



## DOCTRINE OF EXTRATERRITORIALITY IN COMPETITION LAW

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The Doctrine of Extraterritoriality (DoE) plays an important role in the field of Competition Law (CL). The DoE relies on the applicability of CL rules in order to ensure that anticompetitive conduct, anticompetitive behaviour and anticompetitive transactions should be regulated and controlled by the means of International Competition Law (ICL). The purpose of DoE is to investigate and punish the abusive and wrongful conduct and practises carried out by the companies.

A pertinent question of thought arises, does DoE really regulate anticompetitive behaviour. Does it regulate ICL agreements. How does DoE function in protecting competitive agreements needs to be understood. Is there a need to make amendments for both efficient and effective implementation of CL rules across the globe. Furthermore, is there a need for separate CL courts for CL disputes.

This essay maintains the stance that the DoE plays an important role in the field of CL. Without effective CL rules, many harmful situations go unpunished. This essay adopts a comparative approach by examining different jurisdictions, but with a main focus on United Kingdom (UK) CL. The essay argues throughout that there is a need to adopt

unified approach in the CL as this will reduce the ambiguities in the CL over extraterritorial application of laws. The essay concludes with the fact that there is a need to foster both bilateral and multilateral relations between and among the countries for unified approach for DoE. Furthermore, closer form of cooperation will lead to impose deterrent punishment upon violators of CL. Moreover, as mentioned above there is a need to adopt a unified approach in the case of DoE, which is the central argument of this essay.

This essay is divided into five sections. Section 1 examines the rationality of DoE as to what is DoE how DoE plays an important role in the field of ICL, that is, fundamental issues underlying DoE. Section 2 explains the reasons for DoE as to why DoE is required. Furthermore, this section examines what are the difficulties and challenges faced by the countries over the implementation of this doctrine. Moreover, this section examines the role of jurisdiction, role of judiciary in examining the jurisprudence in CL. Section 3 explains requirement of DoE, that is, how strong enforcement of extraterritorial CL rules can contribute to impose deterrent punishment upon the violators of CL rules. Section 4 explain other aspects of DoE, whether strong extraterritorial enforcement of CL rules leads to punishment of all offences committed in the area of CL and how had CL been during Coronavirus Crisis (CC), Brexit, arbitration in CL. Section 5 is Critique. Section 6 is Conclusion.

### **Rationality of Doctrine of Extraterritoriality**

A pertinent question of thought arises as to how should DoE be defined. DoE can be defined as “Extraterritorial reach of CLs



refers to the extent to which jurisdictions are permitted to apply their domestic laws to conduct that occurs outside their jurisdiction, including the reach of remedies (i.e., prohibitions or requirements on foreign conduct or with respect to foreign assets)<sup>1</sup>. Does this definition satisfy all the requirements, requisite for DoE? It's important to learn here that DoE is exercised to overcome both abuse of dominance and monopolisation.

Donnellan defines extraterritoriality as the conduct that occurs in the foreign territory, but which has an impact over the domestic occupation of the state.<sup>2</sup> This definition seems to be accurate because it is the extraterritorial conduct that has an impact upon the domestic conduct. If Donnellan's definition is examined, the following elements are discovered. These are, to what extent is the infringement of CL in foreign jurisdiction and the seriousness implementation of the CL in the foreign jurisdiction. This definition lacks some serious elements, that is, it does not explain as to what act is an offence under CL, that is, how serious and grave is the offence, what kind of punishment must be imposed, arbitrability of CL dispute.

Territoriality and extraterritoriality are the claims of authority made by some particular

actors with some particular interests to promote.<sup>3</sup> The actors who are harmed by the "anticompetitive conduct may invoke the concept of objective territoriality to argue that the regulating country would overstep its authority if it applied its laws to foreign conduct".<sup>4</sup> It is pertinent to mention that "territoriality functions within the jurisdictional context as the conceptual foundation of regulatory authority over transactions or conduct"<sup>5</sup>. The concepts of territoriality and extraterritoriality revolve around the word 'territorium' that was used by Grotius that does not refer to the territory used in the geographical sense, but also the sphere within which the state jurisdiction exists.<sup>6</sup>

The Harvard Draft explains the essence of jurisdictional principles. These include that "there is a substantial connection between the matter and the State seeking to exercise jurisdiction and the State seeking to exercise jurisdiction has a legitimate interest in the matter"<sup>7</sup>. Furthermore, the claims of extraterritoriality work in part to recast jurisdictional analysis rather than to focus on the location of conduct.<sup>8</sup> Harvard Draft gives appropriate jurisdictional principles for DoE. It depends on the countries as to how do they interpret DoE. There are three ways in which DoE can be interpreted. These are Diplomatic

<sup>1</sup> Koren Wong-Ervin and Melanie Kiser, 'Extraterritoriality, Global Dictionary of Competition Law, Concurrences' (Concurrences Antitrust Publication and Events) < <https://www.concurrences.com/en/dictionary/Extraterritoriality#auteur> > accessed on November 27, 2021.

<sup>2</sup> Laura Donnellan, 'The Extraterritorial Reach of Antitrust Laws: A Comparative Analysis' (2003) 4 *Hibernian Law Journal* 239.

<sup>3</sup> Hannah L. Buxbaum, 'Territory, Territoriality and the Resolution of Jurisdictional Conflict' (2009) 57 *The American Journal of Comparative Law* 631, 635.

<sup>4</sup> *ibid*, 635.

<sup>5</sup> *ibid*, 636.

<sup>6</sup> *ibid*, 666.

<sup>7</sup> Dan Jerker B. Svantesson, 'A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft' (2015) 109 *AJIL Unbound* 69, 71 < [https://www.researchgate.net/publication/317362211\\_A\\_New\\_Jurisprudential\\_Framework\\_for\\_Jurisdiction\\_Beyond\\_the\\_Harvard\\_Draft](https://www.researchgate.net/publication/317362211_A_New_Jurisprudential_Framework_for_Jurisdiction_Beyond_the_Harvard_Draft) > accessed on December 27, 2021.

<sup>8</sup> Hannah L. Buxbaum (n 3) 643.



protest, Legislative Enactments and responses on the case laws.<sup>9</sup> They do exert considerable influence upon DoE. Diplomatic Protest has been a common paradigm as diplomatic dialogues have strongly amounted to intrusion in domestic affairs of the countries.<sup>10</sup> Responding by legislation means that the countries enact laws in order to overcome the barriers by blocking laws.<sup>11</sup> An issue arises, by blocking laws can a country overcome the offence committed under CL, just because, the said offence is not considered under its local jurisdiction. An offence in one jurisdiction may not be an offence in another jurisdiction. On the other hand, the response by case law means how the courts have presided over case laws, what decisions have been presided by the courts and precedents used by the courts over citing judgements is an important subject matter of consideration.

On the other hand, an argument arises, is there a need for unified approach for an extraterritorial application of CL. Before proceeding further, it is important to note here that CL has characteristics of public law as well as it imposes duty on various subjects. These are duty not to abuse dominant position, duty not to enter into anticompetitive competitive agreements, duty to comply with merger notification

agreements and duty not to engage in unfair trade practices.<sup>12</sup> Furthermore, the objective of the CL is to protect consumer interests, that is, consumers must pay a fair price for the right product.<sup>13</sup>

The anticompetitive behaviour can be evidenced in a number of situations. These are invalid contracts that show evidence of sharing market information, horizontal and vertical agreements appear to have anticompetitive purposes for sharing information about relevant information about future prices, cartels.<sup>14</sup> The British Parliament adopted the rules to regulate anticompetitive agreements in 1998.<sup>15</sup> Furthermore, the UK adopted rules to control the abuse of dominance in 2002 in the field of merger control.<sup>16</sup> Moreover, UK's Restrictive Trade Practices Act, 1976 highlights compulsory registration of firms who want to carry business in the UK.<sup>17</sup>

In the case of *Phones 4U Ltd (In Administration) v EE Ltd*, the court permitted a retail intermediary for mobile phones in the UK to adduce expert evidence in support of the claim that a number of mobile operators colluded in ceasing the trade, forcing into

<sup>9</sup> Maher M. Dabbah, *International and Comparative Competition Law* (First Edition, Cambridge University Press, 2010) 471, 472, 475.

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> Thanh Phan, 'The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach' 2016 77(2) *Louisiana Law Review* 430 < <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6615&context=lalrev> > accessed on November 29, 2021.

<sup>13</sup> Diva Rai, 'Enforcing competition laws in the UK: a critical overview' (*Pleaders Intelligent Legal Solutions*, 13 September, 2021) < <https://blog.ipleaders.in/enforcing-competition-laws-uk-critical-overview/> > accessed on November 30, 2021.

<sup>14</sup> *ibid.*

<sup>15</sup> Ovidiu-Horia MAICAN, 'The legal regime of competition in United Kingdom' (2015) 5(1) *Juridical Tribune* 113, 114.

<sup>16</sup> *ibid.*, 113.

<sup>17</sup> R.J. Taylor, 'UK competition law and procedures - an overview' 1988 9(4) *E.C.L.R.* 446, 447.



administration.<sup>18</sup> It is important to have an evidential value in CL disputes.

The EU regime explains three pillars for CL. These are the need to capture right agreements, the need to be compatible with other CLs and to impose stringent punishment upon the offenders.<sup>19</sup> In the case of Google LLC v European Commission, “the general court largely dismissed action against the decision of the commission finding that Google had abused the dominant position by favouring own comparison-shopping service over competing shopping services”<sup>20</sup>.

In order to overcome such issues, the countries should adopt a unified approach to CL in order to overcome the double-standards exercised by the countries over acts committed by some jurisdictions.<sup>21</sup> Furthermore, the countries should adopt a unified approach that is suitable for all the

countries across the globe that encourages both competition as well as cooperation. Moreover, the countries should consider a series of issues as well before adopting a unified approach that are beneficial for all the jurisdictions across the globe.

The global framework over the extraterritorial application of CLs is required because markets are global and in the present scenario uniform strategies are required to ensure fair competition. With the unified approach of DoE for the application of CL, the countries will cooperate in the matters of common interest and ensure transparency and procedural fairness in the application of CLs.<sup>22</sup> Furthermore, this will ensure recognition of each jurisdiction’s sovereignty, transparency, non-discrimination among the companies on the basis of their nationality, procedural fairness, efficiency and effectiveness, timely and

<sup>18</sup> [2021] EWHC 2879 (Ch); [https://uk.westlaw.com/Document/IF0240CF037DC11ECA3E5DEAA55F8DBF1/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af00000017e13c549ff6d730a09%3Fppcid%3Dda8af7f3f44146b488257ad5ad2b5d6a%26Nav%3Dduk-CASES%26fragmentIdentifier%3DIF0240CF037DC11ECA3E5DEAA55F8DBF1%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=58d288a27162c8678ccb643df5353466&list=UK-CASES&rank=3&sessionScopeId=2ee8f953468f539d6235ec47638888a663b61ff3e7699a116c89f28c9805909b&ppcid=da8af7f3f44146b488257ad5ad2b5d6a&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&comp=wuk](https://uk.westlaw.com/Document/IF0240CF037DC11ECA3E5DEAA55F8DBF1/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af00000017e13c549ff6d730a09%3Fppcid%3Dda8af7f3f44146b488257ad5ad2b5d6a%26Nav%3Dduk-CASES%26fragmentIdentifier%3DIF0240CF037DC11ECA3E5DEAA55F8DBF1%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=58d288a27162c8678ccb643df5353466&list=UK-CASES&rank=3&sessionScopeId=2ee8f953468f539d6235ec47638888a663b61ff3e7699a116c89f28c9805909b&ppcid=da8af7f3f44146b488257ad5ad2b5d6a&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=wuk) > accessed on January 1, 2022.

<sup>19</sup> Alexander Falco, ‘The UK cartel offence: an exploration into the causes of the underperformance problem’; (2021) 42(12) E.C.L.R. 661, 664.

<sup>20</sup> [2021] EWHC 2879 (Ch); [https://uk.westlaw.com/Document/I7A8D7BF046CF11EC9791BAB668FAA93B/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af00000017e13c549ff6d730a09%3Fppcid%3D27040788cc954a4f991b41ba2abcfb8%26Nav%3Dduk-CASES%26fragmentIdentifier%3DI7A8D7BF046CF11EC9791BAB668FAA93B%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=58d288a27162c8678ccb643df5353466&list=UK-CASES&rank=1&sessionScopeId=2ee8f953468f539d6235ec47638888a663b61ff3e7699a116c89f28c9805909b&ppcid=27040788cc954a4f991b41ba2abcfb8&originationContext=Search%20Result&transitionType=SearchItem&contextData=\(sc.Search\)&comp=wuk](https://uk.westlaw.com/Document/I7A8D7BF046CF11EC9791BAB668FAA93B/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af00000017e13c549ff6d730a09%3Fppcid%3D27040788cc954a4f991b41ba2abcfb8%26Nav%3Dduk-CASES%26fragmentIdentifier%3DI7A8D7BF046CF11EC9791BAB668FAA93B%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=58d288a27162c8678ccb643df5353466&list=UK-CASES&rank=1&sessionScopeId=2ee8f953468f539d6235ec47638888a663b61ff3e7699a116c89f28c9805909b&ppcid=27040788cc954a4f991b41ba2abcfb8&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=wuk) > accessed on January 1, 2022.

<sup>21</sup> Thanh Phan (n 12) 476.

<sup>22</sup> Eleanor M. Fox, ‘Linked-in: Antitrust and the Virtues of a Network’ (2009) 43(1) International Lawyer (ABA) 151, 154.



effective review and protection of confidential information.<sup>23</sup>

### Reasons for Doctrine of Extraterritoriality:

Before explaining the reasons for DoE, it is important to learn here that CL enforcement provisions are important for the parties to cooperate on the issues of CL that includes notification, consultation and exchange of information.<sup>24</sup> An issue arises, do parties really cooperate with these CL provisions during enforcement of CL provisions. In reality, for example, with the ratification of NAFTA, United States (US) entered into agreement with Mexico in 2000 for more detailed enforcement of CL Agreements.<sup>25</sup> US itself had declared that such provisions are inadequate.<sup>26</sup> Furthermore, US continues to enforce its own bilateral agreements and continues to maintain its own extraterritorial enforcement of its own antitrust laws represent its preferred avenue of global antitrust enforcement.<sup>27</sup> It can be argued that antitrust policy is particularly important in liberalisation for global economic order.<sup>28</sup>

Different antitrust laws of different jurisdictions pose enormous costs over

litigation as there are no binding extraterritorial CLs. For example, in the case of *Laker v. Sabena*; the court examined two bases of prescriptive jurisdiction, ie, territoriality and nationality.<sup>29</sup> The ‘territorial effects doctrine’ provided for US jurisdiction, since it had impacted the interests of consumers there and also the interests of creditors there in US, jurisdiction lies with the US.<sup>30</sup>

In the case of *United States v. Microsoft Corp*, Microsoft attempted for monopoly power, that is, with the nature of market to exercise monopoly power and second it claimed monopoly power with technical power and pricing behaviour.<sup>31</sup> It was found that Microsoft was engaged in anticompetitive conduct. Microsoft attempted to reduce to Netscape’s market share which demonstrated Microsoft’s intent to monopolize the browser market, that is, an anticompetitive conduct.<sup>32</sup>

In the case of *OT Computers Ltd (In Liquidation) v Infineon Technologies AG*, the respondents were liable as the cartel existence became a public knowledge.<sup>33</sup> “In 2010, the European Commission found the appellants for the breaches of the EU CL

<sup>23</sup> *ibid*, 162.

<sup>24</sup> Christopher Garrett Lehrer, ‘Ensuring Competition Law Enforcement Under International Trade Agreements’ (2017) 26(2) *Transnational Law and Contemporary Problems* 449, 454.

<sup>25</sup> *ibid*, 455.

<sup>26</sup> *ibid*.

<sup>27</sup> Geoffrey A. Manne & Seth Weinberger, ‘International signals: The political dimension of international competition law’ 57(3) *Antitrust Bulletin* 485, 489.

<sup>28</sup> *ibid*, 505.

<sup>29</sup> 731 F.2d 909; < <https://www.jstor.org/stable/2202608> > accessed on December 11, 2021.

<sup>30</sup> *ibid*.

<sup>31</sup> Mark Geier, ‘United States v. Microsoft Corp.’, (2001) 16(1) *Berkeley Technology Law Journal* 297, 310, 311 < <https://www.jstor.org/stable/pdf/24119925.pdf?refreqid=excelsior%3Aec95d99c07dee062c05e3ea486df1518> > accessed on December 12, 2021.

<sup>32</sup> *ibid*, 310, 311.

<sup>33</sup> [2021] 4 All E.R. 1095; < <https://uk.westlaw.com/Document/I8A9D94C09D1111EB9A7DFDAB9D452D45/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017ddb351928d35769c4%3Fppcid%3D8f0b1c488d5b4c839ef69c779ea68f6e%26Nav%3D Duk->



rules between 1998 and 2002.”<sup>34</sup> Thus, in the claim for follow-on damages arising from price fixing cartels, the judge dismissed the appeal.<sup>35</sup>

In the case of *Cabo Concepts Ltd v MGA Entertainment (UK) Ltd*, there were breaches of CL.<sup>36</sup> It was alleged by the claimants that the defendants were trying to build a pressure upon the UK toy traders not to supply Worldeez toys.<sup>37</sup> This led the claimants to cancel the planned UK launch events, the led to declining orders from retailers, that ultimately led to discontinuation of Worldeez product by 2018.<sup>38</sup> It was held that this was a CL claim case.<sup>39</sup>

It is of paramount importance to adopt alternatives for the enforcement of CL Agreements. These are soft harmonization of domestic CLs, implementation of free trade agreement and to enact and implement a binding, unified and substantive body of CL.<sup>40</sup> An argument arises why not have a unified approach for implementation of CL provisions.

CASES%26fragmentIdentifier%3DI8A9D11C09D111EB9A7DFDAB9D452D45%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=e84bb30ca7c2ca8d1b018e5e8153537e&list=UK-CASES&rank=1&sessionScopeId=b7c5093dd967c59ce94faf26cc9b87c79bd5059f762efb6f9ce62262a71e5452&ppcid=8f0b1c488d5b4c839ef69c779ea68f6e&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=wlu k > accessed on December 21, 2021.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> [2021] 3 WLUK 36; <  
[https://uk.westlaw.com/Document/I7E0793F07D9F11EBA2B881B9F0022E36/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017dea799764653026e0%3Fppcid%3Ddf3aa5e5f346434daac383a8accac621%26Nav%](https://uk.westlaw.com/Document/I7E0793F07D9F11EBA2B881B9F0022E36/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740370000017dea799764653026e0%3Fppcid%3Ddf3aa5e5f346434daac383a8accac621%26Nav%26)

In order to adopt a unified approach over DoE, number of amendments are required to be made. These include “adopting principles of transparency, indiscriminate application of law, the incorporation of economic principles into the legal code, the creation of fair and independent judiciaries, the creation of highly technical and independent enforcement agencies, and the emergence of an epistemic professional community of lawyers to interpret the changes”<sup>41</sup>. Furthermore, there is a need to foster both bilateral and multilateral relations both between and among the states, in order to reduce ambiguities over extraterritorial application of CL.

#### Requirements for the Doctrine of Extraterritoriality:

It is of paramount importance to have strong enforcement of extraterritorial CL rules can contribute to impose deterrent punishment upon the violators of CL rules. For this to happen, it is important to promote

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 CASES%26fragmentIdentifier%3DI7E0793F07D9F11EBA2B881B9F0022E36%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f8883c54ac51875a0aecdf199636f88&list=UK-CASES&rank=2&sessionScopeId=f09fdf649c7a7c32bc5b4bff1d8f0a622a120e0380faf3eb92c4860a1868408a&ppcid=df3aa5e5f346434daac383a8accac621&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)&comp=wlu k > accessed on December 24, 2021.

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> Christopher Garrett Lehrer, (n 24) 457.

<sup>41</sup> Geoffrey A. Manne & Seth Weinberger, (n 27) 485, 495.



international procedural norms in CL enforcement. An argument arises why should governments promote international procedural norms. One of the reasons are “that governments comply with international norms is to induce reciprocal behaviour from other governments”<sup>42</sup>. This takes place in the form of international agreements that is, bilateral relations between the parties to comply in reciprocal manner.<sup>43</sup> The benefits of reciprocity can be conferred in the form of diplomatic relations and recognition of foreign judgements and arbitral awards.<sup>44</sup> An argument arises, why not adopt a unified approach over CL that all parties should adhere too. Why to make amendments in a manner that will be beneficial for bilateral relations and not for multilateral relations among states.

In order to overcome the hurdles of the enforcement of DoE, there is a need to adopt a unified approach in the CL. For this there is a need to create a co-relation between CL and International system. US for example, sanctions export cartels that would not survive anti-trust legislation whereas schedule 3(6) to the British Restrictive Trade Practices Act, 1976 exempts horizontal export cartels from registrability.<sup>45</sup> Thus, such provisions clearly ascertain how states perceive CL with different prospects. [Competition] CL systems exhibit concerns about national power by using CL to protect domestic autonomy from foreign

influences.<sup>46</sup> Furthermore, states should take serious action “to protect their economies and competitiveness from "unfair" foreign competition”<sup>47</sup>. Thus, it can be argued that “systems of CL demonstrate national worries about economic power by using CL to permit actions other-wise questionable from other competition perspectives”<sup>48</sup>. Furthermore, “the systems of CL can project national power in the international system through extraterritorial enforcement”<sup>49</sup>. For example, as explained in the above section diplomatic controversies and problems are generated from extraterritorial enforcement of CL.

It can be argued that there is a need for the criminalisation of CL. The need for the criminalisation of CL centred around that the UK Competition Act, 1998 was unable to produce sufficient deterrent effect against anticompetitive conduct, especially hardcore cartels.<sup>50</sup> Furthermore, extending the criminalisation under CL began in order to overcome the practice of cartels.<sup>51</sup> In addition to this, to overcome the offence under CL, it was considered that there is a need to sign right agreements with all the requisite terms and conditions and to punish the offenders who were responsible for the cartel activity.<sup>52</sup> It can be argued that the offenders include the senior executives or the directors of the company because it is the top hierarchy of the Corporate that can initiate cartels. The employees have to adhere to the instructions of the top hierarchy. On the other hand, Howe

<sup>42</sup> Roger P. Alford, ‘Promoting International Procedural Norms in Competition Law Enforcement’ (2020) 68(5) University of Kansas Law Review 1165, 1167.

<sup>43</sup> *ibid*, 1167.

<sup>44</sup> *ibid*.

<sup>45</sup> David P. Fidler, ‘Competition Law and International Relations’ 1992 41(3) British Institute of International and Comparative Law 563, 572.

<sup>46</sup> *ibid*, 572.

<sup>47</sup> *ibid*, 573.

<sup>48</sup> *ibid*, 574.

<sup>49</sup> *ibid*.

<sup>50</sup> Alexander Falco (n 19) 663.

<sup>51</sup> *ibid*, 663, 664.

<sup>52</sup> *ibid*, 664.



argues that if two parties have entered into agreement to fulfil the conditions but are against the public interest, these will be null and void.<sup>53</sup> This argument is correct because CL aims to protect the interests of consumers, businesses, traders as a whole. Rather than criminalisation, it's important to impose deterrent punishment for violation of CL.

A pertinent question of thought arises why should the extraterritorial violation of CL rules be classified as White-Collar Crimes. The reason is, as explained above all crimes are committed by the top hierarchy of the company, that is, the directors and senior executives.

#### Other Aspects:

Arbitration can play a remarkable role in resolving extraterritorial CL Disputes. The English High Court in ET Plus SA case in 2005, that CL disputes are themselves not non-arbitrable.<sup>54</sup> However, when such a dispute is submitted to arbitration court, it should in accordance to arbitration clauses.<sup>55</sup> Brexit can have an impact upon the arbitration aspects of CL. It's important to determine whether individual arbitration claims under CL will be determined as final determined depends upon the subject matter of the scope of the arbitration clause.<sup>56</sup> Brexit has not prompted any change in the

construction of the arbitration clause for EU CL claims and EU competition claims can come to bear the redressal of disputes in England as there is no specific mention over arbitrability of disputes as doctrine of separability under arbitration law does not expressly provide this.<sup>57</sup>

It is pertinent to mention that CC has had an endless negative impact upon the globe. With the advent of pandemic, the markets are not static, restructuring is taking place and markets have changed.<sup>58</sup> This has posed a challenge to national competition authorities of the countries across the world. Zevgolis argues that the CC, can itself be the most important condition for the creation of temporary position in different cases for different markets; for example, disposable or cloth masks, disposable gloves, vaccines etc.<sup>59</sup>

The pandemic is Sine Qua Non, for certain companies, whether new or existing in the market, to acquire a temporary dominant position, either about competitor or it is about customer or consumer.<sup>60</sup> The pandemic led to various measures like, closure of borders halting supply of commodities leading to rise in the prices.<sup>61</sup> Thus, it can be argued here that the state competition authorities should take requisite steps to check rising prices, monopolisation, cartels in order to protect the

<sup>53</sup> Martin Howe, 'Relationships between competitors under United Kingdom competition law' (1986) 7(3) E.C.L.R. 327, 328.

<sup>54</sup> Yekaterina Kolmogorova, 'Arbitrability of Competition Disputes: Positions of England, France and Kazakhstan' (*Central European University*, 28 March, 2011) <[http://www.etd.ceu.hu/2011/kolmogorova\\_yekaterina.pdf](http://www.etd.ceu.hu/2011/kolmogorova_yekaterina.pdf)> accessed on January 04, 2022.

<sup>55</sup> *ibid.*

<sup>56</sup> Dr. Gordon Blanke, 'Some reflections on UK-seated competition arbitration after Brexit (Part 1)' 2021 42(7) E.C.L.R. 347, 348.

<sup>57</sup> *ibid.*, 349.

<sup>58</sup> Nikolaos E. Zevgolis, 'Temporary dominant position during the Covid-19 crisis: thoughts and proposals in search of theories' 2021 42(11) E.C.L.R. 590, 594.

<sup>59</sup> *ibid.*, 594.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*, 593, 594, 595.



interests of consumers, competitors and economies. Furthermore, it can be argued whether CL is, in reality, a problem or a solution during the CC with the assumption that it should be applied with adjustments and relaxations.<sup>62</sup> CL can be a solution at the time of crisis, like pandemic if it is implemented correctly, that is, with unified approach to implement DoE.

The UK on March 19, 2020 announced that it will adopt legislation to relax elements of CL applied to retailers.<sup>63</sup> The Competition and Markets Authority in the UK, relying on Section 9 of the Competition Act, 1998 explained that legal exemptions have been granted to avoid shortage, ensure essential supplies of commodities and services and food delivery to vulnerable consumers will not be anti-competitive.<sup>64</sup>

Apart from the above, the countries should have a special Competition Court (Cc) like that of Portugal has since 2012.<sup>65</sup> Also, the UK model should be appreciated as competition authority decisions are reviewed by the economic regulatory of the UK.<sup>66</sup> It can be argued that with the advent of Cc, time taken for the decisions will be reduced.

<sup>62</sup> Professor Emiliano Marchisio, 'EU competition law response to the coronavirus crisis' (2020) 41(8) E.C.L.R. 373.

<sup>63</sup> Shreya Chandhok, 'Exemptions and guidelines under antitrust law during Covid-19: a global review' (2020) 41(11) E.C.L.R. 574, 575.

<sup>64</sup> *ibid*, 575.

<sup>65</sup> Mariana de Sousa e Alvim, 'A competition court for the European Union and the right to a fair trial: too much ado about nothing?' (2019) 40(3) E.C.L.R. 114.

<sup>66</sup> *ibid*, 114.

<sup>67</sup> Rimantas Daujotas, 'Extraterritorial Application Of Competition Law: Different Angles – Same Conclusion' 2011 <http://www.rimantasdaujotas.com> 3

### Critique:

UK's position over DoE is much better than other jurisdictions ie, US and EU. It can be learnt from the above that the key issue in the implementation of DoE in CL is that the interests of countries and business of different nationalities often clash with each other.<sup>67</sup> This leads to an odd situation has arisen how different CLs of different countries, protect local markets from the anticompetitive harm by the conduct of foreign companies that had an impact abroad.<sup>68</sup> It can be argued that the unified approach in the CL can help to ward off the conflict of jurisdiction in CL. On the other hand, companies should also take steps to decide how to implement effective enforcement mechanisms. For example, governments can run information and training programmes for companies to train the officials how to practise competition mechanisms.<sup>69</sup>

### CONCLUSION

To sum up, each jurisdiction aims to protect their own personal interests of their own jurisdictional companies over the extraterritorial enforcement of CL. DoE plays an important role in the field of CL.

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<sup>68</sup> *ibid*.

<sup>69</sup> Morgan Carbonnel, 'Set sail for the new world of competition law compliance' (2019) 40(2) E.C.L.R.76, 77.



Without a strong extraterritorial enforcement of competition rules, many harmful situations would go unpunished. It is required to have a uniform approach in CL to implement DoE in order to avoid jurisdiction hassles to solve CL disputes.

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