

BRIEFING PAPER

CUTS Centre for Competition,
Investment & Economic Regulation
CUTS C-CIER



No. 4/2006

Extraterritorial Application of Competition Laws in the US and the European Union

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*“From the day the Sherman Act was passed to the present time, it has been clear that the US antitrust laws have some application to foreign trade and commerce. [...] On the other hand, it is equally clear that the United States did not, and cannot, legislate rules of market organisation or behaviour for the entire world”.*¹

Competition laws, such as EC competition law and US antitrust law certainly must have some application to foreign commerce or conduct, if that conduct adversely affects its domestic commerce, in order to retain and promote competition in the domestic market. The question remains as to the exact scope of jurisdiction over conduct abroad – so called ‘extraterritorial’ application of competition laws.

The aim of this briefing paper is to analyse and compare the scope of US and EC jurisdiction regarding anti-competitive conduct abroad.

US Approach

The US has one of the oldest competition laws in the world. The main US antitrust statute, the Sherman Act, was enacted in 1890 as a response to companies engaging in anti-competitive behaviour as a buyers’ cartel.

The main antitrust statutes in the US governing commerce with foreign nations are the Sherman Act and the Federal Trade Commission (FTC) Act. The Sherman Act declares as illegal “every contract, combination [...] or conspiracy, in restraint of trade or commerce among the several States [of the US], or with foreign nations”, and further declares it a felony for any person to monopolise any part of the trade or commerce among the States, or with foreign nations. In addition, the FTC Act declares as unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”. The FTC Act thereby defines ‘commerce’ – similar to the Sherman Act – as including “commerce among the several States or with foreign nations”. There is thus a direct reference in the text of US antitrust statutes, to the application of US antitrust law to commerce with foreign nations.

In order to clarify the meaning of the term ‘trade or commerce with foreign nations’, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) amended both the Sherman Act and the FTC Act. The FTAIA clarifies as well as limits the jurisdiction of US courts in relation to conduct involving all foreign commerce – with the exception of imports. The Sherman Act and FTC Act, as amended, apply to “conduct involving trade or commerce with foreign nations” only if “such conduct has a direct, substantial, and reasonably foreseeable effect” on

US domestic trade or commerce or “on export trade [...] or a person engaged in such trade [...] in the United States”.

The precise meaning of this part of the FTAIA was interpreted in a 2004 decision of the US Supreme Court, the widely discussed *Empagran* case. The US judiciary from the beginning did not assert US jurisdiction over anti-competitive conduct abroad. In the early years of antitrust enforcement, the courts took a narrow territorial approach.

From Bananas to Vitamins – US Case Law

In 1909, the US Supreme Court in *American Banana’s* emphasised that “all legislation is *prima facie* territorial” and that a “conspiracy [in the US] to do acts [outside the US] does not draw to itself those acts and make them unlawful, if they are permitted by local law”. This narrow territorial approach was widened in a line of subsequent cases, most notably the cases of *Alcoa* and *Hartford Fire*. In *Alcoa*, the US Court of Appeal held that the Sherman Act applied to foreign conduct that has consequences in the US. The Court further set out a test of “intended and actual effects” on commerce within the US that had to be satisfied in order that US jurisdiction be asserted over foreign conduct: “The Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States”. This is how the intent and (substantial) effects doctrine was born.

In 1995, the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) issued their revised joint Antitrust Enforcement Guidelines for International Operations (the Guidelines), which went a step further in providing guidance on this issue.

The Guidelines reiterate the legal position that “anti-competitive conduct that affects US domestic or foreign commerce may violate the US antitrust laws regardless of where such conduct occurs or the nationality of the parties involved”. They further refer to the effects doctrine and emphasise that “the Agencies apply the ‘direct, substantial, and reasonably foreseeable’ standard of the FTAIA” in relation to conduct abroad that “does not ‘involve’ import commerce, but does have an ‘effect’ on either import transaction or commerce within the US”.

In relation to cases involving exports, US enforcement agencies may take enforcement action against anti-competitive conduct – wherever occurring – that restrains US exports, provided “(1) the conduct has a direct, substantial and reasonably foreseeable effect on exports [...], and (2) the US courts can obtain jurisdiction over persons [...] engaged in such conduct”. Secondly, the Agencies may take enforcement action “against conduct by US exporters that has a direct, substantial, and reasonably foreseeable effect on trade or commerce within the US, or on import trade or commerce”.

Although the Guidelines are a useful summary of relevant case law and applicable legislation, it was the *Empagran* case in 2004 that was a turning point, where the Supreme Court clarified the meaning of the FTAIA, and under what circumstances subject matter-jurisdiction may be asserted in relation to foreign commerce. The case relates to the ‘Vitamins Cartel’, a cartel of US and foreign manufacturers and distributors of vitamins, having engaged in a world-wide price-fixing and market-sharing conspiracy, leading to a price increase for vitamins in the US and around the world. Several companies, including Hoffmann-LaRoche, were convicted. US as well as foreign purchasers and distributors of vitamins brought a class action suit under the Sherman and Clayton Acts in the country. The main question the Supreme Court had to resolve in *Empagran* was whether the Sherman Act could apply to price-fixing activity that had the necessary effect within the US, but also had independent foreign effects and was in fact, in significant part, foreign.

The Supreme Court held that US courts had no jurisdiction where a foreign plaintiff’s claim rests solely on harm sustained in a foreign market, with no injuries arising within the US. The Court cautioned plaintiffs that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations’ sovereign authority”.

Although US courts might – and indeed do – appeal to foreign plaintiffs due to its treble damages provision for antitrust violations, the Supreme Court made it clear that the Sherman Act cannot be (ab)used to redress solely foreign injuries with no effect on US commerce. The Sherman Act, as amended by the FTAIA, applies only to conduct, which sufficiently affects US commerce and the effect of the conduct must be considered unlawful under the Sherman Act.

When the case before the court concerns “(1) significant foreign anti-competitive conduct with (2) an adverse domestic effect [as well as] an independent

foreign effect giving rise to the claim” in question, a purchaser in the US can bring a Sherman Act claim under the FTAIA based on domestic injury, whereas a purchaser abroad cannot bring a Sherman Act claim based solely on foreign harm.

However, this also means that the Sherman Act does not apply to American exporters who enter into business arrangements, “however anti-competitive, as long as those arrangements adversely affect only foreign markets”. The Court further clarified what constituted adverse foreign effect that is entirely independent of any adverse domestic effect and thus removes such conduct from the ambit of the Sherman Act.

The case is significant in that the US Supreme Court for the first time clarified the reach of the Sherman Act (as amended by the FTAIA) in relation to anti-competitive conduct outside the US and the kind of links that must exist between the foreign conduct and the effect on US commerce.

Having analysed the extraterritorial application of antitrust law by US enforcement authorities and courts, we turn to the EU. Do European courts, namely the Court of First Instance (CFI) and the European Court of Justice (ECJ), and the European competition law enforcement agency – the European Commission, assert jurisdiction over anti-competitive conduct abroad?

Approach in the EU

The main provisions governing competition law enforcement in the EU, which since May 1, 2004 is comprised of 25 countries, are Articles 81 and 82 of the Treaty Establishing the European Community (EC Treaty). Article 81 EC – the equivalent to Section 1 of the US Sherman Act – states that “all agreements between undertakings, [...] and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market” are prohibited and automatically declared void. Article 82 EC – the equivalent of section 2 of the Sherman Act, dealing with monopolisation – prohibits “abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part of it [...] in so far as it may affect trade between Member States”.

Unlike the US Sherman or Clayton Acts, there is no explicit reference to trade with foreign nations within the text of Articles 81 and 82 EC, but the EC competition law applies to foreign enterprises or conduct outside the EC, if that conduct has as its “object” or “effect”, the distortion of competition within the Common Market. Unlike the US, as set out in *Hartford Fire*, assertion of EC jurisdiction does not require an intent plus actual substantial anti-competitive effect within the EC, neither does it require, as held in *Empagran*, both a ‘direct, substantial, and reasonably foreseeable effect’ on domestic commerce, and an effect that the antitrust law considers harmful. Assertion of EC jurisdiction solely seems to require an anti-competitive objective or effect on trade between Member States of the EU. How have European courts interpreted these provisions?

In the 1972 *Chemical Industries* case, the ECJ analysed whether Article 81 EC (then Article 85 EC) was applicable to companies that were located and registered outside the EU, but that agreed to fix prices within the EC through their owned and controlled subsidiaries located within the EC.

The ECJ held that the anti-competitive effect of the price-fixing arrangements was felt in the EC. Hence, the ECJ held that the EC as the competition enforcement agency and guardian of the EC Treaty rightly asserted jurisdiction over such conduct. Regardless of whether the actual anti-competitive conduct occurs outside the EC, if the effect of the conduct is to “affect trade between Member States” of the EC, such conduct will come within the reach of Articles 81 and 82 EC.

Thirteen years later, in the 1985 *Wood Pulp* case, the ECJ came back to the question of extraterritorial application of EC competition law. The EC imposed fines on wood pulp producers situated outside the EC for price-fixing arrangements contrary to Article 81 EC. The EC argued that quarterly pre-disclosure announcements of prices from one company gave the other companies time to adjust their prices accordingly, leading to a concentration on prices. In asserting EC jurisdiction, the EC relied on the ‘effects’ doctrine in the *Chemical Industries* case and stated that Article 81 EC was applicable to conduct (even if such conduct is outside the EC or parties to the conduct are located abroad) that may affect trade between Member States. The Commission further argued that the effects in this case were substantial, direct, and intended. Although the companies in question had no subsidiaries within the EC, they exported their goods to the EC and about two-thirds of their shipments were affected by the agreement in question.

The ECJ held that a crucial factor of whether the EC jurisdiction could be asserted was the place of ‘implementation’ of the agreement. In order to assert jurisdiction, the implementation must have taken place within the EC. Implementation means the entering into a transaction or contract with a customer in the EC. As contracts were made with customers in the EC, in this case, the ECJ held that implementation took place within the EC; thus the Commission rightly asserted EC jurisdiction.

The 1999 *Gencor/Lonrho* case further elaborated on the ‘implementation’ requirement in the context of a proposed merger between two South African incorporated platinum mining companies. Although the South African authorities had approved the merger, the EC issued a decision arguing that the proposed merger would lead to a collective dominance in the worldwide platinum market, as well as affect trade between members of the EC.

Gencor appealed the decision and argued – in accordance with *Wood Pulp* – that the implementation of the agreement took place in South Africa, not a member state of the EC. The CFI rejected Gencor’s argument and held that the implementation requirement as laid down in *Wood Pulp* was satisfied through mere sales of platinum by the South African companies within the EC, regardless of the location of the source of the raw material or location of the production plant. As the companies sold platinum

in the EC and would have continued to do so after the merger, the requirement of implementation within the EC was satisfied.

Friction Between Trading Partners

The *General Electric/Honeywell* case is an example of how assertion of extraterritorial jurisdiction of the EC’s Merger Regulations can lead to friction between the two trading partners, the EC and US.

The key test for assessing mergers in Europe is whether they “significantly impede effective competition in the Common Market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position”.

After the world’s largest proposed merger between GE and Honeywell was cleared by the US, the EC blocked the merger as it would result in the creation of dominant positions in various markets (including the supply of avionics and corporate jet engines), within the EC, as well as to the strengthening of GE’s existing dominant position in the market for jet engines, for large commercial and regional jets. Although GE proposed a number of undertakings to address the Commission’s concerns, they were considered insufficient and rejected.

Mario Monti, former EU Commissioner for Competition said that it is unfortunate that the EC and DoJ reached different conclusions. The risk of dissenting views, although regrettable, can never be totally excluded.

This was only the 15th time the EC blocked a merger, since its Merger Regulations came into force in September 1990, and only the second time it prohibited a merger involving only American firms. Moreover, it was the first time the EC blocked a merger of two US companies that had already been cleared by the US antitrust enforcement agencies.

The different outcomes of the EC and US competition investigations to this proposed merger lead to friction not only between the competition enforcement authorities, but also to political friction between the trading partners. Can friction resulting from the ‘extraterritorial’ application of each trading nation’s competition law be avoided – through bilateral co-operation agreements between the EU and US, for example?

Comity Considerations – Competition Co-operation Agreements

How can international friction be reduced and collaboration between competition enforcement agencies be reduced? Various bilateral agreements concluded by the US and EC on the application of both parties’ competition laws are a step in that direction.

The 1991 EC/US Agreement on the application of their competition laws was concluded in order to “promote co-operation and co-ordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws”. Each party is to notify the other whenever it becomes aware that its enforcement activities “may affect important interests of the other Party”.

The agreement further provides for the sharing of information in order to “facilitate effective application of their respective competition laws, or [...] promote better understanding [...] of economic conditions and theories relevant to their competition authorities’ enforcement activities”.

In order to avoid conflicts over enforcement activities, the Agreement contains a comity clause in which each party is to “take into account the important interests of the other Party. Each Party [is to consider] important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation [...], the nature of the remedies or penalties sought, and in other ways, as appropriate”.

The Agreement goes a step further and even provides for a ‘positive comity’ clause. If one Party (the EC, e.g.) believes that anti-competitive activities are carried out on the territory of the US, which affect the interests of the EC, the EC can ask the US antitrust enforcement agencies to “initiate appropriate enforcement action”.

The 1998 EC/US Positive Comity Agreement further clarifies that one party (the EC, e.g.) may request competition enforcement authorities of the other party to investigate and remedy anti-competitive activities in accordance with US antitrust laws.

Finally, there is also a 2002 set of Best Practices on EU/US Co-operation in Merger Cases, which further sets out procedures regarding the co-operation between antitrust enforcement agencies of the EU and US in review of individual merger cases.

Conclusion

Both the US and EC have a kind of ‘effects doctrine’ regarding the extraterritorial application of their competition laws.

It seems that European courts are flexible when it comes to interpreting ‘implementation’. Whether a company has headquarters abroad, but controls subsidiaries within the EC (*Chemical Industries*), whether contracts are made with customers in the EC (*Wood Pulp*) or mere sales are taking place within the EC (*Gencor/ Lonrho*) – the courts are willing to hold that these links to EC territory suffice to satisfy the requirement of “implementation in the EC”.

Due to its treble damages provision, the US is an attractive forum for foreign antitrust plaintiffs. The fact

that a foreign plaintiff will not have to be standing before US courts if his claim rests solely on harm that occurred abroad seems to be a useful and necessary limitation on US jurisdiction over anti-competitive conduct abroad, in order to prevent foreign plaintiffs asserting US jurisdiction in cases where there is no (sufficient) effect on US commerce.

Two questions remain, however. Firstly, how much is a ‘sufficient’ effect on US commerce. A ‘direct and reasonably foreseeable effect’ – albeit open to interpretation – might be determined more easily than a ‘substantial’ effect. Other ambiguities include the question of what constitutes a ‘dominant position’ (as per Article 82 EC), or how big the market share has to be to constitute a ‘monopolisation’ of the market (as per Section 2 of the Sherman Act).

Secondly, the ruling in *Empagran* also stated that the “FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements [...] however anti-competitive, as long as those arrangements adversely affect only foreign markets”. This seems to mean that the old saying does not hold true, that indeed you can have your cake and eat it. Or, to put it in other words, does this mean that you can “forbid poisoned cake at home, but allow it to be exported abroad”? (Mario Monti’s speech at Fordham University on October 7, 2003).

The question of extraterritorial application of each country’s competition law has never been more topical than in today’s global economy, where transatlantic and worldwide mergers are likely to increase in the future.

Although the co-operation agreements provide useful guidance regarding the procedural co-operation between both parties, they provide little guidance on the solution of conflicts between the assertions of the parties’ extraterritorial jurisdiction. They merely state that each party is to consider the important interests of the other party. Although co-operation agreements in the area of antitrust are a positive development, the question of the scope of extraterritorial jurisdiction of each country’s own competition law remains.

In the words of Robert Pitofsky, “[t]here will be instances where positive comity is only a preliminary – a practical and comity-conscious preliminary – to old-fashioned extraterritorial enforcement”.

Endnote

¹ Pitofsky, Robert, Goldschmid, Harvey J., Wood, Diane, *Trade Regulation – Cases And Materials* (Foundation Press, New York 2003), at 1171.

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