EXTRATERRITORIALITY IN ANTI-TRUST LAWS OF EUROPE

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1. INTRODUCTION

In modern times, where the authority of the government is restricted by geographical boundaries, the Extraterritorial Jurisdiction (hereinafter 'ETJ') is basically the government's legitimate right to exercise authority beyond those usual geographical limits. According to Goyder (2003), it conjures up images of a law being applied beyond the territorial ambit of its sovereign legitimacy.[1] The ultimate goal for overcoming the limitations imposed on the territorial jurisdiction is to tackle the issue of anticompetitive conduct in foreign territory which either has an impact on the competition within its own jurisdiction or on the competitive character of its corporations at home and abroad. In Europe, this doctrine of ETJ is applied by the European Commission to all the units which are not the members of the Community and those that tend to have repercussions - directly or indirectly on members of that Community. Despite the fact that the 'effects based rationale' for extraterritorial administration is widely accepted to be within the purview of public international law, the European institutions have justified their application of ETJ on the premise that the external entity is accountable for its actions that occur in, as opposed to have effect in, Europe. In the globalised economy of modern era, the concern over ETJ is extremely ubiquitous, where the effects of anticompetitive behaviour can be experienced far away from where they actually originate (Microsoft). Also, given the declining state of the world economy post-2008, the significance it has on mergers and cartels cannot be ignored. In this article, we shall trace the legal grounds and the tactics used by the Commission in claiming ETJ and also refer to landmark cases to explain how the approach of the Commission has changed and progressed.

2. THE CONCEPT OF EXTRATERRITORIAL JURISDICTION

The question of ETJ forms an integral part of the comprehensive debate which deliberates upon the powers of a State to exercise its jurisdiction outside its territory. International law, characteristically, differentiates between two kinds of jurisdictions; prescriptive and enforcement. The former establishes the rights of States to create their independent

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[1] Goyder DG, EC Competition Law (4th edn, Oxford University Press, 2003).

laws that are applicable to persons, territory or situations, while the latter empowers the States, with their right, in executive capacity, to put into effect the compliance with those laws. It is vital for a State to have the enforcement jurisdiction through which its establishments can conduct investigations, gather evidence, assist in proceedings and recover penalties abroad. In the case of *Ahlstrom Oy* v. *EC Commission* (1988)[2], the Advocate General Darmon made this division, signifying that a mere obligation of an economic sanction is only prescriptive and that the enforcement necessitates taking of coercive actions in the territory of a foreign sovereign by the state.

Although 'pure' criminal actions are liable to be punished, the notion of anticompetitive conduct being contrary to public good and that it should be penalised is reliant upon the economic and political ideology of the state. In States where competition laws are well established, the specifics of those laws may fluctuate – for instance in the concerned cases of *Boeing v McDonnell Douglas* (1997)[3] and *GE v Honeywell* (2004)[4], the United States (hereinafter 'US') and the European Community (hereinafter 'EC') asserted conflicting viewpoints while cooperating closely. It is generally accepted that the two undoubted basis for criminal jurisdiction in international law are nationality and territory. Territoriality primarily covers two facets – subjective i.e. the jurisdiction over acts that originated in its territory and other being objective i.e. jurisdiction over acts that originated in foreign sovereign but were accomplished, at least partly, within its territory.

The EC has been cautious of extraterritorial enforcement and instead of permitting itself to be seen as protruding into other autonomous territory, the institutions of the EC have formulated several legal tests that focus on bringing the conduct and culprits within the realm of EC law.[5] One of such tests is the 'group economic test', in which the foreign parents are credited with the accountability for any anticompetitive activity by their active and existing subsidiary in Europe. These parents or any other related members of the group are brought under the control of European Union (hereinafter 'EU') law if they apparently exercise some control or may have exerted control over such subsidiaries.[6] The courts, rather than laying focus on whether or not the control should be exercised, have given priority to the competence of the government to exert control. In some cases, this can be revealed by straightforward assessment of the undertaking's corporate organisation graph.

[2] A Ahlstrom Oy v EC Commission [1988] ECR 5193.

[3] Boeing v McDonnell Douglas [1997] OJL 336 16.

[4] GE v Honeywell [2004] OJL 48 1.

[5] Jones, A and B Sufrin, EU Competition Law: Text, Cases and Materials (Oxford University Press, 2011).

[6] ibid.

3. CHALLENGING THE EFFECTS DOCTRINE: ICI V. COMMISSION

Under the Treaty for the Functioning of the European Union (hereinafter TFEU), Articles 101 and 102 are quiet as to whether or not they can be applied extraterritorially. Earlier, it was the evolution of the *'doctrine of single pecuniary entity'* that averted the necessity for determining this issue. But, the *Wood Pulp*[7] case unmasked an uncertainty in the EC Merger Regulation[8] vis-à-vis the opening of latter's jurisdiction which may catch concentrations between undertakings based outside EC so long as the EC turnover thresholds set out in the Regulation are satisfied. Also, in a particular case[9], Imperial Chemical Industries (hereinafter 'ICI') was suspected to have abetted in concerted practices by providing price directives to its exclusively held subsidiary incorporated in Belgium. ICI being a parent company was neither a member nor had indulged in trading with the European Community. The pertinent point to be noted is that the ICI had the majority of shares in the subsidiary that were present in the dye market and had oligopolistic competition at that time. The issue that was raised in the instant case was whether EC law essentially had an *'effects doctrine'*. The European Commission investigated a suspected cartel amongst the manufacturers of aniline dyes. At that point of time, the ICI was based in the United Kingdom and was not a part of the EC. Thus, ICI had breached Article 81(1) (Article 101(3) since amendment in the year 2009) because of its aforementioned concerted practices. Hence, the Commission imposed a heavy fine on ICI. The arguments that were raised by the Commission were that (i) considering the subsidiary as merely an agent of the parent, ICI was a part of the Community as it had the corporate control and it was authorised to exercise that control over its subsidiary and (ii) the conduct of ICI had an effect on competition within the common market.

Another facet of the argument was presented by Advocate General Mayras. He acknowledged that exercising its jurisdiction outside its legal grounds was acceptable under international law. But it cannot be overlooked that the Commission had built its right to take action exclusively on the *'effects doctrine'*, which in the instant case was not satisfied to provoke action. However, not contradicting Mayras, the EC carefully continued on a less debateable route in establishing its verdict on the *group economic unit* theory on the principle that in spite of the subsidiary having a distinct legal personality, it is not adequate enough to mitigate the likelihood of attributing its behaviour to the parent company. ICI refuted the group economic unit theory by raising

[7] Wood Pulp (n 2).

[8] The EC Merger Regulation [2004] OJ L 24/1.

[9] ICI v Commission (Dyestuffs) [1972] ECR 619.

the argument that accrediting the actions of an entirely owned subsidiary to its parent company shadows the separate corporate status and further contested that the Commission's application of competition rules was outside the EC. The evidence presented were the Telex messages linking the 1964 increase in price and circumstances of sale to be met, and the Commission supposed that the 1965/67 increase were of the same matter; this verified that the subsidiary did not hold any 'real autonomy.'

The Commission subsequently fined ICI 50,000 units of account. The real importance of the instant case is the exemplification of the doctrine by which parents and subsidiaries are treated as one undertaking for the determination of applying competition rules.

4. CONFIRMING THE EFFECTS DOCTRINE: WOOD PULP

In the *Wood Pulp* case[10], the Commission had taken a legal action against a foreign consortium for floating prices within the European market. The case focused on the existence of an '*effects doctrine*'. The defendant (ICI) who manufactured the bleached sulphite pulp was not the member of the Community but still engaged in price fixing arrangements. The producers exported directly to purchasers, branches, agencies or subsidiaries in the Community. The European Commission found forty-one manufacturers and two trade corporations engaging in intensive practice *au contraire* to Article 101(3). These intentional practices had a substantial effect on the Common market. The Courts held that the infringing behaviour comprised of formation of a contract and subsequently its implementation. The Court also maintained that the channel by which the corporation executed it was inconsequential; rather the fact that it was executed (via marketing organisation of a state that is member of the Community) turned it into a European matter. The defendant appealed on the grounds of jurisdiction and argued that they were involved in concerted practices. The European Commission did not apply the *effects doctrine*, but as previously noted, Darmon determined that the *effects doctrine* was an effective ground for extending jurisdiction. Others including Van Germon have found that the two doctrines can lead to different results. The implementation may not establish jurisdiction in cases of direct sales by companies to customers within the Community in the absence of any type of marketing organisation.

The importance of the *Wood Pulp* case[11] is that it not only gave credibility to the operation of Article 81(1) [101(3)] and it's extraterritorially, but it also enunciated the concept of extraterritorial jurisdiction to the Community rather than merely implementing the

[10] Wood Pulp (n 2).

[11] Wood Pulp (n 2).

effects doctrine. The fact that the European Commission does not necessitate proof for effect of anticompetitive practices in order to justify a claim of extraterritorial rule means that some actions, which must not be probed at all, may come under DG Comp's magnifying glass. This could result in covering too many harmless occasions into inquiry, which from an economic welfare viewpoint is a wastage of resources.

5. MERGER REGULATION: THE TURNOVER TEST

Another method of bringing foreign undertakings within European jurisdiction is through the Merger Regulation. The Regulation will only apply where a concentration has a Community dimension which entails meeting the requisite level of sales within Europe - €5000 million turnover worldwide, €250 million Community turnover (A.1(2)). A.1 does not say anything about where the undertakings concerned are located, and A.5(1) goes on to specify that Community turnover consists of products sold or services provided to undertakings or consumers in the Community or in a member state. Unlike the Court's approach in *Wood Pulp*[12], no distinction is made between direct sales or sales through a branch or subsidiary in the Community by a foreign undertaking. This definition avoids any outright admission of extraterritorial application of European law to foreign undertakings. The way in which the Community dimension threshold is formulated can also attract transactions which involve only undertakings located outside the Community with few assets inside it, and transactions which have minimal impact inside the Community.

In *Gencor v. Commission* (1999)[13], the Commission blocked a merger between two companies incorporated in South Africa which would have otherwise impeded competition in the common market through the creation of a dominant duopoly in the platinum and rhodium markets respectively. Although not made public, it was thought that the parties involved, Gencor and Lonhro Platinum Division, each accounted for 15-17% of world sales. The market for platinum is a world market, of which the EU is one of the three largest consumers and the effect of price hikes would be felt in every country. In language bearing overtones of the *effects test*, the Commission argued that the merger would have an immediate and substantial effect in the Community and later concluded that creating a dominant duopoly position in a world market would also impede competition in the Community significantly, which is an integral part of that market. The South African government considered that two fairly equally sized competitors (the merging firms and their rival Anglo-American) would be preferable to a market with Anglo-American as the dominant firm and a fringe of smaller competitors.

[12] ibid.

[13] Gencor v Commission [1999] ECR II-753.

Firstly, Genor argued that if the *Wood Pulp*[14] criterion was applied, then implementation of the concentration outside the community would not pose any problems. Secondly, Genor argued that the Commission cannot claim jurisdiction in respect of a concentration on the basis of future or hypothetical behaviour. The Court of First Instance (Herinafter 'CFI' looked first at the Regulation itself and concluded that, the place of production is immaterial, and greater weight should be placed on sales in A.1. When returning to *Woodpulp*, it stated that implementation of an agreement is satisfied by a mere sale in the Community. The CFI did not expressly adopt the *effects doctrine*, but rather considered that the threshold was an application of the *Woodpulp* implementation principle. However, if implementation in a merger case is satisfied by a mere jurisdiction of the merged firm's products, then implementation means effects. Gencor is a striking demonstration of the implications of the effects/implementation doctrine; the EC forbade a merger between non- members because of sale of the product in the Community. The interests of South Africa did not come into play because South Africa did not require the transaction to take place, and a conflict of interest would only have arisen if South Africa required it, rather than simply allowing it. Fox (1999)[15] makes the point that the prohibited transaction is likely to have a more serious impact on the economy of South Africa than on European consumers. Fox argues that South Africa's diplomatic stance (no opposition) made resolution of jurisdictional problem in Gencor an easy one, compared to what would have been the case had South Africa fought for its merger. Gencor and Boeing raise the issue of the need for an international merger protocol.

6. ISSUES OF INTERNATIONAL CONFLICT IN EXTRATERRITORIAL JURISDICTION

In *Boeing/McDonnell Douglas*, the Commission exercised its jurisdiction over a merger between two US corporations on the basis that both parties exceeded the turnover requirements. In the context of merger control, the propriety of the effects test was made clear by the Court. The creation of the world's largest aerospace manufacturer was of great concern, as it reduced the number of manufacturers from three to two, and opened a Phase II investigation under A. 6(1)c. The Commission communicated its concerns to the FTC, but the FTC subsequently cleared the merger, on the ground that Boeing was already dominant. The FTC had further stated that prohibiting the merger could have harmed important US defence interests. The Commission sanctioned the merger when several conditions were agreed upon to resolve any anticompetitive effects. The case illustrates that despite bilateral cooperation arrangements between like-minded competition authorities, clashes cannot always be avoided.

[14] Wood Pulp (n 2).

[15] Fox, E 'The Merger Regulation and its Territorial Reach' (1999) ECLR 334.

In *Commercial Solvents v. Commission* (1974),[16] the key point of friction was the refusal to supply in order to exclude competitors from ancillary markets. Whatstein (1992) elucidates the relevance of this case to the extraterritorial argument.[17] Commercial Solvents of New York had a controlling interest in its Italian subsidiary of 51% shareholding and 50% representation on the board etc. Commercial was the world's only producer of aminobutanol and the Italian subsidiary Instituto acted as a reseller and having conferred with Commercial, it was prohibited from selling aminobutanol to third parties. The Court upheld the Commission's decision that it was abusive of Instituto to refuse to supply to Zoja, a downstream firm which produced a drug of which aminobutanol was an essential ingredient.

The companies argued that they have always acted independently, so that they cannot be deemed responsible for each other's actions. For the purposes of this case, Commercial wanted to shift the blame on Instituto, on the ground that it only acted within the boundaries of the Community. The Court considered the 'group economic unit' theory in determining that refusal to supply was a united action and with regard to their relations with Zoja, the two companies must be deemed to be an economic unit and that they are jointly responsible for the conduct complained of. In comparison with *Dyestuffs*, where it had to be shown that the subsidiary follows instructions of the parent, and Continental Can, which required that the subsidiary follows instructions in determining its market behaviour, Commercial Solvents relied on the existence of a unified economic unit only with respect to the condemned behaviour, rather than the overall economic activity of the subsidiary, which was found to be a sufficient basis in order to pierce the corporate veil.

7. CROSS BORDER COOPERATION

The Community is acutely aware that it cannot rely on its own concepts and procedures to act against foreign business conduct and that extraterritorial enforcement brings many politically negative externalities. In 1991, the Community and the US entered into their first antitrust cooperation agreement.[18] It contains what are known as passive, or traditional comity provisions, which permit an active communication of information and consideration of a trading partner's interests, but do not involve any 'triggering' of enforcement activity in another jurisdiction. Positive comity, on the other hand, provides for the possibility of one authority to request the other to take enforcement action. The agreement provides for the reciprocal notification of cases under investigation by either

[16] Zoja v Commercial Solvents [1972] OJ L299/51; [1973] CMLR D50.

[17] Whatstein, L "Extraterritorial Application of EC Competition Law - Comments and Reflections" (1992) 26 ILR 195.

[18] EU/US Competition Cooperation Agreement OJ L95 27/04/1995 47.

authority where they may affect the important interests of the other party, as well as periodic meetings and coordination of their enforcement activities.

In 1998, the Community and the US entered into a separate accord expressly supplementing these positive comity commitments; it specified the conditions under which the party requesting enforcement action should suspend its own enforcement activities and let the requested party take the lead. This suspension agreement was limited to 'competitor only' complaints dealing with allegations of export restraints. A similar agreement was entered into with Canada in 1999.

The principle of positive comity applies where undertakings from one party to a cooperation agreement are being harmed by the anticompetitive practices occurring within the territory of another party. As the injured party cannot itself initiate extraterritorial enforcement proceedings (because of the absence of evidence of harm to competition in its own market) it has to rely on the other party taking action on its behalf. The most public informal case of positive comity involved joint investigations by the Community and the US into the bundling/tying of terms of contracts in one country with those in another by A.C. Neilson, a US company that tracks retail sales.[19] Its major Information Resources, Inc. (hereinafter IRI) filed the complaint and as to whether Neilson offered customers more favourable terms in countries where it had market power as means of ensuring that customers use Neilson in countries where it faced competition (Rill et.al, 2005)[20] As the practice took place within the Community's jurisdiction, the Commission took the lead and it was found that Neilson had indeed implemented various exclusionary practices to impede IRI from entering the European market. Similarly, in *SABRE-Amadeus* (1997),[21] the US referred to the Commission to investigate possible anticompetitive conduct by Amadeus, a dominant computer reservation system in Europe, which was preventing SABRE from competing in some EU member states.

The agreement meant that when anticompetitive activities occurred in the whole or a substantial part of the territory of one of the parties and affected the interests of the other party, the latter would normally defer or suspend its enforcement activities in

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[19] Press Release, US Dep't of Justice, Justice Department Closes Investigation into the Way AC Nielsen Co Contracts its Services for Tracking Retail Sales (3 Dec 1996).

[20] Rill, JF & H Rosenblatt, 'Coordinated interaction and collective dominance: a remarkable journey towards convergence' in P Lugard and L Hancher (eds), On the Merits: Current Issues in Competition Law and Policy (Antwerp, Intersentia, 2005) p 127–156.

[21] Thea Freese, 'Coordination in multijurisdictional competition cases developing a main impact principle in international law' SABRE/ Amadeus IP/ 91/784 (1991) < https://europa-kolleg-hamburg.de/fileadmin/user_upload/documents/Study_Papers/SP_12_2_Freese.pdf> accessed 9 January 2015.

favour of the former. This is expected to happen particularly when these anti-competitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the territory of the party deferring or suspending its activities. This new agreement represented a commitment between the parties to cooperate with respect to antitrust enforcement in certain situations, rather than seeking to apply their antitrust laws extraterritorially. However, EC merger rules are not in the scope of the 1998 agreement, as they do not allow for deferral or suspension of action.

Both the US and Canadian agreements with the EC have a confidentiality provision whereby parties can refuse to disclose any information if it is prohibited under the law of the party that holds the information or if it would be incompatible with the important interests of the party that holds it. This gives each party some discretion as to how far confidentiality can extend, which is motivated by the fear of dispatching the information about a company to its competitors. The Community distinguishes between business and agency information; the latter pertaining to the investigation, and the former being company specific which can only be disclosed to the US with the consent of the company. The US does not make this distinction and requires consent of undertakings for disclosure of any information. The Microsoft case in 1994 waived the rights to confidentiality to allow information exchanges as it was easier for the company to work with both authorities together.

Finally, positive comity can only apply where the anti-competitive practice is illegal in the jurisdiction of the requested party. For example, the US approaches vertical restraints in a more lenient manner than the Community does; the latter prohibits arrangements that may significantly restrict competitors' access to a market. It is interesting to note that Europe is not home to as many near monopolies or dominant firms of substantial size such as Microsoft, Apple, Wal-Mart or General Electric. As such, it is less likely that the FTC would take action against vertical restraints which impedes entry of a European competitor, unless they substantially lessen competition in both sides of the Atlantic. As Atwood elucidates – 'it is not realistic to expect one government to prosecute its citizens solely for the benefit of another.' Thus, positive comity is likely to be effective where both parties have a mature legal infrastructure propounded by a mutual consensus on the role of competition policy.

8. CONCLUSION

There have been many initiatives and plans undertaken by the Community to formulate mechanisms for increasing cooperation over these anti-trust laws and avoiding conflicts. This has taken the form of working with the United Nations Conference on Trade and Development, OECD and World Trade Organisation in attempting to establish multilateral cooperation. However, these attempts have still been precipitated by divergent cross-border views and the idea of a global competition law regime is still in its infancy given the economic status of these global countries.

The practice of claiming ETJ is engulfed with political ramifications of international proportions. In applying ETJ, competition authorities must bear in mind the consequences which it may spur such as strained future relations, trade barriers (which would impact the enforcer's economy) and perhaps less cooperation, which may prevent the mitigation of future anticompetitive conduct. For example, if a small open economy such as Ireland took a lawsuit against Apple (an abstract but illustrative example), given that the sale of electronic appliances to Ireland may only represent a small proportion of the company's sale, Apple could decide to cut off selling to Ireland directly, which would have heavy repercussions on consumer welfare. This conjures up a type of trade-off between short run enhanced competition and perhaps long run economic consequences, as in the case of *Gencor*. Despite the theoretical weaknesses and ambiguous scope of the *Wood Pulp*[22] formula, it is clear that trading into the Community as well as trading with the Community falls within the reach of the Community's jurisdictional competence. The "implementation" formula is an elusive concept that can actually embrace all business transactions with a Community dimension, regardless of the territory in which the transaction crystallises and the location of the headquarters of the undertakings involved.

[22] Wood Pulp (n 2).