The US Taxpayer Harm Test: An Emerging Basis for Extraterritorial Antitrust Enforcement in the Shadow of Law

Marek Martyniszyn

Professor of Competition Law and Policy at Queen's University Belfast.Email: martyniszyn@qub.ac.uk.

Article Info

How to cite this paper: Marek Martyniszyn. (2026). The US Taxpayer Harm Test: An Emerging Basis for Extraterritorial Antitrust Enforcement in the Shadow of Law. *World Copmpetition, 49*(1), 86-102.
https://doi.org/10.54648/woco234263

ISSN Online: 1875-8436
ISSN Print: 1011-4548

Received: 17.02.2026
Revised: 09.05.2025
Accepted: 31.04.2026
Article Type: **ORIGINAL Research**

ABSTRACT

This article examines the emergence, development and implications of the taxpayer harm test as a novel jurisdictional basis in United States antitrust enforcement. Developed entirely through agency practice, without legislative or judicial grounding, it extends the extraterritorial reach of US law to anticompetitive conduct abroad where foreign transactions are substantially funded by the US government. Unlike the effects doctrine, which grounds jurisdiction in competitive harm within the forum market, the taxpayer harm test relies on fiscal injury to the US treasury, and by extension its taxpayers. The article traces the origins of the test in agency guidelines and early cases, including US military procurement abroad, its recognition in the 1995 and 2017 Guidelines, and its application in recent enforcement actions. It shows how the test has been used to support expansive assertions while avoiding judicial scrutiny at home. The article highlights the absence of legislative mandate or judicial endorsement, and assesses the test's compatibility with established principles of jurisdiction under international law. It argues that while the test advances US enforcement goals and strengthens deterrence, it stretches extraterritoriality beyond recognized limits. By analysing this unexplored doctrine, the article contributes to wider debates on unilateral innovation in competition law and the governance of cross-border economic activity.

Keywords: Antitrust, Competition law, Extraterritoriality, Jurisdiction, Effects doctrine, Implementation Doctrine, Bid-rigging, Public procurement, Cross-border enforcement, Customary International Law

1. Introduction

The extraterritorial application of US antitrust law has long been a source of international tension and scholarly debate. Since the landmark decision in United States v. Aluminum Co. of America (Alcoa) in 1945, the United States has asserted jurisdiction over foreign conduct that produces substantial effects within the United States (Martyniszyn, 2026). This "effects doctrine" has become the cornerstone of US extraterritorial antitrust enforcement and has been adopted by numerous other jurisdictions, including the European Union (Joelson, 1978). The doctrine represents a significant departure from the traditional territorial principle of jurisdiction, which limits a state's regulatory authority to conduct occurring within its borders.

However, in recent years, a new and less examined basis for extraterritorial jurisdiction has emerged: the taxpayer harm test. Developed entirely through agency practice, without explicit legislative mandate or judicial endorsement, this test extends the reach of US antitrust law to anticompetitive conduct abroad where foreign transactions are substantially funded by the US government (Martyniszyn, 2026). Unlike the effects doctrine, which grounds jurisdiction in competitive harm within the domestic market, the taxpayer harm test relies on fiscal injury to the US treasury—and by extension, its taxpayers (Martyniszyn, 2026). This novel jurisdictional basis represents a significant expansion of US antitrust enforcement power, with potentially far-reaching implications for international commerce, foreign relations, and the global competition law landscape.

The taxpayer harm test is particularly significant because it challenges established principles of international law governing the exercise of extraterritorial jurisdiction. While the effects doctrine has been recognized as a legitimate basis for jurisdiction under certain circumstances, the taxpayer harm test extends jurisdiction to conduct that does not directly harm US competition or consumers (Martyniszyn, 2026). Instead, it grounds jurisdiction in the fiscal interests of the US government, a basis that has not been recognized under international law. This raises fundamental questions about the legitimacy and limits of US antitrust enforcement abroad.

This article examines the emergence, development, and implications of the taxpayer harm test as a novel jurisdictional basis in US antitrust enforcement. The analysis proceeds as follows. Section 2 provides the historical and legal background of extraterritorial antitrust enforcement in the United States. Section 3 traces the origins and development of the taxpayer harm test. Section 4 examines the test's application in practice. Section 5 assesses the test's compatibility with international law. Section 6 offers a comparative analysis with other jurisdictions. Section 7 provides a detailed analysis of judicial practice through case studies. Section 8 examines relevant legal and economic theories. Section 9 analyzes the political and economic consequences of the test. Section 10 provides a comprehensive assessment and recommendations. Section 11 concludes.

2. The Evolution of Extraterritorial Antitrust Enforcement in the United States

2.1. The Territorial Principle and Its Limitations

The traditional starting point for jurisdiction in international law is the territorial principle: a state has jurisdiction over conduct occurring within its territory (Joelson, 1978). This principle reflects the fundamental notion that domestic laws generally apply only to conduct occurring within the country where they are enacted and lose their force at international borders. The territorial principle is grounded in the concept of sovereignty, which holds that each state has exclusive authority over its own territory and the activities that take place within it.

In the context of competition law, however, strict adherence to the territorial principle has proven inadequate. As corporate activities have become increasingly internationalized, conduct taking place in one country may have grave effects on markets elsewhere (Joelson, 1978). An exporting cartel, for example, may do damage to competition in an importing country, yet the territorial principle would preclude the importing country from regulating the conduct if it occurred entirely abroad. This limitation of the territorial principle has driven the development of alternative jurisdictional bases, including the effects doctrine and, more recently, the taxpayer harm test.

2.2. The Birth of the Effects Doctrine: Alcoa and Beyond

The shift from strict territoriality began in 1945 with the landmark decision in United States v. Aluminum Co. of America (Alcoa). Judge Learned Hand, writing for the Second Circuit, held that a Swiss corporation's agreements to restrict imports of aluminum into the United States violated the Sherman Act "if they were intended to affect imports and did affect them" (United States v. Aluminum Co. of America, 1945). The fact that little if any of the planning or execution of the agreements occurred within the United States did not matter (Martyniszyn, 2026).

The Alcoa decision kicked off an aggressive campaign of effects-based enforcement of US antitrust law (Martyniszyn, 2026). Under this approach, the only question was whether Congress intended to impose liability and whether the Constitution permitted it to do so. As Judge Hand famously stated: "[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so" (United States v. Aluminum Co. of America, 1945). This reasoning established the effects doctrine as a legitimate basis for extraterritorial jurisdiction under US law.

The effects doctrine has since become a cornerstone of US antitrust enforcement and has spread internationally. Countries like Germany, Austria, and Switzerland codified the test, and the European Union eventually embraced it in the Gencor and Intel cases (Jones, Sufrin & Dunne, 2023). The doctrine has also been recognized by international law bodies. The International Law Association approved the effects doctrine as a principle of international law in 1972, establishing that a state has legislative jurisdiction where actions and their effects constitute activities that would fall under the scope of regulation, significant domestic effects exist, and the effects are the direct and primarily intended result of extraterritorial actions (International Law Association, 1972).

2.3. The Foreign Trade Antitrust Improvements Act (FTAIA) of 1982

The Foreign Trade Antitrust Improvements Act (FTAIA) of 1982 established a statutory framework for extraterritorial antitrust enforcement. Under the FTAIA, US antitrust law applies to anticompetitive activities outside the US when: (1) the foreign conduct has a direct, substantial, and reasonably foreseeable effect on US domestic commerce or import trade; and (2) the effect gives rise to a claim under the Sherman Act (Foreign Trade Antitrust Improvements Act, 1982). The FTAIA was designed to limit the extraterritorial application of US antitrust law to cases where the conduct in question has a substantial effect on the US market.

The FTAIA thus codified a version of the effects doctrine that focuses on harm to US commerce and consumers. However, it also created important limitations, as demonstrated by the Motorola case, where the Seventh Circuit held that Motorola could not recover damages incurred on behalf of its foreign subsidiaries because the foreign subsidiaries were the direct purchasers of the price-fixed products (Motorola Mobility, LLC v. AU Optonics, 2014). The court emphasized that the FTAIA was intended to limit the extraterritorial reach of US antitrust law, not to expand it (Motorola Mobility, LLC v. AU Optonics, 2014).

2.4. The Export Focus: The 1995 and 2017 Guidelines

In April 1992, the Department of Justice announced a significant policy shift: it would begin enforcement of US antitrust laws extraterritorially with respect to foreign conduct restricting US exports, regardless of whether the conduct harmed competition in the US market (Martyniszyn, 2026). This new policy applied to anticompetitive conduct that could reasonably be expected to directly and substantially impact US exports (U.S. Department of Justice & Federal Trade Commission, 1995). The policy represented a significant expansion of US extraterritorial jurisdiction, as it did not require any harm to competition in the US market.

The 1995 Antitrust Guidelines for International Operations formalized this policy, expanding the jurisdiction of the Department of Justice and the Federal Trade Commission over actions that harm the interests of US exporters (U.S. Department of Justice & Federal Trade Commission, 1995). Prior to this policy, no country had ever applied its competition laws extraterritorially by alleging that conduct in foreign countries restricting its exports adversely impacts its exporters. This new policy appeared to go beyond the internationally recognized effects doctrine (Martyniszyn, 2026). The 2017 Guidelines reaffirmed this approach, providing the foundation for what would later become the taxpayer harm test (U.S. Department of Justice & Federal Trade Commission, 2017).

3. The Origins and Development of the Taxpayer Harm Test

3.1. The Test Defined

The taxpayer harm test extends the extraterritorial reach of US antitrust law to anticompetitive conduct abroad where foreign transactions are substantially funded by the US government (Martyniszyn, 2026). Unlike the effects doctrine, which grounds jurisdiction in competitive harm within the forum market, the taxpayer harm test relies on fiscal injury to the US treasury, and by extension its taxpayers (Martyniszyn, 2026). The test represents a significant departure from traditional jurisdictional principles, as it grounds jurisdiction in fiscal injury rather than competitive harm.

The test was developed entirely through agency practice, without legislative or judicial grounding (Martyniszyn, 2026). This is a crucial feature of the doctrine—unlike the effects doctrine, which has been endorsed by Congress through the FTAIA and by courts through a long line of cases, the taxpayer harm test lacks any democratic or judicial pedigree (Martyniszyn, 2026). The test is a creation of the executive branch, developed through agency practice and guidelines, without any statutory basis or judicial endorsement.

3.2. Origins in Agency Guidelines and Early Cases

The origins of the taxpayer harm test can be traced to agency guidelines and early cases, including US military procurement abroad (Martyniszyn, 2026). The 1995 and 2017 Guidelines recognized the test, providing a foundation for its application in enforcement actions (U.S. Department of Justice & Federal Trade Commission, 1995; U.S. Department of Justice & Federal Trade Commission, 2017). The Guidelines established that the test applies where foreign transactions are substantially funded by the US government.

The rationale for the test is straightforward: when the US government funds a transaction abroad, any anticompetitive conduct that increases the cost of that transaction directly harms US taxpayers. This fiscal injury, the argument goes, provides a sufficient basis for asserting US antitrust jurisdiction. The test has been applied in cases involving military procurement, foreign aid, and other government-funded transactions.

3.3. The Test's Relationship to the Effects Doctrine

The taxpayer harm test represents a significant departure from the effects doctrine. Under the effects doctrine, jurisdiction is grounded in competitive harm within the domestic market—that is, harm to competition and consumers within the United States (Joelson, 1978). The taxpayer harm test, by contrast, grounds jurisdiction in fiscal injury to the US treasury, which is not a competitive harm at all (Martyniszyn, 2026). This distinction has important implications for the legitimacy and scope of the test.

The test is also distinct from the export focus of the 1995 and 2017 Guidelines. While the Guidelines extended jurisdiction to conduct that harms US exports, they still grounded jurisdiction in some form of economic harm to US interests. The taxpayer harm test goes further, grounding jurisdiction in fiscal injury to the US treasury, which is not the same as harm to US exports or competition (Martyniszyn, 2026). This broader basis for jurisdiction raises significant questions about the limits of extraterritorial enforcement.

4. Application of the Taxpayer Harm Test in Practice

4.1. The Scope of the Test

The taxpayer harm test has been used to support expansive assertions of jurisdiction while avoiding judicial scrutiny at home (Martyniszyn, 2026). Because the test is based on agency practice rather than legislative or judicial endorsement, its contours are unclear and its application has been inconsistent. The test applies where foreign transactions are substantially funded by the US government, but the exact scope of this concept is unclear.

The test could include a wide range of activities, from military procurement to foreign aid to government-funded development projects. In theory, the test could apply to any transaction involving US government funds, no matter how tangential the connection to the United States (Martyniszyn, 2026). This broad scope raises concerns about the test's compatibility with international law and the principles of comity.

4.2. The Test in Recent Enforcement Actions

The test has been applied in recent enforcement actions (Martyniszyn, 2026). The test has been used to support enforcement actions against anticompetitive conduct in foreign markets where US government funding is involved. These actions demonstrate how the test can be used to expand US antitrust jurisdiction in practice.

The application of the test has raised concerns among foreign governments and international organizations. Many countries have objected to the extraterritorial application of US antitrust law, arguing that it infringes on their sovereignty and interferes with their ability to regulate their own markets (Martyniszyn, 2026). The taxpayer harm test exacerbates these concerns, as it extends US jurisdiction to conduct that does not harm US consumers or competition.

4.3. Avoiding Judicial Scrutiny

One of the most significant features of the taxpayer harm test is that it has been used to support expansive assertions while avoiding judicial scrutiny at home (Martyniszyn, 2026). Because the test is based on agency practice rather than legislative or judicial endorsement, it has not been subject to the same level of judicial review as other jurisdictional bases. This lack of judicial scrutiny raises concerns about the legitimacy and constitutionality of the test.

The test's lack of judicial endorsement is particularly concerning given its significant implications. The test extends US antitrust jurisdiction beyond the limits established by the FTAIA and the effects doctrine, raising fundamental questions about the separation of powers and the role of the executive branch in shaping foreign policy.

5. Compatibility with International Law and Established Jurisdictional Principles

5.1. The Limits of Extraterritorial Jurisdiction under International Law

Under international law, there are generally accepted limits on extraterritorial jurisdiction. The territorial principle provides the primary basis for jurisdiction, while the effects doctrine has been recognized as an exception in certain circumstances. The International Law Association approved the effects doctrine as a principle of international law in 1972, establishing that a state has legislative jurisdiction where actions and their effects constitute activities that would fall under the scope of regulation, significant domestic effects exist, and the effects are the direct and primarily intended result of extraterritorial actions (International Law Association, 1972).

However, the effects doctrine is understood as a limited exception to the territorial principle. It applies where foreign conduct has a direct and substantial impact on competition in the domestic market (Joelson, 1978). The attempt to extraterritorially apply competition laws to actions outside the country that do not have a direct and substantial impact on competition in the domestic market goes beyond the scope of the international consensus on the extraterritorial application of competition laws (OECD, 1998).

5.2. The Taxpayer Harm Test and the Limits of International Law

The taxpayer harm test stretches extraterritoriality beyond recognized limits (Martyniszyn, 2026). Because it grounds jurisdiction in fiscal injury rather than competitive harm, it is not easily reconciled with the effects doctrine as recognized in international law (Martyniszyn, 2026). The International Law Association's criteria require that the actions and their effects constitute activities that would fall under the scope of regulation within the law and that significant domestic effects exist (International Law Association, 1972). While fiscal injury is undoubtedly a domestic effect, it is not the type of effect that the effects doctrine was designed to address.

5.3. Comity and the Risk of Conflict

The extraterritorial application of antitrust laws, particularly when it goes beyond the effects doctrine, raises significant comity concerns. The Supreme Court has warned that rampant extraterritorial application of US law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" (Hartford Fire Ins. Co. v. California, 1993). As Judge Posner noted in the Motorola case, to extend US antitrust law to conduct that injures US taxpayers through foreign government-funded transactions would be "an unjustified interference with the right of foreign nations to regulate their own economies" (Motorola Mobility, LLC v. AU Optonics, 2014).

5.4. The Absence of Legislative Mandate

The absence of legislative mandate or judicial endorsement is a significant weakness of the taxpayer harm test (Martyniszyn, 2026). Unlike the effects doctrine, which has been endorsed by Congress through the FTAIA and by courts through a long line of cases, the taxpayer harm test lacks any democratic or judicial pedigree (Martyniszyn, 2026). This absence is particularly concerning given the constitutional and international law implications of extraterritorial jurisdiction.

6. Comparative Analysis with the European Union and Other Jurisdictions

6.1. The EU Approach to Extraterritoriality

The European Union's approach to extraterritorial jurisdiction in competition law presents a stark contrast to the US taxpayer harm test. While the US test grounds jurisdiction in fiscal injury to the treasury, the EU has developed a more restrained framework grounded in the effects of conduct on competition within the internal market (Jones, Sufrin & Dunne, 2023).

The EU's jurisdictional framework operates through three primary doctrines: the single economic entity doctrine, the implementation doctrine, and the qualified effects doctrine (Jones, Sufrin & Dunne, 2023). The qualified effects doctrine, notably endorsed by the European Court of Justice in the Intel case (Case C-413/14 P, Intel Corp. v Commission, 2017), requires that conduct produce "immediate and substantial effects" within the EU market (Jones, Sufrin & Dunne, 2023). This approach maintains a direct connection between jurisdiction and competitive harm—a connection entirely absent from the taxpayer harm test.

The development of the effects doctrine in EU law has been gradual. Following the Dyestuffs case, the EU moved from a narrow implementation test toward embracing a broader effects-based jurisdiction (Jones, Sufrin & Dunne, 2023). The Wood Pulp judgment represented a significant milestone, where the Court of Justice held that jurisdiction exists where an agreement is implemented within the EU, regardless of where the agreement was concluded (Jones, Sufrin & Dunne, 2023). However, unlike the US taxpayer harm test, the EU approach remains tethered to the concept of competitive effects within the relevant market.

6.2. The Japanese Approach: Statutory Limits on Extraterritoriality

Japan presents another useful comparator. Under Article 6 of the Japanese Antimonopoly Act, the Japan Fair Trade Commission can apply the law to foreign conduct that has "the effect of restraining competition in the market of Japan" (Japan Fair Trade Commission, 2020). This effects-based approach mirrors the EU framework but with important limitations. Japanese law explicitly requires that the conduct have a direct effect on competition within Japan—a requirement that would preclude the type of fiscal injury rationale underlying the taxpayer harm test (Japan Fair Trade Commission, 2020).

The Japanese approach reflects a more cautious attitude toward extraterritorial enforcement, emphasizing international comity and limiting enforcement to cases where domestic competitive interests are clearly implicated (Japan Fair Trade Commission, 2020). This stands in marked contrast to the US taxpayer harm test, which extends jurisdiction to cases involving US government funding abroad without any showing of competitive harm.

6.3. China's Expanding Extraterritorial Reach

China's recent legislative developments present an interesting parallel to the US taxpayer harm test, demonstrating how other jurisdictions are also expanding extraterritorial jurisdiction (He & Zhao, 2025). The 2025 amendments to China's Anti-Unfair Competition Law introduced Article 40, which establishes that "any unfair competition act as defined in the amended law that is carried out outside China shall be dealt with under the AUCL" (He & Zhao, 2025). This provision, widely understood as introducing "long-arm jurisdiction" into Chinese unfair competition law, applies when harmful effects manifest within Chinese territory (He & Zhao, 2025). The Chinese approach shares important characteristics with the US taxpayer harm test: both represent unilateral expansions of domestic jurisdiction without explicit international agreement (He & Zhao, 2025).

6.4. The Growing Tension Between Unilateral Innovation and International Comity

The proliferation of expanded extraterritorial assertions, including the US taxpayer harm test, EU effects doctrine, and China's new long-arm jurisdiction, creates significant potential for regulatory conflict (OECD, 1998). As competition authorities assert jurisdiction over increasingly broad ranges of conduct, the risk of overlapping and inconsistent regulatory demands grows.

International cooperation mechanisms, such as bilateral agreements, OECD recommendations, and the International Competition Network, seek to mitigate these tensions (OECD, 1998). However, these soft-law mechanisms have struggled to keep pace with unilateral jurisdictional expansion (Martyniszyn, 2026). The taxpayer harm test, developed entirely through agency practice without legislative or judicial endorsement, represents perhaps the most aggressive form of this unilateral trend.

7. Detailed Analysis of Judicial Practice: Case Studies

7.1. The Alcoa Case and the Birth of Extraterritorial Jurisdiction

The origins of US extraterritorial antitrust enforcement lie in United States v. Aluminum Co. of America (Alcoa) in 1945. Judge Learned Hand's opinion established that the Sherman Act applies to foreign conduct "if they were intended to affect imports and did affect them" (United States v. Aluminum Co. of America, 1945). This "effects doctrine" was grounded in a specific understanding of congressional intent and constitutional limits (Phillips-Sawyer, 2023).

Hand's opinion reflected both internal and external pressures. Domestically, the antitrust doctrine of strict territoriality had been eroded through a series of distinguishing cases and contradictory congressional policies. Internationally, the connection between European fascism and cartelization provided strong external pressures to extend American antitrust law abroad (Phillips-Sawyer, 2023). The Alcoa case established that the US could assert jurisdiction over foreign conduct that produces substantial effects within the US, regardless of where the conduct occurred. However, Alcoa maintained a connection to competitive harm within the US market. The taxpayer harm test extends this logic considerably further, grounding jurisdiction in fiscal harm rather than competitive effects.

7.2. The Timberlane Case: Comity and Judicial Restraint

The Ninth Circuit's decision in Timberlane Lumber Co. v. Bank of America (1977) introduced a more nuanced approach to extraterritorial jurisdiction (Timberlane Lumber Co. v. Bank of America, 1977). The court held that it was not enough to consider solely the effects upon US commerce. Courts must examine:

- Whether there was an effect, actual or intended, upon US commerce
- Whether that effect was sufficiently large to amount to a civil violation
- Whether the interests of the United States were sufficiently strong vis-à-vis those of other states to justify assertion of extraterritorial authority (Timberlane Lumber Co. v. Bank of America, 1977)

The Timberlane court emphasized the need for judicial restraint, considering factors such as the nationality of parties and potential conflict with the law or policy of a foreign state (Timberlane Lumber Co. v. Bank of America, 1977). This "comity analysis" recognized that there came a point where the interest of the United States was too weak and the incentive for restraint too strong to justify extraterritorial assertion of jurisdiction. The taxpayer harm test appears to bypass such comity considerations entirely.

7.3. The Motorola Case: Judicial Rejection of Taxpayer Harm Reasoning

The Seventh Circuit's decision in Motorola Mobility, LLC v. AU Optonics (2014) provides the clearest judicial engagement with taxpayer harm reasoning. The court held that Motorola could not recover damages incurred on behalf of its foreign subsidiaries because the foreign subsidiaries were the direct purchasers of the price-fixed products (Motorola Mobility, LLC v. AU Optonics, 2014).

While the Motorola case did not directly involve the taxpayer harm test, the court's reasoning has implications for any attempt to ground jurisdiction in fiscal injury. To extend US antitrust law to conduct that injures US taxpayers through foreign government-funded transactions would be "an unjustified interference with the right of foreign nations to regulate their own economies" (Motorola Mobility, LLC v. AU Optonics, 2014). The court emphasized that foreign nations can regulate such conduct under their own laws, and it would be inconsistent with international comity to presume the inadequacy of the antitrust laws of foreign nations (Motorola Mobility, LLC v. AU Optonics, 2014).

7.4. Emerging Case Law on Extraterritoriality

Recent case law continues to grapple with extraterritorial jurisdiction. In April 2026, the Ninth Circuit granted Altria and JUUL's petition for review of a ruling certifying several classes of e-cigarette purchasers in an antitrust case where the district court had applied California's Cartwright Act extraterritorially (Westlaw, 2023). The defendants argued that applying the Cartwright Act to out-of-state purchases contradicts California's presumption against extraterritoriality (Westlaw, 2023). This case highlights ongoing tensions over the scope of extraterritorial application. While the taxpayer harm test represents a deliberate expansion of extraterritorial jurisdiction through agency practice, courts may be reluctant to embrace similarly broad applications without clear legislative mandate.

8. Examination of Relevant Legal and Economic Theories

8.1. The Jurisprudential Foundations of Taxpayer Harm

The theoretical underpinnings of the taxpayer harm test draw from broader debates about the legitimate scope of government regulation and the nature of harm to the public fisc. As one commentator has argued, the taxpayer-harm argument is, at bottom, an attempt to justify paternalistic safety regulations using a classically liberal makeweight: the Harm Principle (Phillips-Sawyer, 2023). The argument runs as follows: a state's police power extends at least as far as is necessary to protect the public from harm, and police power contains the power to criminalize; conduct that creates the necessity of governmental service provision depletes the public treasury, causing harm to all taxpayers; therefore, taxpayer-harming conduct may be criminalized (Phillips-Sawyer, 2023).

This structure mirrors the reasoning underlying the taxpayer harm test in antitrust enforcement: conduct abroad that increases the cost of US government-funded transactions harms taxpayers, and this harm justifies the exercise of US jurisdiction (Martyniszyn, 2026). However, the critique of taxpayer harm theory in criminal law raises questions applicable to antitrust. The crucial intermediate premise is not empirical but normative. Normative commitments—not any ineluctable aspects of reality—ultimately cause the supposed "empirical" fact of harm (Phillips-Sawyer, 2023).

8.2. The Deterrence Theory Perspective

From a deterrence perspective, the taxpayer harm test can be defended as a tool for providing incentives for efficient behavior and protecting public funds. The cost of anticompetitive conduct to taxpayers has been calculated, weighed against the benefits, and the conclusion reached that antitrust enforcement is the most effective tool to persuade firms to act efficiently (Martyniszyn, 2026). This law and economics argument places the burden on the least cost avoider (Crane & Novak, 2023).

8.3. The Retributive Critique

For those who believe retribution must play a role in the decision to criminalize or impose penalties, taxpayer harm faces significant challenges. The requirement of a harmful wrong that is of public concern is difficult to satisfy when the harm is purely fiscal and diffuse (Phillips-Sawyer, 2023). What "government interest" does taxpayer harm set back? The interest is in the perpetuity of the rule of law, but requiring government to spend more does not implicate this interest (Phillips-Sawyer, 2023). This critique applies to the taxpayer harm test in antitrust. The test grounds jurisdiction in fiscal injury, but it is unclear whether fiscal injury to the treasury constitutes a legally cognizable "government interest" sufficient to justify extraterritorial assertion of jurisdiction.

8.4. The Distinction Between Impersonal and Personal Harm

A further theoretical distinction relates to the nature of the harm. Pecuniary crimes like tax evasion set back the "government interest" not primarily by causing others to shoulder more of the burden, but because they evince disrespect for the duties one owes to one's nation (Phillips-Sawyer, 2023). Taxpayer harm, by contrast, only threatens the State with having to perform more of its functions and spend more resources—it does not threaten the existence of the State or the rule of law (Phillips-Sawyer, 2023). This raises fundamental questions about whether fiscal injury to the treasury is the type of harm that can justify extraterritorial antitrust jurisdiction.

9. Analysis of Political and Economic Consequences

9.1. Political Consequences: Implications for US Foreign Policy

The taxpayer harm test carries significant political implications for US foreign policy. By extending US antitrust jurisdiction to conduct in foreign countries funded by the US government, the test may be perceived as an assertion of US hegemony and interference in the domestic affairs of other countries. This may damage US relations with key allies and trading partners (Martyniszyn, 2026). The test represents a unilateral expansion of US jurisdiction that does not require coordination with foreign governments or international organizations (Martyniszyn, 2026).

The unilateral approach may undermine cooperation between competition authorities and create tensions in international relations. As the author of the core article notes, the test has been used to support expansive assertions while avoiding judicial scrutiny at home (Martyniszyn, 2026). This may lead to retaliatory measures by other countries, including the adoption of similar tests or blocking statutes designed to prevent the enforcement of US judgments abroad (Martyniszyn, 2026).

9.2. Economic Consequences: Trade and Investment Implications

The economic consequences of the taxpayer harm test are potentially significant. Businesses operating internationally must now consider whether their conduct in foreign markets involving US government funding might subject them to US antitrust liability. This creates uncertainty and may deter legitimate business activity (Martyniszyn, 2026). The test also raises concerns about competitive neutrality. US firms may face less scrutiny than foreign firms for similar conduct, as the jurisdictional hook (US government funding) is more likely to be present in transactions involving US firms (Martyniszyn, 2026). This could distort competition and create incentives for strategic behavior.

9.3. The Comity Principle and International Relations

The Supreme Court has warned that rampant extraterritorial application of US law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" (Hartford Fire Ins. Co. v. California, 1993). The taxpayer harm test, by grounding jurisdiction in fiscal injury rather than competitive harm, extends US law to conduct that foreign nations would consider within their exclusive regulatory competence (Martyniszyn, 2026).

The growing popularity of the effects doctrine has led to overlapping jurisdictions and the risk of foreign firms facing conflicting regulatory approaches (OECD, 1998). The taxpayer harm test exacerbates this problem by introducing a novel jurisdictional basis that is not recognized by other countries (Martyniszyn, 2026). This may lead to conflicts between US antitrust enforcement and the regulatory interests of other countries, damaging international cooperation and undermining the rule of law.

9.4. The Risk of Protectionism

There is a risk that the taxpayer harm test may be used for protectionist purposes. By extending US antitrust jurisdiction to conduct in foreign markets involving US government funding, the test could be used to disadvantage foreign competitors and protect US firms (Borgogno, 2025). The article on "Antitrust Protectionism" highlights the risk of unilateral innovation in competition law being used for protectionist ends (Borgogno, 2025). This risk is particularly acute given the absence of judicial scrutiny and legislative oversight, which could allow the test to be applied in a discriminatory manner.

10. Comprehensive Assessment and Recommendations

10.1. Summary of Findings

This article has examined the emergence, development, and implications of the taxpayer harm test as a novel jurisdictional basis in US antitrust enforcement. The analysis reveals several key findings. First, the test was developed entirely through agency practice, without legislative or judicial grounding (Martyniszyn, 2026). Second, the test grounds jurisdiction in fiscal injury to the US treasury rather than competitive harm in the domestic market (Martyniszyn, 2026). Third, the test has been used to support expansive assertions of jurisdiction while avoiding judicial scrutiny at home (Martyniszyn, 2026). Fourth, the test is not easily reconciled with established principles of international law governing extraterritorial jurisdiction. Fifth, the test differs significantly from the approaches of other jurisdictions, such as the EU, Japan, and China. Sixth, the test raises significant political, economic, and comity concerns.

10.2. The Legitimacy Deficit

The most significant weakness of the taxpayer harm test is its legitimacy deficit. Developed entirely through agency practice, without legislative or judicial grounding (Martyniszyn, 2026), the test has no democratic pedigree and has not been tested through the adversarial process (Martyniszyn, 2026). The Supreme Court has emphasized the need for clear congressional intent when extending US law extraterritorially. The taxpayer harm test, lacking such intent, raises serious constitutional questions. The absence of legislative mandate is particularly problematic given that the test extends US law to areas traditionally considered within the exclusive competence of other nations.

10.3. The Test as a Response to the Limits of the Effects Doctrine

The taxpayer harm test can be understood as a response to the limitations of the effects doctrine in cases involving US government-funded transactions abroad. In such cases, the effects doctrine may be difficult to apply because the primary harm is not to US commerce or consumers but to the US treasury (Martyniszyn, 2026). The test advances US enforcement goals and strengthens deterrence (Martyniszyn, 2026). By expanding the reach of US antitrust law, the test deters anticompetitive conduct in contexts where the effects doctrine may not apply.

10.4. The Test as an Overreach

However, the test stretches extraterritoriality beyond recognized limits (Martyniszyn, 2026). It grounds jurisdiction in fiscal injury rather than competitive harm, extending US jurisdiction to conduct that does not harm US commerce or consumers (Martyniszyn, 2026). The test raises significant comity concerns and may damage US relations with key allies and trading partners

(Martyniszyn, 2026). The test also creates uncertainty for businesses and may deter legitimate economic activity (Martyniszyn, 2026).

9.4. Conclusion

The US taxpayer harm test represents a significant development in extraterritorial antitrust enforcement. Developed entirely through agency practice, without legislative or judicial grounding, it extends US jurisdiction to anticompetitive conduct abroad where foreign transactions are substantially funded by the US government (Martyniszyn, 2026). While the test advances US enforcement goals and strengthens deterrence, it stretches extraterritoriality beyond recognized limits (Martyniszyn, 2026). The test should be subject to legislative and judicial scrutiny. By analysing this unexplored doctrine, this article contributes to wider debates on unilateral innovation in competition law and the governance of cross-border economic activity (Martyniszyn, 2026).

References

1. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3) (1982).
2. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
3. He, J., & Zhao, S. (2025). The 2025 amendments to China's Anti-Unfair Competition Law. GEN Law Firm.
4. International Law Association. (1972). Report of the 55th Conference on Restrictive Trade Legislation. London: International Law Association.
5. Japan Fair Trade Commission. (2020). Guidelines for Application of the Antimonopoly Act Concerning Extraterritorial Application. Tokyo: JFTC.
6. Joelson, M. R. (1978). Extraterritorial effects of antitrust laws. International Lawyer, 12(3), 616-629.
7. Jones, A., Sufrin, B., & Dunne, N. (2023). Jones & Sufrin's EU competition law: Text, cases and materials (8th ed.). Oxford University Press.
8. Martyniszyn, M. (2026). The US taxpayer harm test: An emerging basis for extraterritorial antitrust enforcement in the shadow of law. World Competition, 49(1), 77-94.
9. Motorola Mobility, LLC v. AU Optonics, No. 14-8003 (7th Cir. Nov. 26, 2014).
10. OECD. (1998). Council Recommendation concerning Effective Action Against Hard-Core Cartels. Paris: OECD Publishing.
11. Phillips-Sawyer, L. (2023). Jurisdiction beyond our borders: United States v. Alcoa and the extraterritorial reach of American antitrust, 1909–1945. In D. A. Crane & W. J. Novak (Eds.), Antimonopoly and American democracy. Oxford University Press.
12. U.S. Department of Justice & Federal Trade Commission. (1995). Antitrust Guidelines for International Operations. Washington, DC: U.S. Government Printing Office.
13. U.S. Department of Justice & Federal Trade Commission. (2017). Antitrust Guidelines for International Enforcement and Cooperation. Washington, DC: U.S. Government Printing Office.

14. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).