Annual Conference (April 2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf>.

[72] Ibid, at 31–32.

compared to illegal profits, even within the sanctioning jurisdictions.[73] Given the practical impossibility of effective enforcement in every harmed state, those jurisdictions which have the capacity to bring transnational cases should increase the severity of their sanctions to increase deterrence. They should do so by, at least, both increasing permissible fine limits and by utilizing the full available spectrum of punitive measures. In this context, the transnational nature of a violation, leading to a transfer of wealth abroad, should be taken into account.

From the deterrence perspective it would be advisable to relate fines to overall, not just in-forum turnover. This would undoubtedly lead to the defendants' bar raising the double jeopardy argument, conflating the question of which harm is being addressed and which legal interest is being protected with the issue of appropriate sanctions. In the current regulatory framework, each jurisdiction addresses the harm caused on its own market. Therefore, double jeopardy is not and would not become an issue. To avoid this misleading double jeopardy argument, it may be worth considering replacing turnover as a sanctioning benchmark with the overall value of the violator's assets. In general, the type and severity of sanctions is a sovereign matter. For example, the US provides for imprisonment of up to ten years for individuals involved in a cartel,[74] although in many other countries around the world such conduct is not subject to any criminal sanctions, or even to any individual sanctions. Since this is a sovereign choice and there are no binding universal norms to the contrary, it cannot be contested. That said, there is no reason why agencies and courts should not continue with the good practice, which has already emerged, of taking into account sanctions already imposed by other jurisdictions. This practice should continue as a matter of comity, especially in cases involving non-financial sanctions.

Moreover, fines levied on foreign violators could be left, at least partially, in domestic competition agencies' budgets to facilitate future enforcement and advocacy activities. Sceptics may argue that this would skew the incentives, making the agencies more likely to bring such cases. That is, in fact, the very objective of this proposal. As explained above transnational cases are generally more complicated, presenting higher risks for enforcers. The system should reflect that and incentivize the taking of such risks. More fundamentally, given that transnational violations tend to cause greater harm and lead to outflow of wealth, they warrant agencies' enhanced attention.

[73] In this vein Florian Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law', 10(1) Journal of Competition Law & Economics 63 (2013); Emmanuel Combe and Constance Monnier, 'Fines Against Hard Core Cartels in Europe: the Myth of Overenforcement', 56 Antitrust Bulletin 235 (2011); Cento Veljanovski, 'Cartel Fines in Europe–Law, Practice and Deterrence', 30(1) World Competition 65 (2007); John M Connor and Robert H Lande, 'How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines', 80 Tulane Law Review (2005), available at <http://ssrn.com/paper=787907>.

[74] 15 U.S.C.A. § 1.

Finally, execution of any sanctions imposed on foreign violators may be difficult, or even seem impossible in the short to medium term. Such possible challenges should not, however, inform inaction and passive acceptance as it would create perverse incentives for firms to engage in more, not less anti-competitive conduct from abroad. Even if seemingly unenforceable, imposed sanctions fulfil their function of deterrence, signalling to potential foreign violators that the jurisdiction in question is closed for anticompetitive business. In the context of the international vitamins cartesl it was empirically found that a strong enforcement regime may not only discourage cartel formation, but actually leads to lower overcharges even if the cartel is never actually investigated.[75]

V. CONCLUSIONS

This article engaged with the persistent problem of transnational anticompetitive conduct, which causes very significant harm to consumers. It showed that the current regulatory regime consists of a variety of rules and instruments that often leave cross-border cartels untouched. This patchwork is composed of predominantly domestic laws and various agreements, typically bilateral, that provide for different forms of cooperation between competition agencies. There are no binding multilateral instruments that can be availed of in cases involving transnational anticompetitive conduct, and all efforts to develop them, so far, have failed.

States focus on the harm to their own domestic markets. Virtually all jurisdictions do not prohibit conduct causing outbound competitive harm, that is, conduct harming only foreign markets. In effect, the states whose markets are harmed by such inbound competitive harm are left to act on their own, by applying their domestic competition laws extraterritorially. This is so even in the case of hardcore cartels, which are virtually universally prohibited.

Transnational cases are particularly challenging. Access to evidence remains one of the key difficulties. Moreover, less developed and smaller jurisdictions may simply either not have enough resources to bring such cases, or their markets may not be large enough to secure foreign violators' compliance with outcomes of such investigations. While optimists may argue that the significant growth in cooperation and intensity of interactions between competition agencies, on formal and informal platforms, make these cases easier to prosecute, so far they have not overcome the key obstacles. In effect, smaller and less established jurisdictions continue to face a particularly steep and unequal battle when it comes to fighting transnational violations. This regulatory patchwork offers little recourse to them.

[75] Julian L Clarke and Simon J Evenett, 'Deterrent Effects of National Anticartel Laws: Evidence from International Vitamins Cartel', Antitrust Bulletin 689 (2003), at 718, 26.

This article argues that the current regulatory patchwork requires a realignment to address gaps that effectively protect transnational hardcore cartels. The proposed changes are pragmatic and can be introduced unilaterally. If implemented by a sufficient number of states, these proposals would importantly realign the currently sub-optimal system of enforcement worldwide. They carry a promise of significantly strengthening deterrence and addressing some of the main gaps in the present regulatory framework governing transnational anticompetitive conduct.