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The Application of EC Competition Law to Non-European (U.S.) Corporations

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THE APPLICATION OF EC COMPETITION LAW TO
NON-EUROPEAN (U.S.) CORPORATIONS

by

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INTRODUCTION

The present thesis deals with the application of European Community (EC)¹ Competition Law by the competent Communitarian institutions, namely the Commission, the Court of First Instance and the European Court of Justice. Because the discussion will concern its application to non-European legal entities, one explanatory remark is necessary. Dealing with the application of Competition Law with regard to non-European corporations is not meant to suggest that any form of discrimination based on nationality exists. As former Commissioner Sir Leon Brittan commented with regard to one of the early cases involving non-EC companies, “the location of a party’s incorporation or headquarters is *immaterial* for Competition Law”,² which must focus on impact on markets.

However, while Mr. Brittan’s argument can be said to hold true, it must also be noted that EC law is no exception to one basic principle, that is the territorial nature of the law. The law is the expression of one sovereign power which has territorially limited extension and its application to entities or situations that have no territorial links to its territory deserves special treatment.

¹ Nowadays the European Community has evolved into the European Union (EU). However, it should be noted that according to the Treaty of Maastricht, the Community is one of the three “pillars” that constitute the Union. Article A of the Treaty reads as follows: “The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.” The remaining two pillars are enucleated in articles J (Provisions on a Common Foreign and Security Policy) and K (Provisions on Cooperation in the Fields of Justice and Home Affairs). Since European Competition Law entered the structure of the Union as part of the legislation of the Community, in the present thesis the terms will be used interchangeably.

² Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 6 (emphasis added).

One necessary goal of this thesis then will be the assessment of the EC's treatment of these cases. A legal entity's non-European nationality must not be confused with the lack of links to the EC, as the presence of an established (not necessarily incorporated) branch or subsidiary within the EC will suffice to determine the ordinary - that is territorial - application of EC law. Instead, the focus will be on cases that would require extraterritorial application of the law: As it will be discussed, the Court of Justice has never formally endorsed the principle of extraterritorial jurisdiction,³ so that it will be necessary to discover how the EC deals with cases that have no links that could trigger the territoriality principle.

Another purpose of this thesis will be to search into the ramifications of the transnational structure of certain corporations. In fact, while these may be affected by the peculiarities of EC Competition Law, they may be able to affect a market in Europe through their dominance of another market elsewhere. Based on the assumption that the legal standards cannot and will not vary simply depending on the nationality of the entities that are subject to the EC's sovereignty, a case-oriented analysis will be made to uncover the general orientations, if any, followed by the Communitarian institutions in the application of Competition Law to non-EC firms.

Before analyzing these points, some understanding of the legal framework of EC Competition Law will be provided, focusing on the powers of the Commission and the peculiarity of its role (as connected with the peculiar goals of EC Competition Law). Instead, only little analysis of the offences set forth by articles 85 - 86 and the merger

³ See the argument of former Commissioner Sir Leon Brittan reported in Joseph P. Griffin *Extraterritoriality in U.S. and E.U. Antitrust Enforcement* 67 *Antitrust L.J.* 159, 186-187. Also, see Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 2-3 "In my view States may exercise jurisdiction in competition cases with a foreign element only to the extent permitted by international law. [...] This is more obviously true of the European Community, a creature of international law and bound by its rules which has grown into an actor *in its own right* on the world stage." (emphasis added).

control regulation will be carried out, since doing so would divert the thesis from its subject.

CHAPTER I

EC COMPETITION LAW, SCOPE AND ENFORCEMENT

Introductory remarks

The foundations of EC Competition Law essentially consist of a very small number of legislative provisions. Of the articles that constitute Title V, Chapter 1 of the Treaty, only the first two, articles 85 and 86, set forth two of the three basic offenses of EC Competition Law.⁴ Most noticeably, while in 1951 the Members included in article 66 of the European Coal and Steel Community a specific provision about concentrations, the Treaty of Rome does not even contain a similar rule. Yet, the protection of competition was included in the fundamental principles of the Community at article 3 (f) of the Treaty. Because the Treaty can be paralleled to a State's constitution, it is obvious that all basic principles must be read so as to be in accord among themselves. To a big extent, this explains certain orientations of the Commission and the Court of Justice, whose policies in Competition Law enforcement may well seem odd to those who fail to weigh the implications deriving from employing *inter alia* Competition Law for purposes such as friendly relationships, social welfare, market integration and more.

By way of summary, it could be said that in a setting as that of an international organization, that is an institution lacking *original*, sovereign powers and that is only given enumerated attributions, it was left to the Court to assess the scope of the powers of the Communitarian institutions and how they should be applied. Contrary to what might

⁴ Pursuant to article 12 of the Treaty of Amsterdam, which entered into force in May 1999, articles 85, 86 and 87 have been re-numbered and are now articles 81, 82 and 83 respectively. Because they are still commonly referred to by their previous numeration in all the current literature, the same approach will be followed in this thesis.

usually be expected to happen in the case of a jurisdiction that had essentially civilian roots, the Court of Justice arose to a law-making function and very often ended up creating, rather than just interpreting, the law.⁵ Of course, this greatly contributed to the formation of a very case-oriented body of rules, which is not necessarily always consistent with the legal tradition of continental Europe.

In one of the early leading cases the Court had to address an issue that was troublesome under two aspects. In fact, not only did it involve intellectual property - trademarks - something which by its very nature clashes with antitrust in that it tends to endorse monopolistic or restrictive behavior, but it also involved the scope of Communitarian institutions as opposed to national authority. In *Grundig*⁶ in fact the German manufacturer of electronic equipment and its exclusive French distributor - Consten - brought appeal against a decision by the Commission claiming that it infringed article 222 (which requires the EC to refrain from altering national property laws) and 36 (concerning industrial and commercial property as a permissible limitation to the prohibition of quantitative restrictions) of the Treaty.

“Considering articles 36 and 222 [Grundig and Consten] appeared to have a strong case. A court that would have seen its role as a scrupulous guardian of the competence of the Member States would not have found it problematic to pass a judgement in [their] favor. However, anxious [that the Members could use the provisions of the Treaty limiting the liberalization of trade] as a means to weaken the competence of the Community” the Court stated that such provisions should not be intended as to limit

⁵ However, it should be noted that this does not mean that within the E.U. system the decisions of the Court of Justice represent a binding precedent as it happens in the U.S. Even though the Commission and the Court of First Instance keep the orientations of the highest judicial authority into consideration, disagreements do arise. This is most important in the enforcement of Competition Law, because of the broad powers and discretion of the Commission. See for instance Barry E. Hawk *System Failure: Vertical Restraints and EC Competition Law* [1996] C. M. L. R. 973, 980-983 about the contrasting views of the two institutions concerning one of the most debated issues - the law of vertical restraints.

⁶ *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community*. [1966] E. C. R. 329, 339

the application of article 85 and to permit an abusive use of rights granted by the single Members in order to do away with effective enforcement of EC Competition Law.⁷

“Whereas in the U.S. the issue would have been a mere conflict between patent and antitrust law, in the EU it was also one of community law (competition law) and national law (patent law). The Court was eager to declare the superiority of competition law to assure an unchallenged priority of Community law over possibly conflicting national laws.”⁸

Under article 85 concerted anticompetitive practices are illegal if they “may affect trade between Member States.”⁹ Indeed this condition is not only easily fulfilled in the jurisprudence of the European Courts, but it is also represents one of the most fundamental concerns for all Communitarian institutions. This has to do with one of the peculiarities of EC Competition Law, that is market integration. Accordingly, allocation of competence between Communitarian and national authorities is only one of the two functions that the requisite in object serves.¹⁰ While this part of the language of article 85 has certainly been interpreted in the sense of determining *what* triggers EC Competition Law as opposed to national antitrust laws,¹¹ it has also been used in order to give primary relevance to market integration *in the merits* of decisions. Historically, this has been

⁷ H. Thomas Hefti *European Union Competition Law* 18 Seton Hall Legis. J. 613, 637.

⁸ *Id.*

⁹ Article 85 § 1.

¹⁰ In this sense the condition is similar to that of the Sherman Act - “restraint of trade among the several States”. There too, such condition determines whether a given offense should be the object of federal or state action.

¹¹ “The agreement must also be one which ‘may affect trade between Member States’. This provision [...] is directed to determining the field of application of the prohibition by laying down the condition that it may be assumed that there is a possibility that the realization of a single market between member states might be impeded . *It is in fact to the extent that the agreement may affect trade between member states that the interference with competition caused by that agreement is caught by the prohibitions in Community law found in article 85, whilst in the converse case it escapes those prohibitions.*” *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] E.C.R. 235, 248 (emphasis added).

particularly true in cases related to *vertical* economic relationships (see *infra*, under the discussion of *Grundig, Sandoz, Ford*).

The issue can be better explained in connection with the second condition contained in article 85 § 1: agreements must have as their “*object or effect* the prevention, restriction or distortion of competition”. Obviously, the first step must consist of determining *what* amounts to a (potential) restriction of competition. “The Commission decided that under Article 85(1) *any* restriction of the commercial freedom of one or more of the parties to an agreement would amount to a restriction to competition. The practical consequence of this substantive interpretation is that the Commission’s initial finding has almost invariably been that agreements containing *any* restrictive element are anticompetitive [...] despite the recognition by the Commission that much conduct caught by the broad sweep of the provision, as so interpreted, is in fact acceptable.”¹²

In the US, the Supreme Court came to the conclusion that § 1 of the Sherman Act, if interpreted in its literal sense would have brought about impractical consequences with regard to the development of trade.¹³ Likewise, it has been affirmed that article 85 “cannot mean what it says.”¹⁴ In the case of EC Competition Law, especially because of its peculiar goals, the Commission adopted such a strict approach in order to retain control both over the development of market interpenetration and the evolution of the legal standards of Competition Law. Then, far from merely having purposes of

¹² Mario Siragusa *The Millennium Approaches: Rethinking Article 85 and the Problems and Challenges in the Design and Enforcement of the EC Competition Rules* 21 Fordham Int’l L. J. 650, 652.

¹³ The proponent of this interpretation was Justice White. After dissenting in the latest decisions that reaffirmed the traditional, strict interpretation - see *United States v. Trans-Missouri Freight Association* 166 U.S. 290 - he finally led the majority of *Standard Oil of New Jersey v. United States* 221 U.S. 1 (1911) to affirm that only *undue or unreasonable* restraints should be prohibited. The *rationale* was that if literally interpreted the Sherman Act would have effectively prevented the conclusion of virtually every agreement, since agreements were intended to be restraints by definition. The new interpretation therefore superseded the previous one, which had maintained that the Sherman Act was precisely meant to substitute the standard of reasonableness of the English common law tradition - *Mitchel v. Reynolds* 24 Eng. Rep. 347 (1711) - with a stricter requirement.

¹⁴ Mario Siragusa *supra* note 12, note 8.

allocating jurisdiction, the conditions set forth in article 85 provided the Commission with a chance to carry out a scheme of industrial and economic policy.¹⁵

Also, with specific regard to competition policies, article 87 provides for the enactment of second degree legislation to give effect to the substantive provisions of articles 85 and 86. Pursuant to it Communitarian institutions are empowered to set forth comprehensive, detailed legislation. Paragraph 2 provides the authority to “ensure compliance” with articles 85 and 86, lay down “detailed rules” for the application of article 85 §3, “define the scope” of articles 85 and 86, “define the respective functions of the Commission and the Court of Justice” in applying legislation enacted pursuant to article 87 §2 and finally assess interaction with national legislation.

As it appears in the letter of article 87, Communitarian institutions received a very broad mandate to enact and enforce Competition Law, which proved crucial in subsequent developments. Starting from the first piece of legislation implementing articles 85 and 86, regulation 17 of 1962,¹⁶ the Council has enacted several regulations, some of which empowered the Commission to regulate in further detail EC Competition Law. As a result, the Commission not only has competence to directly apply the law - indeed, it is exclusively competent in the case of certain provisions¹⁷ - but it also has (regulatory) legislative capacity in the areas covered by the legislation enacted by the Council by means of its own regulations. This is particularly important because, since the enactment of regulation 17/62 (which empowered the Commission to issue exemptions under article 85 §3) the Commission has frequently used its regulatory attributions to provide detailed discipline in the field of exemptions.

¹⁵ *Id.*, at 655. The author emphasizes that with the exception of France and Germany the Member States simply did not have a body of rules concerning competition. It then took time before the remaining Member States adopted national legislation and developed all the necessary interpretive and enforcement tools. By way of example, Italy only enacted national antitrust legislation in 1990.

¹⁶ 1962 O.J. 204. Hereinafter regulation 17/62.

¹⁷ Most noticeably, regulation 17/62 affords the Commission the exclusive competence to deal with the discipline of exemptions of paragraph 3 of article 85. See Article 9 of regulation 17/62.

For instance, this happened for three major pieces of legislation such as regulation 19 of 1965,¹⁸ 2821 of 1971,¹⁹ and 1534 of 1991.²⁰ Pursuant to these Council regulations the Commission in fact enacted a number of more detailed regulations such as those about exclusive distribution agreements, research and development, franchising, know-how licensing and insurance agreements.²¹

Powers of the Commission and judicial review. Basic procedure. Scope of application

Comparatively, the Commission's role could be paralleled to that of the Federal Trade Commission in the United States. In fact, even though it is left to the Tribunal of First Instance (and, in case of appeal, to the Court of Justice) to perform the Community's judicial function, the Commission's enforcement competence goes so far as to allow it to investigate, perform inspections and finally issue decisions with regard to proceedings against private subjects. Such powers of enforcement, added to the power to regulate mentioned in the previous paragraph and issue individual decisions contribute to characterize the Commission as an institution that - at least to some extent - has been attributed all three basic functions of legal systems.²²

¹⁸ Regulation 19/65, O.J.

¹⁹ Regulation 2821/71, O.J.

²⁰ Regulation 1534/91, O.J.

²¹ These are respectively regulation n. 83 of 1983, n. 418 of 1985, n. 4087 of 1988, n. 556 of 1989 and n. 3932 of 1992. Also, article 87 represented the legal basis for the Council to enact the merger control regulation n. 4064 of 1989, which will be analyzed later in this chapter.

²²It has been commented that the only real limit on the Commission is the lack of human resources, whereas it would be difficult to conceive a broader attribution of powers. Per Jebsen and Robert Stevens *supra*, note , 447.

The powers of the Commission are noteworthy if considered in the light of the degree of integration that the then six Members had reached by the time regulation 17/62 was enacted.²³ In extreme synthesis, they range from that of investigating and requesting information to that of issuing fully enforceable decisions.²⁴ Articles 11-14 of the regulation deal with the acquisition of all information that is necessary to the implementation of substantive Competition Law. Such information may regard single undertakings or entire sectors of the economy (even though these general inquiries inevitably involve individual investigations on their turn). Whenever market parameters such as scarce price flexibility suggest conditions of distorted competition the Commission may start a general inquiry, which as a practical matter will be implemented by requiring undertakings or associations of undertakings to supply information.²⁵ The addressee of a request “*shall* supply the information requested”; if not, the Commission will issue a decision setting forth time limits for compliance and the penalties for noncompliance.²⁶ Also, article 15 of the regulation provides for the power to impose fines for incomplete or misleading information.

With respect to the execution of the investigations articles 13 and 14 distinguish between those carried out by the authorities of the Member States upon request of the Commission - not very frequent - and those that the Commission will carry out itself after informing the authorities of the State. With specific regard to the application of EC

²³ Even though an analysis of the historical evolution of the Community would not be directly relevant to the immediate purpose of this thesis, it should be noted for a better understanding that the 1960s - especially until the 1966 Compromise of Luxembourg - featured strong oppositions (especially from the French Presidency) to enhancing the Community to a properly supranational entity. While the most violent criticism regarded the issue of integration as such and the use of less than unanimous majorities within the Council rather than competition policies in particular, the contrast with the attribution of powers similar to those of a sovereign to the Commission is striking.

²⁴ See James S. Venit *EU Competition Law - Enforcement and Compliance Overview* 65 Antitrust L.J. 81, 86-87.

²⁵ Regulation 17/62 article 12 §§ 1-3.

²⁶ Regulation 17/62 article 11 §§ 4-5.

Competition Law to non-EC firms, nothing prevents the Commission from conducting such investigations, provided that a seat or an establishment of some kind is present within the territory of one of the Member States. In case no such establishment exists, the Commission apparently will need to request the cooperation of foreign authorities, which in the case of EC-United States relations is currently granted to some extent by a bilateral agreement signed in 1991 and improved in 1998 (see *infra*, chapter II). The situation is conceptually similar to that of a refusal to grant entry to the Commission's inspectors: since the Commission's powers fall short of coercive authority to enter the premises of an undertaking, it will need to request the cooperation of national enforcement bodies, which are bound by the duty of cooperation.²⁷ Of course, the degree of cooperation that the authorities of the Member States must guarantee is higher than that of US antitrust agencies.

To summarize, in order to fully appreciate the scope of provisions granting the Commission the power to "obtain all necessary information"²⁸, "undertake all necessary investigations" in connection with the implementation of competition policies²⁹ and, as mentioned, to intervene by requesting information from "undertakings whose size *suggests* that they occupy a dominant position"³⁰ the context of the EC should not be neglected. Communitarian institutions have been granted broad powers and have often stretched the limits of their attributions in pursuit of integration.³¹ In the specific case of Competition Law even efficiency - which is by most recognized as the basic goal of

²⁷ See Regulation 17/62 article 14 § 6 and James S. Venit *supra* note 24, 98-101.

²⁸ Regulation 17/62 article 11 § 1.

²⁹ Regulation 17/62 article 14 § 1.

³⁰ Regulation 17/62 article 12 § 3.

³¹ See Thomas Hefti, *supra*, note 7. While the cited *Grundig* case concerning the conflict between national patent law and Communitarian Competition Law is explanatory, the relations between the EC and the Member States and the direct applicability of EC legislation (especially in the case of directives) is the ground on which the Court of Justice traditionally emphasized to a greater extent the powers of the institutions.

antitrust - has been afforded lesser attention, especially where clashes with integration were possible. “Despite the contention of many scholars that efficiency is the emerging goal of E.U. Competition Law, it is beyond doubt that E.U. officials view European market integration [...] as its most important objective, if not its *raison d’être*.”³²

While in the US enforcement is often ensured by direct private antitrust action, within the EC, Commission investigations may be either triggered by a letter of complaint from a third party (most commonly a competitor of the suspect undertaking, which may also greatly contribute in terms of information-gathering).³³ The interested complainant will typically remain a third party in the sense that if the Commission *in its discretion* prosecutes the infringement it will do so in first person and the violation will be prosecuted directly by it.

Following to the proceedings, the Commission has the power to issue enforceable decisions terminating infringements and imposing fines. The substantial amount (up to 10% of the firm’s turnover) of such fines is meant to represent a deterrent for violations (as treble damages are in US antitrust enforcement). However punitive fines can be, like the entire proceeding they remain administrative in nature, with no criminal consequences whatsoever.³⁴ This distinguishes antitrust enforcement within the EC and the US, as (whatever the actual deterrent of the criminal sanctions of the Sherman Act) criminal prosecution against foreign corporations for entirely foreign conduct is

³² Emmanuel P. Mastromanolis *Insights from U.S. Antitrust Law on Exclusive and Restricted Territorial Distribution: the Creation of a New Legal Standard for European Union Competition Law* 15 U. Pa. J. Int’l Bus. L. 559, 562.

³³ Regulation 17/62 article 3 § 2. See also article 6 of regulation 99 of 1963 setting forth the right of an interested complainant to be heard before the Commission. However, third parties are never entitled to the issuance of a particular decision (or *a fortiori* to a decision that be favorable to them)

³⁴ See James S. Venit *supra* note 24, 103-104. Article 15 of regulation 17/62 sets forth the principles and the criteria that the Commission must follow in determining the amount. Section 4 expressly excludes the criminal nature of the fines.

becoming an increasingly crucial element of the Department of Justice's strategy.³⁵ Yet, it should be noted that the Commission can fine European firms doing business with non-EC firms that do not have assets within the Community.

In case at the end of the proceeding the Commission finds that one or more undertakings have in fact violated Competition Law and issues a decision against them, such decision is subject to proper judicial review like every other act of the Commission. Today such review will typically start with an appeal before the Court of First Instance and may eventually reach the Court of Justice (when the controversy regards the interpretation or the application of the law).³⁶

As for the scope of application of EC Competition Law is concerned, the language of articles 85-86 and of regulation 4064/89 refers to private subjects. "The Treaty uses the term 'undertakings to designate the entities that are subject to EU Competition Law.'³⁷ These are essentially undertakings, that is "any collection of resources to carry out economic activities."³⁸ No mention is made about the nationality or place of incorporation of the undertakings. According to an early definition, "an undertaking is constituted by a single organization of personal, tangible and intangible elements,

³⁵ See Antitrust Enforcement Guidelines for International Operations issued in April 1995 by the Department of Justice. Criminal prosecution will only be sought in actions brought by governmental agencies regarding hard core violation such as naked restraints or bid rigging. The first case that involved criminal sanctions to non-U.S. corporate officials for entirely foreign conduct was *United States v. Nippon Paper Industries Co.* 103 F.3d 1 (1st Cir 1997).

³⁶ James S. Venit *supra* note 24, 87. The procedure is the traditional appeal under article 173, whose procedure now has to keep into account the competence afforded to the Court of First Instance by Council decision 591 of 1988, which introduced the Tribunal. A thorough analysis of the procedural framework of the proceedings from the beginning of the procedure to the decision of the Court of Justice is unnecessary for the purposes of this thesis. The most widely recognized treatise about the procedure of EC Competition Law is Christopher S. Kerse *E.C. Antitrust Procedure* (4th ed. 1998). Since regulation 17/62 is the basic piece of legislation setting forth the powers of the Commission, what matters here is a basic clarification of what kind of attributions the Commission was granted, what kind of approach it will follow in the light of the peculiarity of the EC as opposed to a unitary Country and how it initiates the procedure.

³⁷ Thomas Hefti *supra*, note 7, 620.

³⁸ Valentine Korah *An Introductory Guide to EC Competition Law and Practice*, 42 (6th ed. 1997).

attached to an autonomous legal entity and pursuing a given long term economic aim.”³⁹ As it appears, such definition is liable to be adapted to a number of economic entities⁴⁰ and to all three offenses of EC Competition Law.⁴¹ While the concept of undertaking is seemingly plain, or at least flexible enough to be easily adapted to the circumstances of any given case, determining whether *legally* separate undertakings form a single economic entity may be crucial in determining the field of application of EC Competition Law. The Economic Unit Theory in fact deals with the factual and economic reality of large or composite industrial groups⁴² featuring a number of distinct corporations that are related in terms of ownership and control (as well as productive functions).

³⁹ Klöckner-Werke AG and Hoesch AG v High Authority of the European Coal and Steel Community. 1962 E.C.R. 325, 341.

⁴⁰ See Thomas Hefti *supra*, note 7, 620: “Because the Treaty does not define the term [undertaking], its interpretation was left to the Commission, and eventually to the Court. They did not intend to adopt a narrow meaning; an undertaking may be any natural or legal person, or any sort of entity, that carries out some economic or commercial activity”.

⁴¹ “Undertaking is a broad concept, which seems to have the same meaning in articles 85, 86 and 90.”Valentine Korah, *supra*, note 38, 42.

⁴² One necessary remark: Competition Law is not directed to undertakings alone. Despite the focus of this thesis is (its application to private concerns), it should be clear that all entities (trade associations, States) are subjected to it The issue was specifically addressed in the Wood Pulp case with regard to KEA, the American trade association that participated in the international cartel. See *infra*, chapter II.

CHAPTER II

EXTRATERRITORIALITY, CONFLICTS AND COOPERATION

“Extraterritoriality pertains to the operation of laws upon persons, rights, or jural relations, existing beyond the limits of the enacting state or nation, but still amenable to its laws. The problem of extraterritorial jurisdiction arises when nations advance conflicting claims in an attempt to apply their own policies and laws to regulate extraterritorial conduct in a way which may undermine and conflict with the laws and policies of a foreign Government.”⁴³

The issue in determining the scope of extraterritorial jurisdiction to transnational corporations derives from the simultaneous applicability of the nationality principle - which acknowledges a Country’s power to regulate firms incorporated within its territory - and the territorial principle - which acknowledges a Country’s power to regulate the activity of subjects that are present and, in the specific issue at hand, do business on its territory.

However, because Competition Law deals with the regulation of a given market, its intrinsically territorial nature should be recognized in spite of the attempt of certain authorities to regulate economic behavior abroad. A notorious example in the US is the Webb-Pomerene Act:⁴⁴ Essentially it consists of an exemption from the application of US antitrust legislation to export cartels. In practical terms, those agreements between competitors that would be considered as anticompetitive internally and would fall within the scope of the Sherman Act are permitted upon notification to the competent authorities

⁴³ Allison J. Himelfarb *The International Language of Convergence: Reviving Antitrust Dialogue Between the United States and the European Union with a Uniform Understanding of “Extraterritoriality”* 17 U. Pa. J. Int’l Econ. L. 909, 913.

⁴⁴ 15 U.S.C.A. §§ 61-66.

in the light of the advantages that are expected to derive to US firms doing business abroad (and consequently to US economy generally).

While the act positively encourages anticompetitive activities as long as their negative effects only concern foreign markets, authorities that are responsible to ensure competitive conditions in those markets cannot reasonably be expected to refrain from intervening merely because those anticompetitive acts are permitted or even encouraged under the firms' national law.⁴⁵

Even though the jurisdictional scope of the Treaty of Rome (unlike that of the Sherman Act) is *prima facie* limited in that it only mentions competition and trade within the Community without explicitly mentioning third Countries at all, such scope needs to be redefined when a foreign element (such as the conclusion of an anticompetitive agreement outside the EU by non-EU parties) is added.

Jurisdictional aspects of the Economic Unit Theory

In *Dyestuffs*,⁴⁶ a major case involving EC and non-EC firms, exerting jurisdiction over extracommunitarian firms was a central issue, since before the Court of Justice the British and Swiss defendants argued that they were not subject to EC jurisdiction. Under similar circumstances the proposition of adopting a theory of jurisdiction based on the effects that stemmed from the defendants' conduct (as the Court of Justice had arguably hinted in the language of a previous case) would have played a decisive role in deciding the case.

⁴⁵ Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 4.

⁴⁶ *Imperial Chemical Industries Ltd. v Commission of the European Communities*. [1972] E. C. R. 619.

That was the kind of approach that both the Commission and the Advocate General suggested that the Court openly adopted, as it was indicated that the language of the Treaty “indisputably gives as the *sole* criteria the anticompetitive effects [...] without taking into account either nationality or the locality of the headquarters of the undertakings”.⁴⁷

Whatever the reasons for not accepting the argument without expressly rejecting the underlying doctrine at the same time,⁴⁸ the Court devised a solution that at one time confirmed the assertion of jurisdiction and formally avoided to contravene a generally accepted principle of international public law - territoriality.

First, the Court recognized the need to identify some effects on competition in order for prescriptive jurisdiction to exist, thus satisfying the Treaty’s effect requirement.⁴⁹ Second, it held that “by making use of its power to control its subsidiaries *established in the Community*” it was indeed *the applicant* that “was able to ensure that *its* decision was implemented on that market.”⁵⁰ Third, it established the legal premise that “the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.”⁵¹ In essence, while the recognition of the effects was found to fulfil the requirements set forth in articles 85 and 86, it actually fell short of determining the extracommunitarian defendants’ responsibilities *by itself* (which would be tantamount to apply the effects doctrine).

⁴⁷ James F. Friedberg *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine* 52 U. Pitt. L. Rev. 289, 312 (emphasis added).

⁴⁸ Several scholars suggest that the Court of Justice simply wished to keep both doors open in the light of the effectiveness of the effects doctrine on one hand and the widespread criticism on the other. *Id.*, 312.

⁴⁹ *Dyestuffs*, §§ 126-128.

⁵⁰ *Id.*, § 130.

⁵¹ *Id.*, § 132.

While the Economic Unity Theory favors defendants in that it can exempt from liability in the merits the conduct of two or more undertakings belonging to the same group (see *supra*, chapter I), as proposed by the Court it also proved to be a means to essentially pierce the corporate veil.⁵² In fact because the Court reasoned that “the actions of the subsidiaries may in certain circumstances be attributed to the parent company”,⁵³ it appears that what follows is that the Commission is enabled to fine corporations that otherwise would be out of its reach. The implementation of the doctrine “widens the circle of undertakings subject to jurisdiction of EC Competition Law *by overcoming* [as opposed to resolving] extra-territorial and other jurisdictional problems.”⁵⁴ By finding conduct actually occurred abroad to have legally occurred within the EC (through a subsidiary) the Court felt that it could implement competition policies while avoiding the “knotty question” of extraterritoriality.⁵⁵

Even though the involved Swiss and British corporations were not registered anywhere in the EC in first person, they did have wholly owned subsidiaries within it. By simply combining the legal premise mentioned above with the factual statement that the parent companies, because they “held all or at any rate the majority of the shares”, were “able to exercise decisive influence over the policy of the subsidiaries as regards selling prices”,⁵⁶ the Court opted to ignore further considerations of jurisdiction.

Apart from all possible criticism about the opportunity arising out of the decision of piercing the corporate veil instead of providing a possibly more adequate doctrine for

⁵² [...] In particular where the subsidiary [...] does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.” *Id.*, §§ 132-133.

⁵³ *Id.*, § 135.

⁵⁴ Eran Aharon Lev *European Community Competition Law: Is the Corporate Veil Lifted Too Often?* 2 J. Transnat'l L. & Pol'y 199, 205 (emphasis added).

⁵⁵ Friedberg *supra*, note 49, 309.

⁵⁶ *Dyestuffs*, §§ 136-137.

cases involving extracommunitarian elements, one of the issues that need to be dealt with is the one regarding the definition of control over the subsidiaries. While in *Dyestuffs* and *Continental Can*⁵⁷ the Court applied the Economic Unit Theory in order to impute the conduct of a *wholly-owned* subsidiary to its parent, it did so on a different basis in *Zoja*,⁵⁸ where Commercial Solvents Corporation, the U.S. parent, owned a 51% majority of the shares of the subsidiary Istituto Chemioterapico Italiano.

In the first of these two subsequent cases, *Continental Can*, a New York corporation had allegedly infringed article 86 by causing its Delaware subsidiary Europemballage (which was also registered in Belgium) to buy out its sole competitor in the relevant market. Continental Can's argument ran that generally accepted principles of international law exempted it from EC jurisdiction and that it was Europemballage, a distinct corporation having separate legal personality, that had accomplished the takeover. Reasoning *a contrario* the Court of Justice responded that autonomous legal personality provides shelter from liability for a subsidiary's conduct to the benefit of a parent company *only when the subsidiary determines its market behavior autonomously*, while legal personality alone should be considered as a sham.⁵⁹

Continental Can's contested conduct consisted of "causing" Europemballage to bid for the target company, that is, it operated such an influence on the functioning and decision-making process of Europemballage that the latter could not be considered an autonomous entity. Continental Can's control was also exerted by making the necessary financial means available, which in the Court's holding made the parent "foremost" responsible.⁶⁰

⁵⁷ *Europemballage Corp. v. Commission* [1973] E. C. R. 215

⁵⁸ *Istituto Chemioterapico Italiano S.p.A. v. Commission* [1974] E. C. R. 223.

⁵⁹ *Continental Can*, § 15 (emphasis added).

⁶⁰ *Europemballage*, § 16.

Likewise, because the complaint in *Zoja* concerned conduct that in the merits would amount to a violation article 86 only if carried out by a dominant firm, Commercial Solvents Corporation (the absolute monopolist of the world market of a particular chemical), claimed that it did not form an economic unit with its controlled company in Italy (whose share of the market instead made its conduct negligible in terms of abuse of dominant position). The mentioned twofold importance of the Economic Unit Theory is apparent in that it provided the Commission and the Court with both a means to exert jurisdiction over a firm which was not registered nor did business within the Community and to determine the application of article 86 in the merits.

Before the Court of Justice the Commission maintained that, apart from holding a majority of Istituto's shares, Commercial Solvents had positively issued *directives* to its subsidiary and that it effectively prohibited it to sell the chemical to third parties.⁶¹ This was contrary to Istituto's own interest, but perfectly fitting those of Commercial Solvents. Not only did the Court accept this part of the Commission's reasoning, but it also supported the inference that the *functional* link between parent and subsidiary was decisive in determining the application of the Economic Unit Theory and therefore the *direct* involvement of Commercial Solvents Corp.⁶² It followed that a series of combined business policies and strategies, coupled with Commercial Solvents' control over Istituto Chemioterapico determined that the two were found to be jointly and severally liable.⁶³

Because this entire line of cases is based on the belonging to a given group and on notions of agency law (the subsidiary of course being the agent of the parent), the

⁶¹ *Zoja*, § 37.

⁶² “[T]he coincidence [that] when csc decided to prolong its production to a stage beyond finishing and Istituto, a former distributor of nitropropane aminobutanol, began its activities as a producer of ethambutol is highly significant. It is difficult not to associate the decision by CSC no longer to sell nitropropane and aminobutanol with the fact it made an exception in favour of Istituto, which was supplied with dextroaminobutanol for the purposes of its own production of ethambutol”. *Zoja*, § 39.

⁶³ *Zoja*, § 40.

underlying relation between the two entities is central to the issue. More specifically, this relation is related to the notion of a parent's control over its subsidiary as it is determined by the principles of corporate law. As mentioned, in all cases the parent held more than 50% if not all of the shares of the subsidiary. The major possible downfall presented by the approach based on capital and ownership alone is the possible occurrence of inequities to the detriment of the entities that are subject to proceedings, and the limitation incurred by the Commission. If strictly applied, the approach does not allow the Commission and the Court to hold a firm that exerts a decisive influence without actually possessing a majority of the voting shares accountable.

As it appears, this can well be the case whenever several otherwise unrelated entities or stockholders own the bulk of the shares of a controlled company. Also, should the fining policy continue to be inconsistent (in *Zoja*, but not in *Dyestuffs* both the parent and the subsidiary were fined), minority stockholders would be penalized on account of the violations perpetrated by the controlling stockholders which use the subsidiary in order to procure an advantage to themselves rather than to the subsidiary.

In order to overcome this difficulty, the Court also applied a second test, which aims at providing a basis for liability that is founded on the assessment of the control actually exerted in the matter of the contested practice (or generally on a day-to-day basis). The option of resorting to the test based on the exam of the functioning of the company is apparent in the parts of the language of the discussed judgements that deal with the inferred relations between conduct and the communality of interests between parents and subsidiaries. That was the case in the combined business patterns of Commercial Solvents and Istituto Chemioterapico.

Specifically, the conclusions of the Commission, which the Court agreed on, were based on annual reports showing Istituto Chemioterapico as one of Commercial Solvents' subsidiaries. "It is inferred from the prohibition issued in 1970 by CSC to its distributors on reselling nitropropane and aminobutanol for the manufacture of ethambutol that CSC

was not abstaining from exercising its power of control over Istituto.” This, together with an attempted takeover of its competitor, the complainant Zoja, “in which it is unlikely that CSC played no part” and Istituto’s purchases of raw materials still available on the market in response to Commercial Solvents’ decision to commercialize the finished product was enough to support a finding of functional dependence.⁶⁴ Such reasoning is essentially analogous to that of *Continental Can* and *Dyestuffs*, where the Court had emphasized the role of the parent in the decision-making process in financing the contested practices.⁶⁵

By combining the structural with the functional test the Court of Justice aimed at providing a more reliable and acceptable tool for similar cases. However, it has been pointed out that while the coexistence of the two tests is beneficial to a principled application of the Economic Unit Theory, the fact that after *Zoja* the Court had applied it routinely, without explicitly addressing the requisites and the modalities of application raises more than a doubt about the minimum stock ownership requirements. In particular, what is unclear is whether the importance of the second prong, based on the determination of the actual control, will be extended to the point of invalidating the ownership of the majority of the stock as an unavoidable requirement.⁶⁶ If not, it would follow that the Commission can reach a parent company anywhere in the World provided that it can bear the burden of proving actual control in spite of its position of a minority shareholder.

Obviously, extending the role of the functional test would emphasize the role of the determination of actual control as it is practically exerted in the day-to-day

⁶⁴ *Zoja*, §§ 37-41.

⁶⁵ See James F. Friedberg, *supra* note 49, 314. The author underscores the importance of *Zoja* because the Court of Justice disregarded the fact that Istituto Chemioterapico and Commercial Solvents acted independently in most matters but the relationship with Zoja, “and could therefore be considered an economic unit for purposes of this litigation.”

⁶⁶ Eran Aharon Lev, *supra* note 56, 210-211 and 229-230.

functioning of a given business. Theoretically, control could be simply *presumed* whenever the parent owns a majority or the totality of the stock. As a consequence, the majority stockholder should prove that it cannot control the subsidiary in spite of its position, which clearly appears to be a heavy burden. Essentially, because of the difficulty of rebutting such a presumption, the emphasis would shift back on the structure of the ownership (and all the related problems discussed above).

Alternatively, control could be the object of a specific test. In itself this solution appears more acceptable than a quasi irrebuttable assumption. However, because in the examined cases the Court has showed that it will accept *circumstantial* evidence in a case-by-case assessment of the necessary degree of control, the question remains of *how* circumstantial, *how* indirect such evidence can be for the Communitarian institutions to be able to attribute a subsidiary's conduct to its parents.

Even though subsequent cases seem to indicate a more cautious approach it is here suggested that the Commission will not hesitate to use circumstantial evidence whenever necessary. The Commission has shown to the present day that in pursuit of competition policy objectives it will not adopt a "self-refrain approach" in the name of formally irreprehensible legal standards. This consideration could also be coupled with the inclination that the Communitarian authorities have shown to considering world-wide economic groups or world-wide industry in a given sector with a "global" approach.

When faced with transnational companies whose conduct within the Union is somehow influenced by the connection with their activities elsewhere in the world, the Commission has not declined to weigh their functional or structural links in order to reach its conclusions. In this, it has often been supported by the Court of Justice.

Extraterritoriality, effects and implementation

a) The Effects Doctrine

Because the theory discussed above was specifically designed to avoid the recourse to the principle of extraterritorial jurisdiction, it presents a built-in limitation that cannot always be avoided. Stretching the essence of the doctrine to the point of accepting very weak evidence of actual control over the subsidiary cannot be a viable remedy under all possible circumstances. One obvious limitation is represented by an infringement of Competition Law by a firm which is not present at all as such in the territory of any Member State.⁶⁷ For instance, were an European firm to collude with a non-European one which lacks any direct contact within any Member State, should only the first be held accountable?

Likewise, what would the solution be if none of the colluding firms were European? What if the structural or functional links examined above indicated independent action on the part of their European establishments (generically intended as their business partners or counterparts and not as subsidiaries)? A case decided shortly before *Dyestuffs* had suggested that the Court of Justice *might* have indirectly endorsed a different approach.

Since, as noted, neither article 85 nor 86 expressly refers to jurisdictional limits, it could be argued that such lack of definition - coupled with the language referring to practices having as object or result the distortion of competition - indicates an approach that is merely based on anticompetitive *effects* on markets and trade. This represents the basic tenet of the so called effects doctrine, set forth by Judge Learned Hand in the

⁶⁷ This line of criticism is the most frequently expressed by most commentators, who seem to believe that *Dyestuffs* represented a lost occasion for resolving the issue. See Roger P. Alford *The Extraterritorial Application of Antitrust Laws: The United States and The European Community Approach* 33 Va. J. Int'l L. 1, 31.

landmark case *Alcoa*.⁶⁸ Even though the decision is too notorious, lengthy and complex to be discussed here, few points should be highlighted. In fact, while the Court of Justice never nominally endorsed the doctrine, the effects doctrine and the *Alcoa* case were discussed several times before the Court.

First, *Alcoa* came to reverse the traditional approach based on the principles of nationality and territoriality on account of the internationalization of world trade, which was then taking place on a larger scale than never before.⁶⁹ Since part of the decision focused on the transnational nature of some transactions and business practices, Judge Hand's decision somehow anticipated the reasoning that would be frequently found in the decisions of US and European Courts in the years to come.

In Judge Hand's opinion the passage from local to international trade clearly showed how inadequate the traditional approach was - at least as it was expressed in cases such as *American Banana*. Therefore, there was a compelling need of a solution that could properly weigh agreements *intended* to affect international trade (namely the imports to the US) whose implementation was shown to have had actual *effects* upon it.

In such cases, it would make no difference whether the agreement had been partially performed within the US, since a corporation's agents are its "animate means".⁷⁰ The essence of the doctrine is that circumstances such as the place where an agreement was put into being or the nationality of the parties -formerly crucial in international cases - became merely formal, almost irrelevant details if that agreement was later found to produce negative effects on the competitive conditions of US markets. Under *Alcoa*, an agreement that would be unlawful were it reached within the US would be *equally*

⁶⁸ United States v. Aluminum Co. of America, 148 F.2d 416, 442 (2nd Cir. 1945).

⁶⁹ Prior to *Alcoa*, the statement of the law was represented by decisions such as *American Banana*, where the Supreme Court found it "surprising to hear it argued that [actions by the plaintiff resulting in a conspiracy and done outside the jurisdiction of the United States] were governed by the act of Congress". *American Banana v. United Fruit Co.*, 213 U.S. 347, 355 (1909).

⁷⁰ *Id.*, at 444.

unlawful if intended to affect imports to it, regardless of the legality and validity of the agreement under the law of the Country that had territorial jurisdiction over the agreement.

In order to fully realize the scope of the change that *Alcoa* ended with bringing about, one must combine the theoretical foundations of the doctrine with its actual implementation. Hypothetically, in fact, the *Alcoa* court and all the others thereafter could have required that the effects necessary to essentially substitute the jurisdiction of the US to that of the Country that would be competent under the traditional principles were of a particular magnitude or blatantly exploitative of the lack of sovereignty of the US. In that case, the new doctrine would have been essentially a means to do away with the privileges and subterfuges that derived from a rigid application of the principles of international law.⁷¹

Focusing on the determination of the kinds of effects, their magnitude, the types of conduct and the link between the conduct and the effects, Judge Hand's opinion was quite strict in that it looked beyond 'numerical' effects. In spite of the overall *increase* in the imports to the US, he held that "there is reason to suppose that [the defendants] expected that [the depressant they had applied to the market] would have some effect, which it could have *only by lessening what would have otherwise been imported.*"⁷² Leaving the merits of the decision aside, it remains that from the beginning the effects doctrine has been regarded as a *powerful* - if not intrusive, at times - means to prevent certain international law mechanisms from providing legal shelter to subjects that negatively affected competition within the US.

⁷¹ William S. Dodge *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism* 39 Harv. Int'l L.J. 101.

⁷² Those levels are really unknowable (see Korah, *supra*, note 38, 51). The fact that Judge Hand relied on hypothetical figures (as the Court of Justice did in some cases) is underlined because it is revealing.

In essence, *Alcoa* mandates the application of antitrust laws to conduct abroad and to foreign defendants as long as the conduct *was meant to* and *in fact produced* a negative effect on competitive conditions in the US. The core of this doctrine has never been seriously disputed in spite of the various defenses that may find application on account of the nationality of the defendant, the place where the conduct takes place, the degree of involvement of foreign sovereigns or consideration of political soundness and opportunity.⁷³

The Court of Justice has always been unwilling to adopt the same rule. In part, this can probably be explained in the light of the criticism that has been repeatedly raised (especially - but not only - outside of the US) in connection with the assertion of jurisdiction by US courts in application of the effects doctrine. It “has been heavily criticized because apparently it did not require [in itself] that the predicate effect be of any particular magnitude or character in order to support jurisdiction. Unmoderated, *Alcoa* provided no logical limit to American court jurisdiction.”⁷⁴

Indeed, the difficulty with finding a logical or intrinsic limit to the potentially unlimited scope of a doctrine merely based on the occurrence of some effect is reflected in the numerous endeavors to reformulate and redefine *Alcoa*'s language. Of course, such redefinition has always consisted of specifying and circumscribing the required intended effect and providing both quantitative and qualitative evaluation criteria.⁷⁵

⁷³ See *Defenses and Exemptions to Application of Antitrust Laws in Foreign Commerce* ABA-ALD Ch. XII.H

⁷⁴ Dieter G.F. Lange and John Byron Sandage *The Wood Pulp Decision and Its Implications for the Scope of EC Competition Law* [1990] C.M.L.R. 136, 141.

⁷⁵ The number of cases in which such redefinition has been attempted is huge and it is not relevant to properly examine the implications of all the most important decisions at this time. By way of example, courts have referred to “direct and material effect”, “substantial impact”, “any effect that is not both insubstantial and indirect”, “actions gravely impairing significant American interests”. See Russell J. Davis *Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce* 40 A. L. R. Fed. 343, 2a

Understandably, broad or possibly exorbitant jurisdiction criteria are likely to be welcomed by enforcement agencies. In fact, within the EC the Commission proposed the adoption of the effects doctrine in order to deal with cases concerning non-European defendants or conduct occurring outside the Community as early as 1964. However, it must be noted that even though the Commission openly approved the doctrine, it never exactly paralleled the approach of US authorities. In particular, no attempts of reaching conduct that affected European interests anywhere in the World have been made, while it has always been maintained that anticompetitive effects should occur within the boundaries of the Community.⁷⁶

Yet, the Court of Justice never seemed to share the Commission's views. On one hand in *Beguëlin* it stated that "the fact that one of the undertakings which are parties to the agreement is situated in a third Country does not prevent application of that provision since the agreement is operative on the territory of the Common Market".⁷⁷ On the other hand, in spite of such seemingly plain adoption of the doctrine, "[a]rgument quickly broke out about *how* obiter the dictum was and whether or not this constituted an endorsement of the (or indeed an) effects doctrine."⁷⁸ As a matter of fact, extraterritorial jurisdiction was not really an issue in *Beguëlin*, a case where the involved non-European firm was not a party to the proceedings at all, let alone the target of any direct sanctions.⁷⁹ Also, it remains that *Dyestuffs*, decided after *Beguëlin*, was resolved by resorting to the Economic Unit Theory instead of the rejected effects doctrine, which confirms the disagreement between the Court and the Commission.

⁷⁶ Roger P. Alford *supra* note 69, 28-30.

⁷⁷ *Béguëlin Import Co. v. GL Import-Export S.A.* 1971 E.C.R. 949, 959 (§ 11)

⁷⁸ Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 6.

⁷⁹ See James F. Friedberg *supra*, note 49, 309.

b) Wood Pulp and the Implementation Approach

Because of the inherent limitation of the Economic Unit Theory it remained the need to provide a solution that was more comprehensive and effective on one side and more respectful of the legal autonomy of a subsidiary on the other. At the same time, the solution had to be somehow different from the effective but criticized *Alcoa* doctrine (or the Court would prove inconsistent with its own opinions). In response to this, the Court of Justice came to the formulation of the so-called implementation approach in the notorious *Wood Pulp* case.⁸⁰

From a factual standpoint, what needs to be preliminarily highlighted is the identity of the participants in the international cartel. Because the production of wood pulp in the Member States is negligible and EC-based firms can only concentrate in the manufacturing of the finished product after importing the raw material, anticompetitive agreements among firms based in the producing Countries took place. A number of Scandinavian and North American firms were involved, both individually and in the person of export associations, in the definition of restrictive agreements that heavily impaired imports of wood pulp to the EC.

As anticipated (*supra*, chapter I), nothing prevents the Commission from proceeding against entities other than undertakings in spite of the purposes for which they have been established (including whether or not they are non-profit entities). All the American participants to the cartel belonged to Kraft Export Association (KEA), an association availing itself of the exemption from US antitrust provided by the Webb-Pomerene Act. A number of the participant firms and the trade association itself did not have an establishment within the EC, which meant that - before it could issue any fine - the Commission had to exert jurisdiction without relying on the Economic Unit Theory.

⁸⁰ Åhlström Osakeyhtiö and Others v. Commission [1988] E. C. R. 5193.

The Commission started by stating that the Treaty applies to practices that may affect trade between Member States “even if the undertakings and associations [...] are established or have their headquarters outside the Community, and even if the restrictive practices in question also affect markets outside the EEC.”⁸¹ Without more, this statement would be so broad as to equal the strictest form of the effect doctrine, as it would be liable to embrace any effects regardless of whether the contested activity was intended to affect the EC markets at all. The Commission then added a limitation in that it specified that it had jurisdiction over the defendants because “the effect of the agreements and practices on prices [...] within the EEC was not only substantial *but intended*, and was the *primary* and *direct* result of the agreements and practices.”⁸²

While such language certainly aims at making the assertion of jurisdiction less exorbitant in that it seeks to establish a direct link (and could therefore be paralleled to the various attempts of US courts to redefine the scope of the *Alcoa* doctrine mentioned above), it remains that the Commission unmistakably chose to re-propose the effects doctrine.⁸³ Under the circumstances of the case, where the concerted practices regarded some two thirds of the exports to the Community and almost the same amount of the overall consumption, the effects could reasonably seem substantial enough for the Commission to establish its jurisdiction even though the defendants’ intention seemed to be more inferred than positively demonstrated. In fact, it should not be neglected that - if accepted - the Commission’s theory would have remained and could have been employed under less clear circumstances.

⁸¹ 1985 O.J. (L 85) 1, § 79.

⁸² *Id.* (emphasis added).

⁸³ Scholars generally have no doubt that the Commission deliberately adopted the effects doctrine. See for instance Steven T. Gubner *Wood Pulp - The European Economic Community and Effects Doctrine Jurisdiction: The Community’s New Weapon* 3 *Transnat’l Law*. 759, 765.

Before the Court of Justice however the Commission had to present its argument in the light of the defendants' predictable contention that in the absence of such a link to the EC as a registered subsidiary, international law prohibits such an expansive reading of article 85. The disputed agreements had been reached outside the EC and the members of the trade associations (particularly KEA) argued that since they were permitted to do so under their national law, international comity prevented the Commission from issuing fines that would frustrate the policy underlying the Webb-Pomerene Act.

In the Commission's view the defendants' arguments were meaningless, since it maintained that its formulation differed from the exorbitant bases of the original effects doctrine in that there was an "important third requirement [...]: the concerted doctrine must not only have a direct and substantial effect, but it must also be 'implemented' within the EC in order to create jurisdiction. From this [...] the Commission attempted to fashion a slender but sufficient *territorial* nexus"⁸⁴ Clearly, managing to qualify the application of article 85 as territorial would entail the rejection of the objections founded on extraterritoriality.

In the intentions of the Commission this approach was meant to make the one based on the presence of subsidiaries unnecessary, or the case could have been resolved through the *Dyestuffs* doctrine. By stating that all the defendants were "exporting *directly* to or doing business *within* the Community", without distinguishing between those that had "branches, subsidiaries, agencies or other establishments", and those that did not, the Commission meant to emphasize the consequence that the "the concertation on prices [...] concerned shipments made *directly* to buyers in the EEC or sales made in the EEC to buyers there."⁸⁵ In other words, it seems that the Commission tried to bypass the structural and functional features that had been very much relevant the Economic Unit

⁸⁴ Lange & Sandage *supra*, note 76, 149 (emphasis added).

⁸⁵ 1985 O.J. (L 85) 1, § 79 (emphasis added).

Theory in order to focus on the repercussions that the European buyers had to bear. It reasoned that if the emphasis shifted on the buyers, EC institutions would have been unquestionably competent.

Essentially, the whole idea of the Commission's approach consisted of giving relevance to the fact that if the concertation negatively conditioned the prices that *European* buyers were to pay for wood pulp, then a *territorial* link was present. "Jurisdiction arises not from the concerted conduct of the defendants *per se*, but from the tangible effect [...] on the EC customer in the form of higher prices."⁸⁶ Likewise, KEA, which was not engaged in any business itself, was to be reached by the Commission because it acted as a *trait d'union* among the US participants. In spite of the lack of direct sales, the agreements reached at its meetings were implemented while trading with European firms. Regardless of the legality of the agreements under US national law, it was in the trade with European buyers that they produced their effects.

Inevitably, the emphasis on the implementation of the concerted practices in terms of higher prices for European customers did not make the Commission's theory radically differ from the consideration of the effects on trade operated by US courts (whether the strict *Alcoa* doctrine or the more flexible conflict of laws approach of *Timberlane*⁸⁷ are considered).⁸⁸ Before the Court of Justice therefore the question was whether it would agree with such a change in the jurisprudence of EC law.

Following a line of reasoning that is frequent in its decisions, the Court of Justice started from the premise that the case at hand regarded world-wide commerce. Such consideration is particularly important in the light of the fact that the Court did not

⁸⁶ Lange and Sandage *supra*, note 76, 150.

⁸⁷ *Timberlane Lumber Co. v. Bank Of America*, 549 F.2d 597 (9th Cir. 1976).

⁸⁸ See Leon Brittan *Competition Policy and the Merger Control in the Single European Market* (1991), 10 (supporting the conclusion that in the Wood Pulp case the Commission plainly intended to apply the effects doctrine by also citing the yearly report on competition issued by the Commission itself).

exactly follow the Commission in its (possibly more straightforward) attempt to use the effects doctrine but brought the Commission's conclusions into the broader framework of international law.

The Court found the Commission's determination of the scope of EC law to be "not incorrect".⁸⁹ However, it was also confronted with the contention that the assessment of jurisdiction was contrary to international law in that the Commission's theory was merely based on the effects that the defendants' conduct outside the EC had produced within it. What the Court did was to focus on the conduct *as disassembled* into two elements.

Firstly, it considered the decision-making process, which consisted of conduct that had been accomplished completely outside the EC. Therefore, with respect to it, the EC could not seek to establish jurisdiction unless it adopted the effects doctrine. Secondly, it considered the implementation of the agreement, in the form of the sales performed within the Common Market. The Court found that the parties to the cartel could not escape the prohibition of article 85 simply by forming their agreements outside the EC and later "exporting" them to the EC along with the exportation of wood pulp. Finally, focusing on the place of implementation, the Court felt it could disregard the presence of establishments within the EC: because of that territorial link the application of article 85 would remain territorial.⁹⁰ Of course, to achieve this, the Court had to consider the primary and the secondary element of the conduct as equally relevant.⁹¹

⁸⁹ *Wood Pulp*, § 14

⁹⁰ *Wood Pulp*, §§ 17-18. "The producers implemented their pricing agreement within the Common Market. It is immaterial whether or not they had recourse to [establishments] within the Community in order to make their contracts [...]. Accordingly, the Community's jurisdiction [...] is covered by the territoriality principle as universally recognized in public international law".

⁹¹ Gubner, *supra*, note 85, 787.

c) Effects doctrine versus implementation approach

Some commentators maintain that there is indeed no difference at all between the effects doctrine and the implementation approach. It is argued that if the place of implementation is the decisive factor, “undertakings implementing anticompetitive conduct within the Community will now be subject to ‘effects’ jurisdiction regardless of whether they have agents or maintain subsidiaries.”⁹²

Yet, at least conceptually, a difference between the effects doctrine and the Court of Justice’s implementation approach should remain. “Selling directly into the Community at prices agreed outside was implementation in the Community of an agreement formed elsewhere. There was therefore conduct within the Community”.⁹³ The distinction between the implementation of an agreement within the EC and the agreement itself aims at emphasizing the complementary nature of the two aspects in order to support the conclusion that jurisdiction over non-European subjects remains strictly territorial. Therefore, it is considered as subject to principles that are “universally recognized in public international law.”⁹⁴ Apart from the lack of general consensus about this statement, there remains the fact that - whatever the reason - unlike US authorities, the Court of Justice seemed to feel compelled to comply with recognized principles of international law.

Undeniably, the question remains of whether any practical consequences stem from the Court’s orientation and such conceptual distinction. If not, the EC approach would ultimately consist of a formal device.⁹⁵ As noted, the effects doctrine, if unlimited,

⁹² Gubner, *supra*, note 85, 788.

⁹³ Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 12

⁹⁴ *Wood Pulp*, § 18.

⁹⁵ That the implementation approach is but a seemingly less exorbitant assertion of jurisdiction has been denied by Brittan (Competition Policy and the Merger Control in the Single European Market, 13). He argued that the circumstance that after doing so in *Dyestuffs* the Court refused again in *Wood Pulp* to nominally endorse the effects doctrine cannot be underestimated and is the expression of choice of policy.

is liable to reach virtually any distortion of competition regardless both of the nationality of the defendants and the place where conduct actually occurred. Instead, in the intentions of the Court of Justice the implementation approach should not be interpreted so as to completely disregard the lack of positive conduct within the Union. As noted above, US authorities have used the effects doctrine in order to reach conduct that harmed American interests anywhere in the world.⁹⁶ In those cases, the consideration of “consequences to the American economy and policy” were found to “permit no alternative to firm judicial action enforcing [US] Antitrust laws abroad.”⁹⁷

If the theoretical foundations of a legal doctrine matter at all, a similar result appears to be possible only by adopting the effects doctrine. Therefore, harming European interests from the outside without creating a territorial link (such as the implementation of the violation within the EC) should be considered an excessively weak, generic connection for EC law to apply. As discussed below, cases that in the opinion of critics challenge the validity of this statement - such as *Boeing* - rest on different, specific jurisdictional bases (provided by the EC merger regulation).

Considering the example of violations affecting the imports to the EC, it may be that some conduct of undertakings that are not present within the EC formally meets the requirements of a violation of either article 85 or 86. Also, there could be an affect over the European market in the sense that EC-based firms directly buy from those undertakings, concluding and performing purchase contracts outside of the EC. While such cases are liable to be reached by the effects doctrine,⁹⁸ theoretically it should not be

⁹⁶ Roger P. Alford *supra* note 69, 28-30. US courts have found that they have subject matter jurisdiction on account of the far reaching language of the Sherman Act. In *Mannington Mills Inc. v. Congoleum Corp.* 595 F.2d 1287 (3rd Cir. 1979) the court reasoned that since *Alcoa* neither nationality of the parties to a transaction nor the place where the conduct took place matter in the face of anticompetitive effects over the US.

⁹⁷ *Mannington Mills*, 1296.

⁹⁸ However, the fact that the effects doctrine would afford a means to assert jurisdiction must not be confused with the fact that a violation will be actually sanctioned in the merits. Courts within the US

so under the implementation approach. At least, not if the EC purchasers are passively subject to similar anticompetitive practices (otherwise, the purchasers would be fined for dealing with non-reachable firms pursuant to article 15 of regulation 17/62).

Yet, such conclusion should be read in the light of the of the part of *Wood Pulp* that concerned KEA. Being essentially the legalized forum where US producers could meet and reach their agreements and not a trading entity itself, it was not directly engaged in any business with the European purchasers. However, its role was not ignored in the judgement as one might expect. The Court of Justice found that its role was such that the decision making process that occurred within it could not be distinguished from the conduct of the participants. In fact all the KEA members, even those that had not taken part to the meetings where pricing agreements had been reached, were bound by KEA's by-laws to hold all unanimous decisions regarding prices as binding.⁹⁹

Because of the factual setting of the case and KEA's role and operative methods, the Court announced that it could exert jurisdiction over it on account of the essentially unitary nature of the conduct of KEA and its single members. Unfortunately, the language of the decision does not provide a clear definition of what conduct, what activity is necessary in order for jurisdiction to be asserted in less peculiar circumstances.

Most important, of course, is the fact that in spite of the relevance of its conduct in the decision-making process, eventually KEA was *not* fined. The Court in fact found that KEA, since it was not involved in the manufacturing nor in the direct selling to EC-based purchasers, did not participate to the implementation of the agreement. "The Court's refusal to sustain liability against KEA suggests, perhaps, an important limitation on the

disagree as for the opportunity to match a transnational foreign firm's conduct in its home country with that within the US (see *infra*, the discussion under article 86).

⁹⁹ "The unanimous agreement of the members present is also binding on members who are absent when the decision is adopted." It was then found to be apparent "that KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements." *Wood Pulp*, § 26.

traditional effects test: ‘implementation’ appears to mean engaging in a transaction with an EC customer in furtherance of an illegal agreement.”¹⁰⁰

Ultimately, in order to draw a line between the implementation approach and the effects doctrine, one probably has to rely on the fact that the former is said by its proponents to require a stronger link to the EC than the latter to the US. As Sir Brittan put it, “implementing conduct has to be direct, substantial and foreseeable for jurisdiction to be engaged.”¹⁰¹ At a first glance, Sir Brittan’s definition resembles in its very inspiration the various adjustments that the effects doctrine went through in US courts. From this perspective, even the definition provided by an EC Commissioner would seem to fail to respond to the argument that the implementation approach is but a different name for the same theory.

On the other hand, others underline that, read carefully, *Wood Pulp* proves different from the *Alcoa* approach in that it contains more limitations to the possibility of establishing jurisdiction. In particular, the emphasis on the requirement that the conduct affect *directly* the Common Market could be properly weighed by comparing the Court’s and the Commission’s opinions in *Wood Pulp* with respect to KEA.¹⁰² As noted, the latter plainly proposed the adoption of the effects doctrine and eventually fined KEA, thereby basically unifying its treatment to that of the other defendants. The former started by stressing KEA’s role in the formation of the anticompetitive agreements as undistinguishable from that of its participants (thereby giving the impression that condemnation should follow), but then ended with finding KEA’s conduct not to integrate a violation.

¹⁰⁰ Lange and Sandage *supra*, note 76, 155.

¹⁰¹ Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 13

¹⁰² Lange and Sandage *supra*, note 76, 158.

In the Court's opinion one could see a "causation link" between the lack of direct sales to EC buyers and the lack of direct effects. "By direct, the Court evidently meant that a defendant must in some fashion be *a party* to actual sales to an EC purchaser."¹⁰³

If accepted, this observation provides a working distinction between the two jurisdictional theories. To request that an individual or an entity be positively a *party* to a transaction represents a requirement that could be said to be more detailed and qualified than the generic participation to anticompetitive practices or the causation, in some unspecified fashion, of a negative effect over price, output or other factors affecting the availability of commodities or services in a given Country.¹⁰⁴

Also, it has been suggested that, possibly because of the intention of remaining within the criteria of international law, the Court showed a more lenient approach with respect to non-EC firms in the event that the anticompetitive agreement does not in fact reach the operative stage. In itself, the language of article 85 includes both practices that have the *object or effect* of harming competition. Plainly, an agreement that falls short of producing negative effects would not be considered less illegal than one that was successfully implemented. Yet, in *Wood Pulp* the Court seemed to find that a clear and demonstrated intent must be coupled with some substantial and foreseeable effect. Therefore, anticompetitive "schemes by non-EC undertakings to restrain competition would not violate Article 85 so long as the scheme was never carried forward to the point of sales at fixed prices",¹⁰⁵ which does not hold true in the case of schemes by EC undertakings.

It must be finally noted that not all commentators accept such conclusions, maintaining that the differences between the two theories are more asserted than real.

¹⁰³ *Id.*, 159

¹⁰⁴ *Id.*, 162.

¹⁰⁵ *Id.*, 162.

Some simply believe that no practical difference whatsoever exists between the EC and US approaches and conclude that the “although the EC and US approaches differ, they usually arrive at the same result: the extraterritorial assertion of antitrust laws”.¹⁰⁶ Others note any practical differences, if any, would be limited to a series of rare, marginal situations. For instance, such would be the case of agreements between non-EC buyers not to purchase from EC producers or between non-EC producers not to sell *at all* to EC distributors (as opposed to selling at fixed prices or other violations).¹⁰⁷ Under similar views the implementation approach would be a far cry from proposing a new, autonomous jurisdictional criterion (which in its turn would make it not different from the numerous redefinition attempted by US courts)¹⁰⁸

Should the idea underlying the implementation approach be that, no matter how, “the sale of goods into the Community at prices determined by collusion between producers elsewhere *must* engage [EC] jurisdiction”,¹⁰⁹ any effort to distinguish the two theories would be vain. In the absence of cases that help define more accurately the scope of such distinction it remains that EC institutions, particularly the Commission, should

¹⁰⁶ Laura E. Keegan *The 1991 US/EC Competition Agreement: A Glimpse of the Future through the United States v. Microsoft Corp. Window 2* J. Int'l Legal Stud. 149, 158.

¹⁰⁷ These and other examples, including refusals to deal (consisting of omissions, which some argue should escape the prohibition set forth in the Treaty of Rome) are discussed in Joseph P. Griffin *Extraterritoriality in U.S. and E.U. Antitrust Enforcement* 67 Antitrust L.J. 159, 187.

¹⁰⁸ Undeniably, Sir Brittan's contention that the Court of Justice correctly exerts jurisdiction over non-EC manufacturers that, after reaching pricing agreements, avail themselves of independent distributors to sell their products in the Common Market seems to fuel the argument of those who claim the identical character of the US and EC approach. See Leon Brittan *Competition Policy and the Merger Control in the Single European Market* (1991), 13. Even though the scheme clearly aims at interrupting the nexus between the violation and its implementation within the market (the distributors not being part to the anticompetitive agreement), and is therefore to be considered an expedient, it could well be thought to fall in a “gray area” that the implementation approach - because it seeks to be less exorbitant of the effects doctrine - should not cover.

¹⁰⁹ Joseph P. Griffin *Extraterritoriality in U.S. and E.U. Antitrust Enforcement* 67 Antitrust L.J. 159, 187.

accept to renounce to exert jurisdiction and ultimately exclude certain violations from their purview.¹¹⁰

International conflicts and cooperation

a) Jurisdictional conflicts, the OECD Recommendations and International Comity

If exorbitant jurisdictional criteria are always likely to bring about some controversy around the definition of the competent Country, the same is particularly true in the case of Antitrust. Of course each Nation has a vivid interest in maintaining its national market free from concerted or unilateral practices that negatively affect competitive conditions. Output reductions, lack of innovation and higher consumer prices obviously harm a Country's economy.

At the same time, it could well be that a given Country has a vivid interest in protecting national businesses both from competition from outside (producers of a given commodity exporting to the Country in question, thereby diminishing the business of national manufacturers) and from competition they are bound to meet in the transnational arena. It is all too obvious that closing the borders from imports and encouraging national firms to gain supracompetitive profits in other national markets would help the economy of a Country thrive. It is not surprising that Antitrust has increasingly become the battlefield of vehement battles.¹¹¹ Obviously, the continuous increase in World trade is liable to provide more and more potential controversy, as each Country would rather

¹¹⁰ Roger P. Alford *supra* note 69, 36. See also Lange and Sandage *supra*, note 75, 164-165.

¹¹¹ The World Trade Organization has been indicated several times as the most appropriate forum to deal with Nations' unilateral steps. At the time of the *Boeing* case Americans warned that they would bring the issue there, as they did for the Kodak - Fujiifilm case. See William H. Barringer *Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the US-Japan Film Dispute* 6 Geo. Mason L. Rev. 459 and Eleanor M. Fox *Toward World Antitrust and Market Access* 91 Am. J. Int'l L. 1, 9-13.

regulate international trade to its best interest and make the most out of World competition.

Similar plain considerations are at the very foundations of the character of international antitrust, which, not surprisingly, until very recently was essentially non-existent. Indeed, one could speak of international antitrust law when referring to a case where national authorities of a Country investigate, prosecute or fine a firm that is based in another Country. In this sense, the main peculiarity concerning the EU is the fact that the Union is a supranational entity itself and therefore a creature of international law. “Other than among the member states of the European Communities (EC) there is no international law of antitrust. No internationally agreed-upon rules of subject matter jurisdiction have emerged in antitrust cases.”¹¹²

Yet, as discussed in this chapter, the way EC institutions asserted jurisdiction in the cases analyzed so far is very much the same of that of any national institution. This is absolutely clear when rethinking of KEA, the Webb-Pomerene Act and the principle underlying the act as contrasted with the interest of the EC.

From the standpoint of the history of international relations, the 1980s were the time when some EC Member States, such as Great Britain and France, enacted legislation specifically designed to limit, oppose and possibly frustrate the enforcement of the Sherman Act with regard to their national firms.¹¹³ Mechanisms (claw-back laws) were designed to help national firms recover before their national Courts part of the losses they had suffered in the form of treble damages awarded by US courts or to prevent the gathering of evidence.¹¹⁴

¹¹² Joseph P. Griffin *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business* 24 *Law & Pol'y Int'l Bus.* 1051, 1051

¹¹³ Joseph P. Griffin *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction* 6 *Geo. Mason L. Rev.* 505

¹¹⁴ Joseph P. Griffin *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business* 24 *Law & Pol'y Int'l Bus.* 1051, 1053.

The basic limitation to the applicability of national antitrust legislation to foreign firms consisted of comity, a notion of international public law. Not belonging specifically to the field of antitrust enforcement, comity can be defined in general terms as a mechanism that keeps one Nation's laws from finding application in the light of the recognition of a specific, conflicting interest of another Nation. "Comity, in the legal sense, is neither a matter of absolute obligation [...] nor of courtesy and good will [...] It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation".¹¹⁵

International comity is also at the foundations of the Recommendations of the Organization for Economic Cooperation and Development (OECD Recommendations),¹¹⁶ in which the EC participates. Even though comity is generally recognized as a viable means to resolve jurisdictional controversies, its traditional limitation rests on the lack of a bright line definition concerning the degree of tolerability of conduct that is illegal under the laws of the concerned Nation and is instead allowed under the national laws of the involved firm.

As Sir Brittan put it, the Commission considers itself "obliged to have regard to comity when exercising its jurisdiction in cases with a foreign element [and] respects scrupulously the relevant OECD recommendations".¹¹⁷ Yet, from the standpoint of their legal nature, the Recommendations are... recommendations. They do not consist of positive, binding obligations for the participating Nations. "Assent to intentionally vague recommendations is not equivalent to a commitment to follow those recommendations in specific circumstances, nor is it equivalent to an agreement that a nation may enforce the

¹¹⁵ *Hilton v. Guyot* 159 U.S. 113.

¹¹⁶ The recommendations have been revised in 1995 for the last time. 35 I.L.M. 1313 (1996).

¹¹⁷ Leon Brittan Competition Policy and the Merger Control in the Single European Market (1991), 16.

recommendations against aliens acting outside its territory.”¹¹⁸ Considering similar premises, it is not surprising that they could not represent a viable forum for the harmonization of the enforcement efforts of each participating Nation.

One year before the publication of the 1986 OECD Recommendations the Commission reasoned that if the application of EC Competition Law does not *require* the involved undertakings to act in a way that is contrary to a domestic rule of law and if it does not “adversely affect *important* interests of a non-Member State”, EC law will apply. Immediately afterwards, the Commission specified that “such an interest would have to be *so important as to prevail over the fundamental interest of the Community* that competition within the common market is not distorted”¹¹⁹

When *Wood Pulp* was before the Court of Justice few years later, the participants in KEA understandably argued that they should be exempted from the application of EC Competition Law because of the exemption of the Webb-Pomerene Act, which made it perfectly legal for them to meet and concert export trade conditions. As discussed above, legislation of that kind cannot reasonably be expected to keep another Nation from enforcing its own antitrust legislation. The Court’s response was clear:

“There is no need to inquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct *required* by the United States and that *required* by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws *but does not require such cartels to be concluded.*”¹²⁰

¹¹⁸ Joseph P. Griffin *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business* 24 Law & Pol’y Int’l Bus. 1051, 1055.

¹¹⁹ Aluminum Imports from Eastern Europe 1985 O.J. L(42) § 14.7 (emphasis added).

¹²⁰ *Wood Pulp*, § 20 (emphasis added).

Very clearly, at least in the field of Competition Law, the position of the Communitarian institutions is that international comity only matters in the event an objective conflict between two Nations' legislation exists. The main, if not only, criterion rests on the circumstance whether one or more firms *must* abide by two conflicting bodies of rules. To the extent that they are required by law to behave in a certain way which integrates a violation of EC Competition Law, the following violations will be excused.

Because of the very nature of international comity, that is of mutual recognition, the Community's approach should be coupled with that of the other Nations, whose legislation conflicts with EC law. With specific regard to the US, which participates in the OECD as well, in recent years its extraterritorial antitrust enforcement appears to have been boosted in consequence of a decision of the Supreme Court, *Hartford Fire*,¹²¹ and the publication of the 1995 Guidelines for International Operations of the Department of Justice.

Hartford Fire concerned a violation of § 1 of the Sherman Act by a group of insurers and reinsurers, some of which were based in London and had no significant connection to the US other than the involvement in the case. As expected, the London reinsurers claimed that their conduct was absolutely legal under the laws of the United Kingdom. The Supreme Court responded that "The Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and [...] concerns of comity come to play, *if at all, only after* a court has determined that the acts complained of are subject to Sherman Act jurisdiction."¹²²

The Supreme Court found that unless the defendants could not objectively comply with both American and their national legislation, no appreciable conflict would come into being. Also, unlike the mentioned Commission' decision in *Aluminum Imports*, the

¹²¹ *Hartford Fire Ins. Co. v. California* 509 U.S. 764 (1993)

¹²² *Id.*, 798.

language of the court did not seem to admit that compliance with a *strong* national policy (yet falling short of legislative prescription) would excuse defendants for not abiding by US legal requirements.¹²³ In essence, first jurisdiction is exerted in any event; secondly, legal compulsion will be considered a viable defense.¹²⁴

Without purporting to fully analyze the decision, it is worth noticing that the dissent argued that the case at hand was peculiar in that the nationality of the defendants, their place of business and the place where conduct had occurred all indicated in an unusually clear fashion that the US should abstain from judging the British defendants. In essence, to require absolute coercion by the national law of the defendants even in the light of the facts at issue would be tantamount to deny the practical applicability of comity at all.¹²⁵

Yet, *Hartford Fire* was assumed as a model in the 1995 Guidelines for International Operations published by the Antitrust Division of the Department of Justice. The 1995 guidelines purport to completely extend the application of US antitrust laws to foreign entities on account of their conduct abroad, which will include *criminal* prosecution by the Department of Justice in case of hard-core violation of the Sherman Act such as horizontal agreements to fix prices or restrict output.

As a matter of fact, a 1997 Circuit Court decision, *Nippon Paper*,¹²⁶ testifies the enactment of such policy: there, the First Circuit relied heavily on *Hartford Fire* to extend the applicability of the criminal sanctions of the Sherman Act to foreign

¹²³ *Id.*, 799

¹²⁴ Compare with *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (2nd Cir. 1979).

¹²⁵ See William S. Dodge *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism* 39 Harv. Int'l L.J. 101 and Robert C. Reuland *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws* 29 Tex. Int'l L.J. 159.

¹²⁶ *United States v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997).

defendants on account of conduct occurred abroad.¹²⁷ The 1995 Guidelines, coupled with the Supreme Court's holding in *Hartford Fire* apparently suggest that neither nationality nor consistency with another Country's strong policies will determine a more flexible approach in analyzing their conduct or its effect on the US.¹²⁸

b) The EC/US agreement. Positive Comity.

In the light of the considerations above it is not surprising that many commentators advocated a *political* solution to the controversy relentlessly arising on the two sides of the Atlantic. Unilateralism is bound to bring about an endless series of retaliatory measures that are capable of blocking the implementation of antitrust law at any stage, from discovery to the enforcement of a decision. If, historically, the fact that the US courts were the first to systematically claim their jurisdiction with respect to international cases, the discussed developments of EC law understandably are liable to bring about - as in fact they have - more controversy.

The enactment of an EC regulation concerning mergers, because of the likelihood that it would apply to transnational structural operations, caused then Competition Commissioner Brittan to urge the conclusion of an international treaty or other informal agreement between the EC and the US to deal with bilateral antitrust relations. Eventually, because unilateral exemptions or assertions of jurisdiction (whatever the

¹²⁷ Id., at 9-10. "We need not go further. *Hartford Fire* definitively establishes that Section One of the Sherman Act applies to wholly foreign conduct which has intended and substantial effect in the United States. [...] Under settled principles of statutory regulation we also are bound to apply it by interpreting Section One the same way in criminal cases." The concurring opinion mentioned the 1995 guidelines and underlined the opportunity of resorting to usual interpretive principles.

¹²⁸ If anything, in *Hartford Fire* the foreign defendants incurred in a stricter application of US antitrust. The Supreme Court, reversing the holding of the Court of Appeals, found that while the domestic defendants' conduct was covered by a specific antitrust exemption (provided by the McCarran - Ferguson Act), that was not the case for the foreign reinsurers that had participated in the same scheme. At the same time, the domestic insurers were not found to have forfeited their immunity by conspiring with foreign reinsurers. [W]e think it was error for the Court of Appeals to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for sake of argument, were not regulated by state law." *Hartford Fire*, 506 U.S. at 784.

jurisdictional doctrine) had failed to provide a solution that be acceptable for both the enforcing agencies and the businesses an agreement was reached in 1991.¹²⁹

“[R]ather than seeking primarily to protect the sovereign interests of one jurisdiction against encroachments by the antitrust authorities of the other, the agreement between the United States and the European Commission is more clearly designed to facilitate cooperative, and in some cases coordinated, enforcement by antitrust authorities”¹³⁰ The importance of the agreement firstly rests on the legal nature of its provisions, which are binding. The US and the EC chose to abide by formal obligations regarding antitrust enforcement which is of course a step forward from the discretionary nature of the OECD Recommendations.

i. notification

Structurally, the first element of the agreement concerns the notification requirement. Each party must notify the other whenever its enforcement activities are likely to affect “important interests” of the other.¹³¹ In the absence of a definition of important interest applicable to an undetermined series of circumstances, article II § 2 establishes that notification is appropriate in a number of specifically listed situations that should trigger the fulfillment of the obligation.¹³²

A diversified exception is provided for the case of mergers, which is the only case where the nationality of the involved entity matters in determining the applicable

¹²⁹ 30 I.L.M. 1491 (1991).

¹³⁰ Spencer Weber Waller *The Internationalization of Antitrust Enforcement* 77 B. U. L. Rev. 343, 368.

¹³¹ 30 I.L.M. 1491 (1991) § II.

¹³² In order for the obligation to exist, the activities: a) of one Party must be relevant to the other’s enforcement activities; b) must involve conduct carried out in significant part in the other’s territory; c) must relate to a merger or acquisition which involves a company that is a national of the other Party; d) must involve conduct “required, encouraged or approved” by the other ; e) must involve remedies that would require or prohibit conduct in the other Party’s territory.

notification obligation. Pursuant to it, the Commission is required to notify the US government: a) when notice of the transaction is published in the Official Journal; b) when EC competition authorities decide to initiate proceedings; and c) before adopting a decision.¹³³ It follows that in any case other than a merger, the Commission is not required to notify the Justice Department of an investigation involving activities substantially taking place in the Community for the only reason that US firms are involved.

ii. exchange of information

Any of the Parties will provide the other with significant information concerning anticompetitive activities taking place in the other's territory and with requested information that is relevant to enforcement activity. However, an exception apply when information exchange is prohibited by confidentiality laws or is incompatible with important interests of the Party that has the information in object.¹³⁴

iii. cooperation and coordination

The agreement requires the Parties to assist each other and to coordinate their enforcement activities. However, coordination is not mandatory, as the Parties "may" agree to coordinate their efforts.¹³⁵ Again, the "important interests" exception applies. However, the Parties are committed to consider their mutual interests in order to coordinate their investigative activities, which is designed to reduce the possibility that activities end with being in fact merely duplicated.

¹³³ 30 I.L.M. 1491 (1991) § II-3-b.

¹³⁴ 30 I.L.M. 1491 (1991) § III.

¹³⁵ 30 I.L.M. 1491 (1991) § IV-2. On the other hand, the Parties are bound to consider certain specifically listed factors in order to decide whether they may agree.

iv. positive comity, adversely affected interests and avoidance of conflicts

The positive comity clause (article V) represents one of the most significant innovations introduced by the agreement and can be better understood if read together with the following two. Positive comity in a sense supersedes ‘traditional’ comity, which by contrast can be defined negative comity in that, as discussed, it merely consists of a self-restraining approach.

Here, it is agreed that when one Party (for instance the Commission) believes that important EC interests are adversely affected by anticompetitive activities that take place within US *and* violate US antitrust laws, the Commission may request that the US initiate enforcement activities. Once it has received the notification containing the necessary information, the requested Party will consider whether to initiate or expand enforcement activities (which remains a discretionary decision).¹³⁶

Moreover, the Parties, pursuant to article VI, “shall” recognize that besides infringing one’s Competition Law, anticompetitive practices could be particularly harmful to the other’s interests.¹³⁷ Such recognition will occur in all stages of the said activities, from the determination concerning whether to initiate enforcement activities, the scope of such activities to the application of remedies or penalties.¹³⁸

Even though the requested Party would not be under any obligation to act and the requesting Party would not be obligated to abstain from undertaking its own activities, the gap between positive and negative comity remains remarkable (as it will be discussed more extensively below in this section).

¹³⁶ 30 I.L.M. 1491 (1991) § V.

¹³⁷ 30 I.L.M. 1491 (1991) § VI.

¹³⁸ 30 I.L.M. 1491 (1991) § VI.

v. consultations and confidentiality

The Parties are committed to expeditious mutual consultation upon either one's request.¹³⁹ While consultation appears to be a natural provision in the context of an agreement aiming at enforcement cooperation, it will be no exception to the limitation of confidentiality.

Confidentiality operates to limit the scope of the agreement within the boundaries of any important interests of either Party not to disclose and within legislative disclosure prohibitions.¹⁴⁰ Also, it should be noted that the Parties agreed to maintain the fruits of their cooperation as exclusive, as they are committed not to disclose to third parties (that is antitrust agencies of Nations that are not a party to the agreement) whatever information they have confidentially exchanged.¹⁴¹

vi. the 1998 renewed agreement on positive comity

In 1998 the US and the EC partially revised the agreement with the purpose of redefining the positive comity clause without altering the agreement as such, which remains fully in force.¹⁴² The revision is also partial in the sense that it does not regard the field of mergers and acquisitions, on account of the differences that exist between EC and US procedure with respect to this area of antitrust.¹⁴³

It is specified that a Party may request the other to initiate enforcement activities and adopt remedies in accordance with the requested Party's antitrust laws regardless of

¹³⁹30 I.L.M. 1491 (1991) § VII.

¹⁴⁰30 I.L.M. 1491 (1991) § VIII-1.

¹⁴¹30 I.L.M. 1491 (1991) § VIII-2.

¹⁴² [1998] O.J. L 173, 26 article VI.

¹⁴³ [1998] O.J. L 173, 26 article II, setting forth among others the definition of Competition Law in the meaning of the agreement, expressly excludes the EC merger regulation.

whether the requesting Party has taken any step concerning the case at issue.¹⁴⁴ The requesting Party may or will (depending on the anticompetitive impact of the practices over it and the effectiveness of the measures adopted by the requested Party) defer or suspend its own activities. The presumption (as specified by the second part of article IV) is that the requested Party will use its best efforts to comply with the request.¹⁴⁵ Even though neither Party is precluded from eventually starting or restarting its own procedures, the requesting Party “shall” inform the requested Party of the reasons for which it chooses not to defer or suspend its activities in case the requested Party has complied with all the formal and substantive requirements set forth for the enforcement activities.¹⁴⁶

The possibility for a Party to request the other to intervene regardless of the commencement (or imminent commencement) of its own activities may be regarded as a step forward with respect to the 1991 agreement. There, a provision conceded that while a Party is to take the other’s important interests into account, in the absence of direct involvement of the latter into a single case, those interests should be reflected in antecedent laws or decisions.¹⁴⁷

vii. conclusions

In sum, the agreement, especially as far as the positive comity clause is concerned, may prove extremely effective. One may not fully agree with the definition of negative comity as a “doctrine of politeness and good manners between nations”.¹⁴⁸ Still,

¹⁴⁴ [1998] O.J. L 173, 26 article III.

¹⁴⁵ See Joseph P. Griffin *Extraterritoriality in U.S. and E.U. Antitrust Enforcement* 67 *Antitrust L.J.* 159, 183.

¹⁴⁶ [1998] O.J. L173, 26 article IV.

¹⁴⁷ 30 *I.L.M.* 1491 (1991) article VI.

¹⁴⁸ Claudio Cocuzza and Massimiliano Montini *International Antitrust Cooperation in a Global Economy* [1998] *E.C.L.R.* 156, 157.

the difference between it and the US/EC agreement is noteworthy. As noted, it contains binding provisions between the Parties. On the other hand, the ‘important interests’ limitation clearly reveals that the results that the Parties will be able to reap from it largely depend on their attitude, as case-by-case relations and negotiations will determine the application of the cooperation clauses or, by contrast, of the important interests exception.¹⁴⁹

The consideration is indeed obvious in the light of the fact that the solution to bilateral controversy is essentially political, even though it found practical application by means of a legal instrument such as an international treaty. Because of its nature, the agreement only applies to bilateral relations between antitrust agencies of the US and EC. Nowhere in the agreements are other subjects (such as economic entities, transnational companies) referred to, which does not come as a surprise in the context of international law, that is a legal system of sovereigns rather than individuals.

“The Agreement is among government agencies, it provides no rights to individuals or enterprises. Thus, for example, unless existing confidentiality laws require notification, companies have no right to know whether information they supplied to one Party has been transferred by that Party to the other Party.”¹⁵⁰ On one hand, as it has been commented, it is possible for a company to make a complaint to one agency and thereby “request [it] to invoke the positive comity provisions of the agreement, intervene (via amicus briefs or otherwise) in pending private litigation, or both”¹⁵¹ On the other hand, similar initiatives could be regarded as falling within the possibility of requesting a

¹⁴⁹ Others suggest that the degree of cooperation also depends upon the degree of recognition and respect that each authority is able to “impose” on the other. In that sense, the criticized treatment of the Boeing/McDonnell-Douglas merger helped make clear how serious the Commission is. See Thomas Lampert *International Cooperation Among Competition Authorities* [1999] E.C.L.R. 214, 218.

¹⁵⁰ Joseph P. Griffin *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business* 24 *Law & Pol’y Int’l Bus.* 1051, 1062.

¹⁵¹ *Id.*

governmental institution to act in a certain way in defense of private interests. While that possibility is generally recognized and has been a viable way of protecting private interests in the international law arena for a long time, governmental authorities maintain their discretion and are not obliged to act in a certain way.

Unquestionably, in the light of the discussed tensions that survive in the field of antitrust enforcement, the possibility of requesting - not yet requiring - the antitrust agency of a foreign Nation to proceed in defense of the requesting Party's interests, is unprecedented. Positive comity differs from negative comity in that it consists of positive acts of cooperation and reciprocal assistance rather than decisions not to act. It is certainly a means of avoiding controversy, but it is also the "cornerstone of broad schemes of cooperation".¹⁵²

Two related advantages immediately follow from the enactment of the agreement: First, a potentially revolutionary solution is provided with respect to the questionable unilateral assertions of jurisdiction that normally occur in the international arena. In a sense, the agreement is in fact liable to by-pass and thereby avoid the question of jurisdiction by simply providing a chance to entrust the national authorities of a Country to conduct the appropriate proceedings. Recalling the comments reported above concerning the attempt to avoid instead of solving extraterritoriality issues probably gives the measure of the potential improvement.

Second, and most important from the standpoint of the execution of investigations and the gathering of the necessary elements, it cannot be omitted that once one agency has requested its homologue to take action, the latter will be in better operative conditions when conducting the necessary proceedings, since as a national governmental authority it will be in the position of directly exercising sovereign powers.

¹⁵² Claudio Cocuzza and Massimiliano Montini *supra*, note 150, 158.

It is in fact obvious that in practical terms the first problems that are bound to be encountered on either side of the Atlantic in a case concerning one or more firms based on the other is the gathering of the necessary information. Even in the absence of legislation specifically enacted in order to prevent a foreign agency from proceeding, in any specific case governmental and judiciary authorities may refuse to collaborate in a more or less explicit way.¹⁵³

In the basic discussion concerning EC antitrust procedure of the first chapter, mention was made of the broad investigating powers of the Commission. Because those powers are obviously limited to the territory of the Member States, it is not surprising that since the enactment of the US/EC agreement each agency has noticed a remarkable increase in the flow of information, from which they benefit in terms of effective enforcement.

Indeed, even though the improvement certainly regards the exchange of information in the first place, is not limited to it. By way of example, it has been commented that the agreement is liable to cover a loophole in the implementation approach in that it could provide the Commission with a solution to deal with a buyers cartel of non-EC purchasers fixing the purchase price of goods manufactured in the EC and subsequently exported abroad.¹⁵⁴

As discussed above, that would be anticompetitive behavior that the implementation approach does not reach if occurring abroad. It follows that, without resorting to exorbitant jurisdiction assertions (bound to cause protectionist reactions on the part of the national authorities of the participants in the cartel), the Commission would be able to prevent such cartel from negatively affecting the Common Market. The

¹⁵³ See on discovery and gathering of information *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.* [1978] A.C. 547 (H.L. 1977). Previously, other frictions had arisen when English courts refused to enforce a US judgement against Imperial Chemical Industry favoring DuPont de Nemours.

¹⁵⁴ Joseph P. Griffin *EC/US Antitrust Cooperation Agreement: Impact on Transnational Business* 24 *Law & Pol'y Int'l Bus.* 1051, 1060.

fact that the EC would be able to prosecute the members of such cartel with exclusive regard to the case that they are based within the US (to the extent that a violation of US antitrust laws exists) and not elsewhere gives the measure of the scope and effectiveness of the agreement.

In sum, even though the agreement cannot by itself overcome all possible conflicting issues in the application of antitrust to transnational companies, it does bring about substantial improvements that could probably be better appreciated by not excessively emphasizing the separation between jurisdictional (or in a broader sense procedural) and substantive aspects of a antitrust cases. The fact that the immediate object of the agreement is the establishment of certain common jurisdictional and procedural concepts should not be considered that procedure is meaningless if not connected to substantive provisions.

Therefore, the requisite of the infringement of antitrust legislation of the Country whose agency is required to act does not seem to an excessively strict limitation if regarded in the light of the circumstance that substantive EC and US provisions are a far cry from being incompatible or helplessly different. Pursuant to the agreement EC and US officials do not merely exchange information in a strict sense, thereby replacing the complex and often ineffective procedure based on letters of rogatory. Cooperation also provides a chance to exchange legal and economic analysis.¹⁵⁵ When the object of the officials' analysis is more immediately related to their local market the beneficial effects of the agreement do not show their highest potential; on the other side, "when a global market is at stake, [and both authorities] conclude that relief is necessary, there is the greatest potential for coordination."¹⁵⁶

¹⁵⁵ Nina L Hachigian *An overview: International Antitrust Enforcement* 12-FALL Antitrust 22, 25.

¹⁵⁶ *Id.*

The most frequently criticized weakness of the agreement is the limitation concerning confidential information as of article VIII of the 1991 agreement, since that information is very often the most sensitive and crucial. The argument runs that the impossibility of exchanging that kind of information substantially cripples the agreement. Therefore, knowledge of crucial facts concerning market definition, market shares and the like can only be exchanged as long as it is based on publicly available data,¹⁵⁷ at least as long as it can be defined as business information (as opposed to agency information).¹⁵⁸ In spite of this, an important exception to the confidentiality limitation applies: Firms that are subject to investigations or proceedings may agree to waive the right to keep the information confidential.

The reason why a firm should forfeit one of its privileges rests essentially on the advantages that may derive from a cooperative attitude. The waiver is likely to cause all proceedings to be speedier, which is of course valuable for a firm that is being subject to investigations. Also, by waiving confidentiality rights, the firm provides enforcement officials with a chance to reach a concerted outcome on both sides of the Atlantic, which of course brings about the benefit of a single (and to some extent negotiated) solution to the relevant antitrust issues.¹⁵⁹

Avoiding repeated or inconsistent requests separately coming from the Commission and US agencies represent a plus that, as of the present day, could be said to outweigh the downfalls of waiving confidentiality (such as leakage or misuse of information).¹⁶⁰ However, it appears that for this 'trilateral concertation' concerning

¹⁵⁷ Thomas Lampert *supra*, note 151, 218.

¹⁵⁸ Under this definition agency information is not public; However, the agencies maintain that they are allowed to share it. See John J. Parisi *Enforcement Cooperation Among Antitrust Authorities* [1999] E.C.L.R. 133, 137.

¹⁵⁹ John J. Parisi *supra*, note 160, 138-139.

¹⁶⁰ *Id.*, 139-140.

confidential information to be fully effective, it takes that the two enforcement authorities agree to some extent on the use that should be done of the information as well as on the conclusions that should be drawn. For instance, such was not the case in the notorious Boeing/McDonnell-Douglas case, where consensus between the Federal Trade Commission and the EC Commission was not reached in the merits of market analysis and anticompetitive effects over it.¹⁶¹

Indeed, the first application of the cooperation agreement - coupled with the waiver of confidentiality rights - was a success to most commentators. The case concerned Microsoft's violation of § 1 and 2 of the Sherman Act and of articles 85 and 86. In that case Microsoft agreed to waive its confidentiality rights (thereby authorizing the Department of Justice to provide the Commission with such information) in exchange of a settlement that kept Microsoft's violations into account with respect both to the US and EC. Microsoft must have concluded that facing two separated proceedings, being potentially exposed to two sets of investigations and finally being subject to distinct outcomes would be too detrimental for its business. "The Microsoft investigation was unique in that Microsoft agreed to an exchange of information, which permitted closer cooperation whereby the two competition authorities jointly negotiated an eventual settlement."¹⁶²

¹⁶¹ Lampert, *supra*, note 151, 218-219.

¹⁶² Laura E. Keegan *supra*, note 109, 174.

CHAPTER III

EC COMPETITION LAW: TRANSNATIONAL ISSUES

The three offenses of EC Competition Law do not represent the immediate object of this thesis, on the assumption that the reader is to some extent familiar with it. Therefore, the object of this chapter is the analysis of only those aspects of articles 85 - 86 and the merger regulation that are perceived as more characteristic.

Article 85 will be discussed having vertical restraints in mind because of certain political orientations that are regarded as less relevant to antitrust within the US but essential within the EC. Article 86 will be considered with respect to the consequences of dominance in terms of special responsibility for large firms. Concerning the merger regulation, the emphasis will be on the *Boeing* case.

Article 85

Article 85 prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices”, which may encompass essentially any kind of collusion between two or more firms. Whenever there is some evidence that undertakings have abandoned the competitiveness that ideally characterizes their interaction, virtually *any* conduct is liable to be regarded as part of anticompetitive concertation. From this perspective to precisely pigeonhole the agreement under any given juridical category - whether contract or others - is not material. In *Fedetab*¹⁶³ a recommendation issued by a non-profit association of undertakings (therefore not an

¹⁶³ Heintz van Landewyck SARL and others v Commission 1980 E.C.R. 3125.

undertaking itself) revealing the members' intention to *compulsorily* abide by its terms was found to integrate an article 85 violation.

The Court of Justice rejected the contention that nothing less than a contract, enforceable under national law, could trigger the application of article 85, and reasoned that accepting the notification and complying with the recommendation fell within the prohibition of article 85 in that it created a sufficient *probability* that the concertation in question *may* have had an influence, direct or indirect, actual or potential, on trade between Member States.¹⁶⁴

As the language of article 85 and *Fedetab* suggest a violation must be founded on the defendants' positive will, which appears to be the only necessary requisite. Instead, the form of the agreement (written or oral) is immaterial if a some anticompetitive impact is ascertained or possible. Focus is therefore on the economic impact of the agreement rather than on its legal nature,¹⁶⁵ although the Commission receives criticism because it is said to neglect economic analysis and favor a legalistic approach.

There appears to be a close relationship between the types of conduct that are forbidden and evidentiary requirements: Because anticompetitive conduct obviously needs proving, prohibiting concertation only makes sense in the presence of some element that helps recognize conduct as willfully concerted. The issue is sometimes a subtle one, since antitrust may theoretically be meant to punish firms simply on account of conduct that *might* be the fruit of concertation but *might* as well be the fruit of objective economic conditions. For instance, oligopolistic markets are a thorn in the side

¹⁶⁴ *Fedetab*, §§ 85-86.

¹⁶⁵ See *Société Technique Minière v. Maschinembau Ulm GmbH* 1966 E.C.R. 235, 248.

“In order to be prohibited [...] an agreement between undertakings must fulfil certain conditions depending less on the legal nature of the agreement than on its effects on ‘trade between Member States’ and its effects on ‘competition’. Thus as article 85(1) is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature.”

of antitrust: the few firms present in the market usually gain supracompetitive profits; a firm's attempt to reduce prices and gain competitive level profits (usually by means of secret discounts) in order to attract its competitors' customers will be almost immediately detected by its competitors, that will react. Non-concerted adaptations usually follow (so called interdependent behavior), which in the end are likely to bring each firm's profit back to more than competitive levels. This puzzles antitrust theory, as while the effects of the adaptations are likely to harm consumers as well as price fixing, competitors may well have acted individually.¹⁶⁶

The question of whether or not to punish such behavior is essentially a matter of policy. In general, one may confidently maintain that more or less all legal systems (certainly the US and EC) require some kind of willful participation. Yet, the issue rests on the degree of willfulness that will trigger enforcement.

Such seemingly obvious thoughts become much more troublesome for the US business that complies with §1 of the Sherman Act and is therefore used to its requirements (as interpreted by the courts). The Sherman Act in fact prohibits explicitly determined types of conduct (contracts, combinations and conspiracies). Broad as the prohibition may be, it seems that article 85, as interpreted by the Court of Justice, is even broader and intendedly undetermined. "Doctrines governing agreement issues in Section 1 cases strongly resemble standards used in conventional criminal conspiracy litigation."¹⁶⁷ Needless to say, criminal standards have to be extremely rigorous and standards have changed a great deal during the century, indeed making it more and more difficult for governmental agencies and private plaintiffs to win their case. Without purporting to discuss the entire history of § 1 standards, it could be mentioned that some fifty years ago awareness of a competitor's conduct and subsequent adaptation (so called

¹⁶⁶ Eleanor M. Fox and Lawrence A. Sullivan Antitrust (1989), 506-511.

¹⁶⁷ Kovacic and Gellhorn, 225.

conscious parallelism) was liable to determine a violation.¹⁶⁸ Today, standards tend to require much more than that.¹⁶⁹

In *Dyestuffs*, three simultaneous (and identical, as for each firm's increase) price increases in five of the then six national markets of chemical colorants occurred. To the Commission, this could have only been explained in the presence of some kind of concert, even if the market in question had been oligopolistic. According to the Commission, the existence or *a fortiori* the positive evidence of an agreement was not a requirement under article 85.¹⁷⁰

The Court of Justice reasoned that “the object is to bring within the prohibition of [article 85] a form of coordination [...] which, *without* having reached the stage where an agreement properly so-called has been concluded, *knowingly* substitutes practical cooperation between them for the risks of competition . *By its very nature, then, a concerted practice does not have all the elements of a contract* but may inter alia arise out of coordination which becomes apparent from the behavior of the participants.”¹⁷¹

The Court conceded that parallel conduct does not necessarily amount to illegal concert, but it implicitly endorsed the economic analysis of the Commission in that it concluded that the defendants had managed to stabilize prices at a level different from

¹⁶⁸ The U.S. Supreme Court at first condemned conscious parallelism in *Interstate Circuit v. United States* 306 U.S. 208 (1939), holding that *knowingly* adhering to an invitation advanced by competitors rendered positive agreement superfluous in order to find a violation of § 1 of the Sherman Act. Later on in *Theater Enterprises Inc. v. Paramount Film Distributing Corp.* 346 U.S. 537 (1954) it denied that parallel pricing *in itself* could conclusively establish such a violation.

¹⁶⁹ See *Monsanto Co. v Spray-Rite Service Corp.* 465 U.S. 752 (1984).

¹⁷⁰ The Commission had previously analyzed the market of dyestuffs in each Member State, finding that the lack of homogeneity should have prevented such a remarkable parallelism in conditions of undistorted competition. *Imperial Chemical Industries Ltd. v Commission of the European Communities.* 1972 E. C. R.619 §§ 52-56.

¹⁷¹ *Id.*, §§ 64-65 (emphasis added).

that to which competition *would have* led, which the Commission was not able to submit in its allegations.¹⁷²

The contested practice consisted of publicly announcing the increase ahead of time, which to the defendants was legitimate as mere conscious parallelism and price leadership. The Court did not object to the principle that in a highly concentrated market transparency may occur. Yet, it concluded that the market was not oligopolistic and that any of the major firms might well have tried to act independently in order to win customers by means of price competition.¹⁷³ It found that by increasing prices after the announces, the defendants “eliminated all uncertainty between them as to their future conduct and [...] the risk usually inherent in any independent change of conduct.[... which] led to the fixing of general and equal increases in prices for the markets in dyestuffs [and] rendered the market transparent ”.¹⁷⁴ Without further evidence, the Court felt free to conclude that the only cause was the common intention of the parties. Indeed, even though the Court in principle did not reject conscious parallelism, its opinion condemned *any* kind of cooperation aiming at determining a “coordinated course of action” and ensuring “its success by prior elimination of all uncertainty as to each other’s conduct”.¹⁷⁵

¹⁷² *Id.*, §§ 66-67. The decision has been criticized because such term of comparison - price in competitive conditions - was relied upon in spite of the fact that it had not been identified. See Valentine Korah *supra* note 38, 51. The level of price to which competition *would have* led “is *unknowable*. In the absence of collusion prices might be at the competitive level, the level that maximises the profits of a monopolist in the short term, or anywhere in between.” (emphasis added).

¹⁷³ “[F]rom the number of producers concerned it is not possible to say that the European market in dyestuffs is, in the strict sense, an oligopoly in which price competition could no longer play a substantial role. These producers are sufficiently powerful and numerous to create a considerable *risk* that in times of rising prices some of them might not follow the general movement but might instead try to increase their share of the market by behaving in an individual way.” *Id.*, §§ 105-106.

¹⁷⁴ *Id.*, §§ 101-102.

¹⁷⁵ *Id.*, § 118.

Under EC Competition Law then detailed agreements between undertakings about the conduct they are to put into being are unnecessary to integrate a violation, as even gentlemen's agreements have been object of condemnation. Also, the Commission and the Court have shown that they will go beyond appearances in considering the actual contribution of both parties, especially when the supposed unilateral conduct would not have been possible without *some* form of acceptance.¹⁷⁶

In its decision regarding the distribution scheme of Sandoz, implemented through its Italian subsidiary, the Commission focused on a standard sale provision printed exclusively on invoices sent to Sandoz' customers in Italy.¹⁷⁷ Such provision aimed at integrating the distribution contract, thereby prohibiting parallel exports from Italy to other Member States.¹⁷⁸ The Commission reasoned that “[a]lthough no written general contract existed between Sandoz PF and its customers”, through its commercial procedures Sandoz had established continuous distribution patterns that were “at least *implicitly*” accepted by its customers. Invoice were *documentary evidence* of the *contractual* ban on exports implemented by means of “a clause forming an *integral* part of the agreement” between Sandoz PF and its customers.¹⁷⁹

Likewise, in *Ford* the Court of Justice rejected the contention that a distribution scheme aiming at disrupting supplies of right-hand drive cars to non-British retailers was implemented by means of Ford's unilateral conduct (namely in the person of U.S.-incorporated Ford Europe and the German subsidiary Ford Werke A.G.). Ford had issued

¹⁷⁶ Thomas Hefti *supra*, note 7, 620-621. See also James S. Venit *supra*, note 24, 82.

¹⁷⁷ Commission Decision of July 13, 1987. 1987 O.J. (L 222) 28.

¹⁷⁸ The Italian pharmaceutical industry is heavily regulated. A special governmental committee determines, *inter alia*, the price of drugs. In particular, since most of the full price of drugs is paid for by the Ministry of Health, consumers only have to pay a fraction of the full price that the manufacturer receives. Apparently, the uniquely low wholesale and retail price represented a strong incentive to parallel trade. In fact, Italian wholesalers and pharmacies alone therefore received invoices which bore the export ban provision.

¹⁷⁹ 1987 O.J. (L 222) 28 §§ 26-27 (emphasis added).

a circular announcing the disruption, which integrated concerted conduct because “admission to the Ford A.G. dealer network *implies acceptance* by the contracting parties of the policy pursued by Ford”.¹⁸⁰

Ford concerned a debated issue such as that of selective distribution, that is a manufacturer’s choice to select its distributors and condition their belonging to the distribution scheme on the fulfillment of certain requirements. Obviously, a manufacturer may be more willing to invest in research or improvements to its products if it can devise a way to gain high return from such expenses. By ensuring that its distributors provide high quality services or help improve the recognition of its products, it has an incentive to keep improving its products, which is of course beneficial for consumers. On the other hand, *free riders* are said to take unjustified advantage from those investments by selling advertised and recognized products without participating in the investments in any way. In the end it is widely maintained that because investments are less profitable if not fully exploitable, competition would suffer from excessively strict standards concerning vertical restraints.

In the US the law of vertical restraints is much more flexible than in the EC. Going back to evidentiary requirements, the U.S. Supreme Court in *Monsanto* required that in order to successfully present its case the plaintiff produce evidence that tends to *exclude the possibility* of independent behavior by the defendants.¹⁸¹ Absent direct evidence, under this standard it would be necessary to adequately support allegations of unity of purpose between the manufacturer and the distributor.¹⁸²

¹⁸⁰ *Ford - Werke AG and Ford of Europe Inc. v Commission of the European Communities*. 1985 E.C.R. 2725 §§ 21-22 (emphasis added). In spite of Ford’s contention that the assumption of the risks of its entrepreneurial activity should entail the freedom to choose the most suitable chain and method of distribution the Court found that the scheme really aimed at ending parallel imports to the United Kingdom, whose car market featured higher prices.

¹⁸¹ *Monsanto Co. v Spray-Rite Service Corp.* 465 U.S. 752 (1984).

¹⁸² See Kovacic and Gellhorn, *supra*, note 169, 231.

On the other hand, if the factual setting of *Ford*, which featured conflicting interests between the manufacturer and its distributors (in that each of them had a direct interest in doing business with British distributors to the exclusion of the other) is considered, such unity of purpose could hardly be inferred.

Even though Supreme Court and the Court of Justice have recognized the legitimacy of foreclosures in the light of the activity of *free-riders*, they seem to have reached quite different conclusions. The Court of Justice has in fact recognized the legitimate interest of a manufacturer in establishing a specialized (or *selective*) distribution network and ensuring its profitability, but it does not show tolerance for those unnecessary restrictions that conflict with one particular, and indeed peculiar, goal of EC Competition Law: market integration (as opposed to market efficiency).¹⁸³

Limitations in *price* competition deriving from the existence of a selective distribution system were said to be legitimate to the extent that they found a justification in the higher expenses related to specially trained personnel or sophisticated equipment. These in fact help provide consumers with qualified and *otherwise unavailable* services and performances. Ensuring *high* profitability to distributors by means of fixing resale prices - *resale price maintenance* - is not considered to be compatible with the goals of Competition Law, especially in view of the alternative available to the manufacturer (namely, non admitting or expelling - according to non arbitrary criteria - those distributors whose economic organization proves inefficient and scarcely profitable).¹⁸⁴

It probably takes to consider the economic reality of distribution, of course directly related to vertical restraints by its very nature, to fully comprehend the Commission and the Court of Justice's attitude towards the phenomenon. In particular, distributors operate over assigned areas that, in the case of international distribution,

¹⁸³ See Valentine Korah, *supra* note 38, 199-202 for a critic analysis of the treatment of selective distribution in the jurisprudence of the Court of Justice.

¹⁸⁴ AEG Telefunken v. Commission 1983 E.C.R. 3151 §§ 41-42

often tend to coincide with national territories. This, coupled with the goals of the EC, may help explain one of the features that contribute the most to differentiate its Competition Law from US Antitrust - that is the failure to weigh differently horizontal and vertical restraints. While in the U.S. the law of vertical restraints can be said to form a set of doctrinal rules that has become clearly separate from that of horizontal restraints and less stringent in terms of legal standards, the same is not true within the EC.¹⁸⁵

A comparison between the Supreme Court's *rationale* in *Sylvania* and that of the Court of Justice in *Grundig* is striking even considering the time elapsed between the two decisions. The first was largely based on the positive consideration of the efficiencies that may derive from certain restraints and on the enhancements to *interbrand* competition (as opposed to *intra-brand*) competition. In particular, it was found that restraints to the latter could be acceptable to the extent that they brought about an improvement of the former (and, eventually, to overall competition). It was then held that a case-by-case approach would be the most appropriate solution for discerning between anticompetitive and procompetitive restraints.

In the distribution contract between Grundig and Consten, the second was appointed exclusive distributor for France in exchange of the covenant not to sell comparable merchandise produced by Grundig's competitors. The Court of Justice rejected the contentions that the vertical nature of the agreement did not constitute the required agreement between undertakings¹⁸⁶ and did not bring about a distortion of competition.¹⁸⁷ The Court repeatedly emphasized the purposes of the Treaty (rather than,

¹⁸⁵ After many years of *per se* prohibition of vertical *non-price* restraints in the US the landmark case *Continental T.V. Inc. v. GTE Sylvania Inc.* 433 U.S. 36 (1977) brought about a major change in that it mandated a rule of reason approach.

¹⁸⁶ The Court rejected the argument that the prohibition in article 85 §1 applies only to horizontal agreements and that "sole distributorship contracts do not constitute 'agreements between undertakings' within the meaning of that provision". *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v. Commission of the European Economic Community.* [1966] E. C. R. 329, 339

¹⁸⁷ "The possible application of article 85 [...] cannot be excluded merely because the grantor and the concessionaire are not competitors *inter se* and not on a footing of equality. Competition may be distorted

for instance, goals such as efficiency, incentives to innovation or price reduction) and the need to avoid the reinstatement of national barriers.

Also, confronted with an *increased* interstate trade of Grundig equipment and the argument that some appreciable influence (directly imputable to the scheme) should be proved, the Court responded that the issue was “whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of the *objectives of a single market*. Thus the fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may ‘affect’ such trade in the abovementioned manner.”¹⁸⁸

After such a statement of policy (indeed very different from the efficiency-oriented *Sylvania*), it is not surprising that, after quickly rejecting the presumption that distribution restrictions are not harmful to overall competition¹⁸⁹ the Court went so far as to rule out the consideration of the redeeming value of vertical restraints in spite of analytical considerations.¹⁹⁰

As mentioned, the exclusion of intrabrand competition has recognizable procompetitive effects: customer services; distributive efficiencies; incentives for

within the meaning of article 85(1) not only by agreements which limit it as between the parties, but also by agreements which prevent or restrict the competition which *might* take place between one of them and *third parties*. [...]. [B]y such an agreement, the parties might seek, by preventing or limiting the competition of third parties, to create or guarantee for their benefit an *unjustified* advantage at the expense of the consumer or user, *contrary to the general aims of article 85*.” *Id.* (emphasis added).

¹⁸⁸ *Id.*, at 341 (emphasis added).

¹⁸⁹ “The principle of freedom of competition concerns the various stages and manifestations of competition . Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of article 85(1) merely because it might increase the former.” *Id.*, at 342.

¹⁹⁰ “There is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision.” *Id.*

productive and or distributive investments, both by the distributors in first person and the manufacturer, at least partially relieved from marketing costs. Yet, from an economic standpoint, there are inevitable downfalls as well. These normally include higher prices on account of the total lack of competition created by the exclusive;¹⁹¹ a potential output reduction; a reduced welfare for those consumers who do not value nor need *non-price* efficiencies brought about by the scheme and will have to buy a lesser quantity because of the higher price; and a higher cost for those consumers who will buy in the same quantity in spite of the price.¹⁹² Finally, it must not be underestimated that that concluding that restraints to intrabrand competition will enhance interbrand competition might in the end be overly simplistic, as weighing one type of competition against the other is sometimes a difficult task.¹⁹³

Unquestionably, the argument that the suppression of intrabrand competition is often outweighed by the overall procompetitive effects brought about by enhancements in interbrand competition has solid foundations. The US rule of reason, including the analysis of the structure of the market, allows to verify the actual outcome.¹⁹⁴ However, it is crucial to insist that “*Sylvania’s* endorsement of an efficiency-based methodology for evaluating vertical restraints focused attention on the questions of *what goals* antitrust should pursue.”¹⁹⁵

In the light of the peculiar goals of EC competition policy it appears that many of the (Chicagoan) economic findings that made US Courts substantially legalize vertical

¹⁹¹ “Because intrabrand competition is eliminated as a result of exclusive and territorial schemes, even distributors representing a *weak* manufacturer who faces numerous interbrand rivals will charge higher prices than if intrabrand competition existed.” Emmanuel P. Mastromanolis *supra*, note 32, 593.

¹⁹² *Id.* at 592.

¹⁹³ See Kevin J. Arquit *Market Power in Vertical Cases* 60 Antitrust L.J. 921, 923 note 6.

¹⁹⁴ *Id.*, at 592-594. See also the discussion about *Sylvania* at 598-603.

¹⁹⁵ Ernest Gellhorn, William E. Kovacic *supra*, note 169, 288 (emphasis added).

restraints do not hold true within the EC.¹⁹⁶ The EC objective of integration results in “stricter rules on vertical *territorial* restrictions [and] a different method of analysis”. EC authorities do not show the “depth of economic analysis seen in many U.S. decisions. The EC makes no inquiry into market power (effect on intrabrand competition) or possible *economic* justifications or efficiencies”.¹⁹⁷ Also, goals of fairness, wide access to entrepreneurial activities and a different emphasis the attainment of generalized welfare (referred to as the *distributive* purposes of EC Competition Law) rather than efficiency alone determine a shift from the purposes of US Antitrust.¹⁹⁸ “The protection of small and medium firms is often justified on the assumption that this promotes competition in the long run.”¹⁹⁹

The EC has been considering whether to amend its orientations and if so to what extent. Probably seeking to retain stricter control over legal developments, EC institutions have always preferred to enact individual or collective exemptions in order to recognize that certain formally anticompetitive practices may in the end bring about positive effects.²⁰⁰ The case of distribution is exemplary: When the Commission was empowered to exempt firms from the application of article 85, it received many more requests than it could handle.²⁰¹ Thus, the practice of issuing block exemptions started. In

¹⁹⁶ Some US scholars however object to the opinion that vertical restraints are bound to increase competitive conditions and general welfare. See Robert L. Steiner *Sylvania Economics: A Critique* 60 Antitrust L.J. 41 and Jonathan B. Baker *Vertical restraints with Horizontal Consequences: Competitive Effects of “Most Favored Customer” Clauses* 64 Antitrust L.J. 517.

¹⁹⁷ Barry E. Hawk *The Proposed Revisions to the Justice Department's Antitrust Guidelines for International Operations and Recent Developments in EEC Competition Law* 57 Antitrust L.J. 299, 306 (emphasis added).

¹⁹⁸ *Id.*, at 307.

¹⁹⁹ Barry E. Hawk *System Failure: Vertical Restraints and EC Competition Law* 32 Comm. Mkt. L. Rev 973, 981.

²⁰⁰ The discipline of exemptions is one of the most peculiar characters of EC Competition Law and would require detailed analysis, which is not within the scope of this thesis.

²⁰¹ Regulation 67 of 1967 was one of the early pieces of legislation adopted following to the regulatory scheme shortly described in the first chapter (Commission regulations being enacted in pursuance to

the end, firms had to deal with a complex system of provisions and orientations of *de facto* or *de jure* regulatory nature (regulations and notices), whereby the Commission governed different economic sectors.

This approach has been criticized because of its excessively strict rules, uncertainty, legalism, lack of economic analysis. The collapse of the system has been described as a vicious cycle, starting from the excessively broad application of article 85 and then continuing with the issuing of numerous block exemptions (needed in the light of the difficulties arising out of the broad scope of article 85) and the formalism brought by their category-based mechanism. Finally, all emphasis is on legal categories and economic analysis is neglected.²⁰² The lack of economic analysis in terms of price and output (that is in terms of the basic effects on economy, competition and the consumers), and the omitted consideration of market power, make the Commission's conclusion that exclusive distribution agreements violate article 85 automatic.²⁰³

The Commission issued a Green Paper on vertical restraints,²⁰⁴ and a follow-up document reconsidering the issue in the light of the opinions received from other Communitarian Institutions, Member States, scholars and businesses on the Green Paper.²⁰⁵ The prospected reform will tend to harmonize EC Law and US Antitrust. Yet,

Council regulations). It was adopted in pursuance to regulation 19/65 (see *supra*, chapter I) to respond to the huge number of individual exemption requests that the Commission received. Regulation 67 is now expired and the subject is currently covered by regulation 83 of 1983, whose provisions in part are essentially the same.

²⁰² Barry E. Hawk *System Failure: Vertical Restraints and EC Competition Law* 32 Comm. Mkt. L. Rev. 973, 974.

²⁰³ *Id.*, at 975. "Market power is perhaps the most fundamental factor in competition analysis. Market power is just as important under article 85 as it is under article 86. The fact that the *legal* thresholds for the requisite degree of market power differ under article 85 and 86 should not obscure the fact."

²⁰⁴ Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721. It is reminded that the Green Paper does not have legislative force.

²⁰⁵ Communication from the Commission on the application of the Community competition rules to vertical restraints - Follow-up to the Green Paper on vertical restraints 1998 O.J. (C 365), 3.

this is not to say that the two are likely to be identical in the near future, as the EC does not accept certain restrictions that recent developments made legal within the US. Such is the case of vertical price fixing, subject to the rule of reason since the US Supreme Court's decision in *Khan*,²⁰⁶ which reversed the former orientation.²⁰⁷ Within the US vertically fixing maximum resale price is therefore subject to a rule of reason (efficiency-biased) scrutiny similar to that of *Sylvania*. Within the EC instead it is still assumed that fixing the maximum price will often imply that distributors charge the highest price contractually possible, thereby altering the minimum price as well.

The opinion that price restraints will be equally illegal whether they are vertical or horizontal is reaffirmed in another official document, the *de minimis* notice,²⁰⁸ which provides firms with indications about the Commission's orientations.²⁰⁹ Indeed, the new notice may be more relevant to the business of some transnational corporations (which are presumptively assumed to be large companies) because one of the two threshold criteria that limited the applicability of the notice - that based on the turnover of the firm - has been abolished. As for the other criterion - the market share threshold - a distinction between horizontal and vertical agreements has been introduced.²¹⁰

²⁰⁶ *State Oil v. Khan* 522 U.S. 3 (1997).

²⁰⁷ See *Albrecht v. Herald Co.* 390 U.S. 145 (1968), where the Supreme Court had found illegal *per se* a distribution agreement aiming at fixing the *maximum* resale price.

²⁰⁸ Commission notice on agreements of minor importance, OJ C 372, 9/12/1997. It is a limitation to the applicability of article 85 which operates regardless of economic sectors and concerns agreements that have little or no anticompetitive effects on account of the dimension of the firms that take part to them. In short, the agreements fail to meet the requirement of appreciable effect on competition.

²⁰⁹ It is worth mentioning that as for their legal nature, notices are not binding with respect to the Commission, let alone the Courts. See Morten B. Broberg *The De Minimis Notice* 20 *European Law Review* 371, 374 [1995].

²¹⁰ The market share threshold is 5 % for agreements between undertakings operating at the same business level and 10 % for agreements between undertakings operating at different economic levels. In the case of a mixed horizontal/vertical agreement or where it is difficult to classify the agreement as either horizontal or vertical, the 5 % threshold is applicable. *Id.*, § 9.

The distinction, in practice allowing a higher threshold, confirms the more permissive approach toward vertical agreements, consistently with the general orientation of the Commission.²¹¹ However, the more favorable look on vertical restraints does not go so far as to include resale price maintenance and territorial allocation.²¹²

Article 86

Underlying policies that differ from those of the US and historical reasons of development are at the very foundations of the jurisprudence of the offence of abuse of dominant position in the same peculiar way as the elimination of national barriers and market integration are at the foundations of the law of vertical restraints examined above. Only, article 86 is arguably even more controversial in its application than article 85, related as it is to measurable yet ever controvertible concepts such as market definition and dominance. Controversies are bound to increase when considering the application of article 86 to transnational firms and the application of those concepts on a world wide scale.

Indeed, the wording of article 85 and 86 differs in a seemingly minor fashion in that the first prohibits practices that “may affect trade [...] and which have as their effect or object” some negative impact on competition, while the second prohibits any abuse “*in so far as it may affect*” trade. This has been found to require a case-by-case evaluation of the quantitative impact of the contested practice that is based on less rigid and

²¹¹ The discrepancy between the 10% figure of the Notice and the 20% figure of the Green Paper (which is the proposed market share under which the Commission will deem the restraint not to be harmful to competition) has been criticized as a demonstration that the Notice does not reflect the current orientations of EC Competition Law. See Frances Barr *The New Commission Notice on Agreements of Minor Importance: Is Appreciability a Useful Measure?* [1997] E.C.L.R. 207, 211.

²¹² *Id.*, § 10 (b). These add to the horizontal “blacklisted” offences that are liable to be prosecuted regardless of the threshold criteria.

legislatively or jurisprudentially predetermined criteria than those that Communitarian institutions resort to in the application of article 85.²¹³ In particular, in cases such as *Commercial Solvents* and *United Brands* the Court of Justice focused on the overall competitive structure of the market rather than on actual effects on interstate trade, thereby emphasizing the importance of the political (as opposed to purely economic) purposes of Competition Law.²¹⁴ Because this adds to the uncertainty that characterizes the application of article 86, such approach is frequently criticized (particularly by US antitrust scholars and lawyers who propose a less “contaminated” enforcement of Competition Law).²¹⁵

The contrast with US standards is important also in the light of the fact that most landmark cases concern US-based firms. *Continental Can*, *Philip Morris*, *United Brands*, *Commercial Solvents Corp*, *General Motors* were all involved in major cases that eventually shaped the outline of article 86 jurisprudence (and prepared the subsequent enactment of the merger regulation).

One could guess that the long post-war era and the crisis of the 1970s took their toll on European undertakings, which therefore were not always in the position to consistently increase in size and, therefore, control a substantial share of a given market. Also, the more prompt availability of capitals in the US influences the enforcement of antitrust (with special regard to the definition of a relevant market and entry barriers). In this sense, under US standards - especially on account of the general acceptance gained by the Chicago School - very large investments that are necessary for a firm to enter a market are not deemed to represent an entry barrier: if a market is profitable, it is

²¹³ See Luigi Ferrari Bravo and Enzo Moavero Milanese Lezioni di Diritto Comunitario - Le Regole Antitrust (1995).

²¹⁴ *Id.*, 344.

²¹⁵ See for instance Thomas E. Kauper *The Problem of Market Definition under EC Competition Law* 20 *Fordham Int'l L. J.* 1682, 1682-1688.

assumed that there will always be a potential competitor that will readily punish the behavior of a monopolist that gains supracompetitive profits. Unless particular conditions are found to exist, which is currently less and less frequent, most markets are deemed to be competitive and “barriers to entry are low or nonexistent over the long term.”²¹⁶

If, instead, capitals are less readily available and the enforcing agencies are concerned with the chances that small firms (considered as important economic actors in that they help correct the anticompetitive tendency of a market) have, “the need for capital may constitute a barrier to entry.”²¹⁷

As a matter of fact, the Commission and the Court of Justice are sensitive to global businesses - as their corporate and financial structure may partially insulate them from certain competitive dynamics that concern other businesses - in a way that does not seem to be paralleled by that of US courts. Also, US courts do not seem to worry about the need to adapt or modify their analysis when they are confronted with cases that include transnational elements (assuming that typically there will be some coincidence between large and transnational concerns). Very often, such elements will be either ignored or weighed by means of the usual analytical reasoning.²¹⁸

²¹⁶ That market definition is oriented to a continuous broadening of the relevant market in question in any single case is widely recognized, whether or not the argument is used in a polemic fashion to criticize the opposite inclination of the Commission and the Court of Justice. See Per Jebsen and Robert Stevens *supra*, note 22, 455-456.

²¹⁷ Korah, *supra*, note 38, 15

²¹⁸ In *Sammi*, (Vollrath Co. v. Sammi Corp., 1989 WL 201632 (S.D.Cal.); *The Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993); *Metro Industries Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996)) the Ninth Circuit rejected allegations of leveraging and anticompetitive effects over the US in two distinct lawsuits brought against Sammi, a Korean producer of kitchenware and an importer to the US, that had monopoly power over the Korean production and export market (also thanks to an export association that may be paralleled to KEA). The *Sammi* litigation is one of the very few of the decade that regarded similar allegations directed against foreign firms. The Ninth Circuit is one of those that rejected the inclusion of monopoly leveraging within the practices prohibited by the Sherman Act (*Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991)). Both the District Court and the Circuit Court found that, if anything, the fact that Sammi could exploit monopoly power within Korea was beneficial to the US, as economic theory would teach that firms cannot exploit monopoly in more than one market. Yet, the fact that the US market of the kitchenware at issue consisted only of products imported from Korea was not given any thought. This was because US antitrust must disregard competitive conditions in Korea

It is hard not to notice that while the *Alcoa* doctrine was so far-reaching, often US courts seemed blind in front of the anticompetitive potential of international commerce. In a landmark case of the 1980s, *Matsushita*,²¹⁹ the Supreme Court held that American plaintiffs could not recover treble damages from Japanese defendants on the basis of the cartelization of *their* national market “because American antitrust laws do not regulate competitive conditions of other nations’ economies”²²⁰ Indeed, while it is obvious that US legislation cannot purport to affect business practices that remain exclusively related to a foreign territory, it does not necessarily follow that courts should not take into account the possibility that transnational companies exploit economic and legal conditions of non-US markets to finance *otherwise unaffordable* business practices within the US (which was the case in *Matsushita*). By denying that possibility the Supreme Court arguably left the door open for an excessively definite separation between geographic areas and markets that does not correspond to the economic reality of internationalization of trade of modern days.

It is indeed obvious that the courts of a given Country are impotent in front of foreclosures that their national companies may encounter while trying to compete in those foreign markets. Going back to *Matsushita*, Japan has always been a difficult environment - to say the least - for foreign firms. If it is mainly left to the executive branch and agreements such as that described in the previous chapter to deal with such hurdles (or even trade wars), courts may nevertheless consider the economic ramifications of similar patterns on competition within *their* national market. As the dissent in *Matsushita* pointed out, firms may employ certain business patterns in one Country *in combination* with others elsewhere.²²¹

²¹⁹ *Matsushita Electronics Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574.

²²⁰ *Id.*, at 582

²²¹ *Id.*, at 605.

In such cases, given the impossibility for national authorities to reach practices that would be illegal within their own territory, a solution may still be devised in order for courts to consider the distorting ramifications of those practices in their Country (without exerting exorbitant jurisdiction nor purporting to regulate the economy of other Nations). Since under the approach in question conduct abroad would only matter insofar as it allows firms to distort competition in the host Country, it is here argued that doctrines such as monopoly leveraging or essential facilities may be an option. In fact, what matters in leveraging cases is not just the possession of monopoly market itself (which may be legal or simply *beyond the reach* of the court) but mainly its influence over *another*, non-monopolized market.²²² Therefore, provided that monopolistic conditions abroad (as arguably in *Matsushita*) allow or cause foreign defendants to maintain distorting practices within another, unfair competitive advantages may be challenged through leveraging claims or by maintaining that a firm may have to abide by stricter standards.

Within the EC, the Commission is much more inclined to avail itself of doctrines such as leveraging and maintains a more internationalist approach. This, combined with a third important factor - its theory concerning market definition - has caused and causes pains to firms that are used to US-style antitrust enforcement. A reason for that is again to be sought in the fact that Competition Law is part of the Rome Treaty, the “Constitution” of the EC. Therefore, the Commission reads article 86 in the light of the goals of the Treaty rather than efficiency-oriented economic theory.²²³

²²² See J. Neil Lombardo Resuscitating Monopoly Leveraging: Strategic Business Behavior and Its Implications for the Proper Treatment of Unilateral Anticompetitive Conduct Under federal Antitrust Laws 41 St. Louis L. J. 387. Even though the article does not focus on international cases, it does provide a very clear analysis of the long term effects of monopoly power as leveraged on non-monopolistic markets. Essentially, the issue is one of business strategy and possibility to expand the possibility to reap benefits of monopoly power from one market to another (something which is objected by mainstream antitrust scholars, who believe that monopoly can only be exploited in one market).

²²³ See Thomas E. Kauper *supra*, note 217, 1682-1688.

In this perspective, it appears understandable that, to US standards, the Commission is (polemically) considered a determiner of fact instead of a trier of fact.²²⁴ It is in fact argued that the Commission *states* and does not bother to prove, that a certain market is indeed a separate market. The Commission is often criticized for not providing sufficient factual or methodological bases (on which one may present its counter-arguments) and to completely disregard relevant economic data once it has drawn its conclusions.

The one case that is still frequently referred to, as it illustrates most effectively how the three troublesome aspects mentioned above affect the application of article 86 is *United Brands*.²²⁵ The case regarded abusive conduct in the imports of bananas to Europe by the well-known American corporation. To begin with, the Commission's definition of the relevant market (accepted by the Court of Justice) was characterized by the lack of statistical and economic data that in the tradition of US antitrust must shape market definition.

Geographically, the market was found to be determined by the absence of duties and quotas which were in place in three Member States (the United Kingdom, Italy and France). In short, the three Members were excluded from the relevant market because imports were somehow publicly regulated and therefore subtracted from the free play of competition.²²⁶ While such argument does not certainly appear to be ill founded in itself, in strictly economic terms the fact that the remaining six Members were open to free competition does not necessarily make all part of a unitary relevant market. Undeniably,

²²⁴Jebsen and Stevens, *supra*, note 22, 463-466.

²²⁵ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, [1978] E. C. R. 207.

²²⁶ “The effect of the national organization of these three markets is that the applicant's bananas do not compete on equal terms with the other bananas sold in these States which benefit from a preferential system and the Commission was right to exclude these three national markets from the geographic market”. *Id.*, § 51.

many other factors, like those based on consumer behavior in each Member State, or specific costs that may vary from one area to another (relating to transportation, existing retail facilities, advertising and marketing investments) could have shown that the six Members were in fact too heterogeneous to be all part of the relevant market.

The definition of the product market (bananas, as opposed to fresh fruit generally) was even more remarkably non-economically oriented and was later harshly criticized for the emphasis the Court put on certain social goals of Competition Law, which are of course totally absent in US antitrust standards. First, the Court heavily stressed certain unique physical characteristics of bananas (appearance, taste, softness, seedlessness)²²⁷ which according to the US approach may be kept into account only if they are reflected by some economically measurable appreciation (namely, substitutability) that is brought before the court as evidence.

Second, the Court coupled such characteristics with their attractiveness to a determined, narrow group of consumers that, as a matter of general experience, were deemed to find bananas particularly valuable and non-substitutable (the very young, the old and the sick).²²⁸ As many commentators recognize, by so doing the Court overemphasized the importance of so-called infra-marginal consumers, that is those customers who are unlikely to shift to another product in spite of price increases, usually because certain characteristics of the product in question make it the only suitable one.

Instead, it is widely thought that the Court should have considered marginal consumers, that is the large group of individuals whose behavior is thought to be the object of a monopolist's business strategy in the sense that they can easily shift from one

²²⁷ *Id.*, § 31.

²²⁸ *Id.*

product to another, thereby protecting also infra-marginal consumers (who in themselves are considered too much a narrow group for a firm to reap high profits).²²⁹

In economic terms, the Court should have ascertained whether there existed a group of marginal consumers that, by shifting to a product other than Chiquita bananas, could have punished United Brands' pricing and distribution practices.²³⁰ From an economically-oriented standpoint it would have been more accurate of the Court to hold that the lack of cross elasticity with respect to other fresh fruit should have been tried in connection with the large group of consumers that, not having particular needs, may react to price increases by shifting to other seasonal produce.²³¹ Critics object to the finding that the arbitrarily asserted low degree of substitutability was the key factor to conclude that bananas had specific features which influenced consumer choice.²³²

This part of the holding contributes to distinguish US antitrust and EC competition law in a very vivid fashion. The first is oriented to the protection of competition *as such*,²³³ which is considered capable to increase general welfare and thereby help society *as a whole* benefit from technical and economic improvements. The second, even considering the changes that are occurring (or to a bigger extent are expected - sometimes skeptically - to occur) on account of the Commission Notice on

²²⁹ Simon Baker and Lawrence Wu *Applying the Market Definition Guidelines of the European Commission* [1998] E.C.L.R. 273, 276.

²³⁰ See Mark Furse *Market Definition - The Draft Commission Notice* [1997] E.C.L.R. 378, 380.

²³¹ *United Brands*, § 28 “There is no significant long term cross-elasticity any more than - as has been mentioned - there is any seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and table grapes) in one of the Countries (West Germany) of the relevant geographic market.”

²³² *Id.*, § 30.

²³³ From a different point of view, that of antitrust injury and recoverable damages, the Supreme Court held in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc* 429 U.S. 477 (1977) that antitrust legislation aims at protecting competition. In this sense, in order for an antitrust violation to exist, it must be proved *inter alia* that the contested practice diminished overall competitive conditions, which was well beyond the scope of the Court of Justice's holding in *United Brands*.

market definition²³⁴ remains strongly attached to values that cannot be reduced to economic efficiency.

The other part of *United Brands* that receives harsh criticism from US commentators is that relating to the firm's organization and commercial might. Many read between the lines of the judgement and complain that under EC Competition Law it is dominance in itself, no matter how legally obtained or employed, that is *bound to* be punished.²³⁵ In *United Brands* neither the Commission nor the Court of Justice conducted supply-side analysis to ascertain whether there was product substitutability, as the Commission would be expected to do today in compliance with the guidelines it set forth in the Notice.²³⁶ While demand-side substitutability (that is, the analysis in *United Brands* reported here) is still to be considered as the most important factor in market definition analysis, the Commission today recognizes that under certain circumstances supply-side substitutability may have equivalent effects.²³⁷

However, to admit that *United Brands* was not decided with the support of supply-side analysis does not necessarily mean that the Court completely ignored that aspect. Indeed, the Court's language shows that it did (however indirectly, incompletely, possibly improperly) compare United Brands' potential with respect to that of other producers of bananas. The Court considered United Brands' structure on a global scale. It

²³⁴ Commission Notice on the definition of the relevant market for the purposes of Community Competition Law O.J. 97(C) 372, 3. It is reminded that the Notice is not legislation in force.

²³⁵ Per Jebsen and Robert Stevens *supra*, note 22, 462.

²³⁶ The Commission's step has been widely welcomed. See for instance Baker and Wu, *supra* note 231, 275. Others seem to maintain that in the end demand-side substitutability will remain the only decisive criterion. See Kiran S. Desai *The European Commission's Draft Notice on Market Definition: A Brief Guide to the Economics* [1997] E.C.L.R. 473, 473.

²³⁷ O.J. 97(C) 372, 3 § 20. "Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices."

started from its huge, unparalleled productive potential, deriving from its large plantations of particularly resistant banana trees, which added to its privileged links with independent producers (from which it was inferred that United Brands had managed to insulate itself from any possible productive shortage, even in the face of natural disasters). In short, at the production stage United Brands was able to “comply with all the requests which it received”²³⁸ and so well organized that, despite any adverse circumstances, it would have been unable to meet its clients’ needs.

The Court deemed worth including in the decision all the characteristics that made United Brands a unique producer and distributor of bananas, which made it an “undertaking integrated to a high degree”:²³⁹ growing expertise, transportation and packaging facilities, successful scientific research, high yield, ripening techniques, effective advertising campaigns.²⁴⁰ Needless to say, United Brands was highly efficient and profitable on account of such perfected organization.

This point is exactly the conflict between US-style Antitrust and EC-style Competition Law. “The EU authorities appear to regard factors that in the United States would reflect nothing more than efficiency and success in enhancing consumer welfare as necessarily indicating dominance.”²⁴¹ It is not always easy not to fall into political if not ideological considerations when dealing with similar issues, since there is not such thing as an ultimate answer to whether a firm’s success will necessarily bring about enhanced consumer welfare.

In fact, it could be effectively argued that even though the firm in question only tries to maximize its own profits, it cannot do so without *ipso facto* providing better

²³⁸ *Id.*, §§ 70-77.

²³⁹ *Id.*, § 70.

²⁴⁰ *Id.*, §§ 80-94.

²⁴¹ Jebsen and Stevens, *supra*, note 22, 483.

products or lower prices or both, thereby increasing general welfare. At the same time, the policy of favoring smaller firms may be just as effective if distributive purposes are accepted as a legitimate end of Competition Law. Also, big firms could be said to be rightfully frowned upon because their size and dominance will help them exploit consumers more effectively, so that the firms will not pass a fair share of production improvements to the public. Stated differently, the reasoning could be stretched to mean that too big a concentration of power in the hands of private businesses was not welcomed in the community.

However, turning to legal arguments, there remains that even those who criticize Communitarian institutions for their mindset and lament the Court's inclination to blame a firm for its success,²⁴² must recognize that for the Court of Justice considering the world-wide structure and productive potential of United Brands really meant finding that the relevant market featured exceptionally high entry barriers. Only, in order for them to be adequately evaluated, these barriers were to be sought (at least to a great extent) *outside* the relevant market, outside the territory of those Members and, in short, outside the Community.

The particular barriers to competitors entering the market are the exceptionally large capital investments required for the creation and running of banana plantations, the need to increase sources of supply in order to avoid the effects of fruit diseases and bad weather (hurricanes, floods), the introduction of an essential system of logistics which the distribution of a very perishable product makes necessary, economies of scale from which newcomers to the market cannot derive any immediate benefit and the actual cost of entry made up inter alia of all the general expenses incurred in penetrating the market such as the setting up of an adequate commercial network, the mounting of very large-scale

²⁴² The paradox has been recognized for a long time. Among others, Judge Hand in *Alcoa* held that "although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins." *Alcoa*, 430.

advertising campaigns, all those financial risks, the costs of which are irrecoverable if the attempt fails.²⁴³

Right or wrong, the importance of concerns of financial availability could not be more clear. The Court was worried that no other firm could ever find the funds necessary to compete with United Brands, since of course having to operate a competing business without the availability of the named structure and facilities was not a viable option. United Brands had been in the business for about a century and had developed expertise and experience. Also, United Brands had incurred the costs necessary to the achievement of its state-of-the-art structure gradually, so that by the time of the contested violation it was in the position to gather the benefits of investments that had been spread on a considerable time span. Some commentators maintain that this is the underlying reasoning of *United Brands*.²⁴⁴

The Court did not hesitate to hold that the firm, because of its own financial and industrial power was in a comparatively advantageous position that did not allow other producers to effectively compete.²⁴⁵ In order to compete, businesses should have collected and invested money on a gigantic scale within a very short time, which was deemed to be impossible or at least too unlikely for the Court to let the forces of the market police any exploitative abuse. Or, other business should have tried to compete by means of a less perfected organization, which would have exposed them to a variety of possibly fatal risks. Within the EC, such sunk costs matter for the purposes of applying Competition Law.²⁴⁶ In the particular case, United Brands was eventually not fined for unfairly high pricing, as the Court reversed the Commission's decision on the matter.

²⁴³ *United Brands*, §122.

²⁴⁴ Jebsen and Stevens *supra*, note 22, 486.

²⁴⁵ *United Brands*, § 84.

²⁴⁶ See Korah, *supra*, note 38, 16 and 90.

Yet, the Court did not rule out the possibility that United Brands or any other firm may be held accountable for unfairly high prices in the presence of adequate evidence.²⁴⁷

This aspect of EC Competition Law is puzzling to US standards. One of the basic tenets of mainstream US antitrust is that excessively high pricing is a counterproductive practice in that it creates a chance for new competitors to enter the market and offer the same commodity at lower yet fully profitable prices. In other words, it is maintained that in the absence of barriers to entry - which from an economic standpoint are considered very unlikely to exist - it will be a firm's own interest not to attract entrants by charging supracompetitive prices, as that firm would be *bound to* lose customers to the new competitors.

Yet, the Court plainly combined the "possibilities arising out of dominant position" with price exploitation.²⁴⁸ In this criticized language²⁴⁹ it is plainly possible to read the concern that a firm which does not have to fear new entrants can afford to reap supracompetitive profits for a *long* time. If in fact under US antitrust law it is not excluded that a monopolist may reap such profits, it is expected that within a reasonably short time new entrants will punish such behavior. In this sense, the fact that within the EC this concern is to some extent subtracted to the forces of competition and subjected to the application of Competition Law is frowned upon by Americans.²⁵⁰

²⁴⁷ *United Brands* §§ 248-249.

²⁴⁸ *United Brands*, § 249.

²⁴⁹ "The acceptance that excessive prices may infringe article 86 is disturbing", since a firm could be fined for pricing at levels that the Commission later exceed the economic value of the product. Korah *supra*, note 38, 113.

²⁵⁰ "The imposition of special responsibility notions in the area of monopoly power, and the willingness of the authorities to take actions beyond those which may be called for in situations of normal competition, permit the EU competition regime to be *regulatory* in a fashion that the US is not." And again, "the potential for using Article 86 for regulatory purposes could not be more obvious." Stevens and Jebsen *supra*, note 22, 490 and 506.

In conclusion, it is interesting to note that the Court of Justice's decision would not be there had it not been for an orientation that is the opposite of that the US Supreme Court seemed to embrace in the part of the *Matsushita* opinion discussed above. Neither the Commission nor the Court of Justice purported to condemn United Brands for its world-wide dominance in growing and distributing bananas. Doing so would have implied a gross violation of jurisdictional principles to say the very least. Also, conducting the necessary information-gathering would have been almost impossible. Yet, the Communitarian institutions chose not to disregard the importance of United Brands' organization, and refused to conclude that the implausibility of exerting prescriptive jurisdiction should necessarily imply denying any legal relevance of factors that eventually were thought to have had some effect on Europe.

The question that remains then is not whether the *United Brands* decision was in fact correctly decided. For instance, probably today the case would have been to some extent different from its very foundations, as the Commission would follow its own guidelines concerning market definition, making it less unilateral. In fact, even though the Court of First Instance and the Court of Justice are by no means bound by those guidelines, they are expected to reach a decision that is based on the allegations of the parties.

Instead, the question is whether within the Community a change similar to that mentioned above regarding the evolution of vertical restraints (which at least to some extent approached the EC and the US) is taking place. The answer is of course complex. Yet, it should not be forgotten that in recent years there have been new examples (such as in *Tetra Pak*) of a mindset that remains different from that of US courts with respect to dominant firms. Tetra Pak was condemned on charges of monopoly leveraging and tying. Its absolutely dominant position in the market of aseptic carton containers for milk and other liquid foods, acquired and reinforced by means of intellectual property rights over processing machinery was fatal. In fact, the Court agreed with Court of First Instance,

which was “correct in stating that the actual scope of the *special responsibility imposed on a dominant undertaking* must be considered in the light of the specific circumstances of each case which show a weakened competitive situation.”²⁵¹ Tetra Pak’s impressive share of the market was found to justify the Court of First Instance’s non-orthodox assessment of the relevant market. Quasi-monopolist firms (90-95% market share) that occupy a leading position on distinct, though associated, markets (that of non-aseptic containers in *Tetra Pak*) remain in a position similar to that of a dominant firm on these markets as well. Tetra Pak’s conduct in the non-monopolized market was still subjected to the special responsibility of the dominant firm *without any need to show* that it dominates the leveraged market,²⁵² which could be said to correspond to the possibility impose stricter standards on firms that ‘export’ dominance in one market to affect another, competitive market..

The merger control regulation

Some of the difficulties in understanding the problems of market definition and technical and economic progress seem to arise from a misapprehension of the nature of competitive policy analysis. We are not taking a snapshot of a market situation at a particular time. We are looking at the dynamic development of a market and considering the short, medium and long term impact of a given merger. In a time frame in which foreseeable market developments are taken into account, it is perfectly proper to consider wider market issues and the merger’s contribution to technical and economic progress. It is in this context too that the recital to the Community’s goal of social and economic cohesion must be understood. Of course, we will seek to encourage economic development in poorer areas of the community.²⁵³

²⁵¹ Tetra Pak International Sherman Act v. Commission [1996] E. C. R. 5951. § 25.

²⁵² *Id.*, § 30.

²⁵³ Leon Brittan *The law and Policy of Merger Control in the EEC* 1990 E.L.Rev. 351, 353.

This statement shows very clearly that many of the considerations made and the criticism reported under the discussion of article 86 could be repeated, at least in part, with respect to Regulation 4064/89. Again, distributive, social and dynamic factors are openly accepted as part of Competition Law enforcement.

In itself, the regulation was the fruit of an extremely lengthy debate which arose out of the application of article 86 to a concentration that occurred when Continental Can Corporation was found to have abused of its dominant position by acquiring its sole competitor, thereby harming competition within the Community (the case was in part analyzed under the discussion about the Economic Unit Theory, *supra* chapter II). Like in *United Brands* and other similar cases, there was concern regarding Continental Can's financial might, which enabled it to achieve objectives that other firms could not afford to pursue.²⁵⁴ This was challenged by the Commission as an article 86 violation. Even though the Court of Justice eventually overruled the Commission's decision (which had fined Continental Can) for lack of evidence, it did uphold the reasoning that considered abusive the structural change in competitive conditions obtained by means of superior financial availability and overwhelming commercial might.

The difficulty with applying article 86 was clear since the beginning, as it is obvious that a firm (like Continental Can) is liable to fall within the field of applicability of article 86 only if it is already a dominant firm at the time of the acquisition of the target. On its part, also article 85 was unsuitable with respect to a series of cases, since concerted behavior (present in the *Philip Morris* case)²⁵⁵ - an absolute requirement for its

²⁵⁴ See Jebsen and Stevens *supra*, note 22, 483-484.

²⁵⁵ *British American Tobacco Ltd. and Reynolds Industries Inc. v. Commission* [1987] E.C.R. 4487. In the case the Court, reasoning on Philip Morris' position as a minority shareholder, found that the possibility to control a competitor by means of a shareholding relationship was a violation of article 85.

application - might not necessarily be there every time a concentration is achieved: primarily, not when a concentration derives from a hostile take-over bid.²⁵⁶

Apparently, any concentration whose implementation could have proved highly anticompetitive would have been out of the reach of the Commission if carried out in the form of a hostile take-over by a non-dominant firm. A similar scenario is a far cry from being unrealistic: In 1999 one of the newborn telecommunication companies in Italy acquired in a hostile fashion former State monopolist Telecom; remarkably, the size of the target (one of the top five telecommunications companies in the world as for its size) was estimated to be several times larger than that of the shark. Given the absence of national merger control legislation within most of the Member States before the enactment of regulation 4064/89, the difficulties arising from challenging anticompetitive concentrations on the basis of sound legal bases are apparent.

Regulation 4064/89²⁵⁷ came to provide specific rules for concentrations, whether these derive from mergers, acquisitions or concentrative (as opposed to cooperative) joint ventures. In few words, concentrations that create or strengthen a dominant position are incompatible with EC Competition Law, and subjected to the Commission's review if they meet certain threshold requirements.²⁵⁸ The time elapsed from 1957 and the decades of jurisprudential improvements to Competition Law contributed to its remarkable internationally oriented character.

Especially today that all Member States have merger control legislation, the Commission is expected to focus on the enforcement of large, transnational concentrations. The difficulties that accompanied the extraterritorial application of articles 85 and 86 were resolved (or circumvented, to others) by simply providing *ad hoc*

²⁵⁶ See Christopher S. Kerse and C.J. Cook E.C. Merger Control (2nd edition, 1996), 2-5. See also Luigi Ferrari Bravo and Enzo Moavero Milanesi *supra*, note 215, 352-355.

²⁵⁷ [1989] O.J. L 395, 1.

²⁵⁸ Regulation 4064/89, article 2 § 3.

jurisdictional requirements that leave no doubt concerning the possibility to apply the regulation to fully non-European concentrations. As for the possibility to issue fines against firms that do not have any contact to the EC (which of course poses enforceability problems), under article 15 of regulation 17/62 the Commission could in fact fine European firms that do business with condemned non-EC undertakings (that would remain beyond the direct reach of the Commission). In the *Boeing* case, this would have meant that many of the world's major airlines would have been fined had they done business with Boeing.²⁵⁹ Of course, while this remains true on a merely legal plane, it is not to say that criticism to the broad scope of the regulation is absolutely unfounded: The conflicts between purely objective, certainly aggressive jurisdictional criteria and international law discussed in chapter II are even more troublesome in the field of concentrations because of their increased frequency and strategic importance.²⁶⁰

The study of the Boeing - McDonnell Douglas (MDC) case (*Boeing*) is particularly fitting to this thesis in that (i) both companies were American; (ii) they did not have assets or subsidiaries within the Community, which highlights the complete unimportance of territoriality for the purposes of merger regulation; (iii) the relevant geographic market was found to be the entire world,²⁶¹ which of course maximizes the implications deriving from taking into account all possible factors that are liable to somehow affect competition within the Community in spite of the location of competitors and/or customers; (iv) many sovereign priorities were at issue, since the case involved the highly strategic aerospace industry and even sensitive (military) research, which caused

²⁵⁹ Regulation 17/62, article 15.

²⁶⁰ See Andre R. Fiebig *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestion for Reform* [1998] E.C.L.R. 323, 325-327.

²⁶¹ Commission Decision of July 30, 1997. O.J. L 336, 16 § 20 "Large commercial jet aircraft are sold and operated throughout the world under similar conditions of competition. Relative transportation costs of delivery are negligible. Therefore, the Commission considers that the geographic market for large commercial jet aircraft to be taken into account is a world market."

the highest political authorities to take part in the dispute. Not surprisingly, the US/EC cooperation agreement, which as discussed above requires each party to consider the other's interests, was found to be futile by some commentators.²⁶² The disagreement between the Federal Trade Commission (which authorized the merger) and the European Commission was deeply rooted. "While the FTC looked to McDonnell Douglas competitive significance, the EC focused on whether the merger would strengthen Boeing's dominant position. US courts likely would not have recognized the EC theories, and the reverse may be true as well".²⁶³ combined with the tense political environment that accompanied the negotiations surrounding the merger might be one of the reasons which caused the US and the EC to exclude merger control when they enhanced the positive comity clause in 1998 (even though the legal argument for doing so rested on scarce procedural compatibility).

From the standpoint of the language of the merger regulation, there is no doubt that the Commission rightfully exerted jurisdiction over Boeing and MDC precisely on account of their agreement: "it was clear that as a matter of EC law, there would be jurisdiction over the transaction."²⁶⁴ The regulation in fact supersedes the results of the debate about jurisdiction examined above by introducing a new jurisdictional basis, that is the Community dimension.²⁶⁵

As far as global transactions such as that in *Boeing* are concerned, employing purely numeric criteria such as that aggregated world-wide and Community-wide turnover provides an objective basis, which can only be disputed to the extent that

²⁶² Amy Ann Karpel The European Commission's Decision on the Boeing - McDonnell Douglas Merger and the Need for Greater US - EC Cooperation in the Merger Field 47 Am. U. L. Rev. 1029, 1034.

²⁶³ Nina L Hachigian *An overview: International Antitrust Enforcement* 12-FALL Antitrust 22, 25.

²⁶⁴ Joseph P. Griffin *Antitrust Aspects of Cross-Borders Mergers and Acquisitions* [1998] E.C.L.R. 12, 16.

²⁶⁵ Pursuant to article 1, the regulation "shall apply to hall concentrations having a Community dimension", which is on its turn defined on the basis of the thresholds set forth in the following section of article 1.

difficulties arise with respect to the monetary determination of the turnover.²⁶⁶ As it appears, nothing else but the simple conclusion of the agreement between parties whose turnover exceed the thresholds of article 1 has relevance, as it was the case in *Boeing*.²⁶⁷ Nationality, place of business, presence of assets and/or subsidiaries or unincorporated establishments of either Boeing or MDC were immaterial, proving once more that “the regulation is essentially unlimited in its territorial scope.”²⁶⁸

On account of such legal requirements, it was virtually impossible for the parties to object to the Commission’s jurisdiction. In fact, the regulation’s requirement that at least one of the parties have substantial operations within the Community only appears in the recitals. It has been correctly argued that, had the requirement found place within the prescriptive part of the regulation, the *Boeing* case would not be there.²⁶⁹

Interestingly, the regulation’s thresholds are often said to have been founded on the effects doctrine / implementation approach (the effects in question being the turnover of the merging firms as allocated within a specific territory).²⁷⁰ It follows that once the threshold requirements are satisfied, a non-rebuttable presumption operates in the sense of concluding that the merger at issue is being implemented within the Community regardless of other territorial factors: “The real source of expansive authority derives from the definition of Community dimension.”²⁷¹

²⁶⁶ See C.S. Kerse and C.J. Cook, *supra* note 258, 66-68.

²⁶⁷ See Antonio F. Bavasso *Boeing/McDonnell Douglas: Did the Commission Fly Too High?* [1998] E.C.L.R. 243, 245.

²⁶⁸ Andre R. Fiebig *The Extraterritorial Application of the European Merger Control Regulation* 5 Colum. J. Eur. L. 79.

²⁶⁹ Andre R. Fiebig *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestion for Reform* [1998] E.C.L.R. 323, 325.

²⁷⁰ See article 5 of regulation 4064/89.

²⁷¹ Andre R. Fiebig *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestion for Reform* [1998] E.C.L.R. 323, 323.

In the absence of an explicit decision of the European judiciary most commentators maintain that the principles set forth in *Wood Pulp* must apply to all sectors of EC Competition Law, including the merger regulation.²⁷² Only, unlike articles 85-86 or §§ 1 and 2 of the Sherman Act, the merger control regulation (like § 7 of the Clayton Act) is triggered when mergers are still incipient. Technically, the antitrust violation is yet to take place (in fact, it is a violation not to notify the Commission of the proposed or concluded deal). Based as they are on the past turnover of the merging firms, the effects on competition are both potential and merely anticipated.²⁷³

Because the assessment of the effects takes place prior to their actual unfolding and is precisely aimed at controlling the way they unfold once the concentration has occurred, there is a trilateral relation encompassing the assessment of anticompetitive effects, the exertion of jurisdiction and the substantive application of the regulation (that is, the scope of the conditions that the Commission will try to impose on the merging parties). Some commentators do not overemphasize the possibility of conflicts that arise out of this construction. While they concede that a case such as *Boeing* is peculiar for its “blatant foreignness”, they acknowledge the authority of enforcement agencies to reach anticompetitive activities that harm competition and consumers on their territory in spite of the location of the assets or nationality.²⁷⁴

Others argue that the regulation’s language concerning the Community threshold, coupled with the attitude the Commission maintained in *Boeing*, really serve like a springboard to impose “remedies wholly unrelated to a merger and targeted at

²⁷² See J.D. Banks *The Development of the Concept of Extraterritoriality under European Merger Law and its Effectiveness under the Merger Regulation Following the Boeing/McDonnell Douglas Decision 1997* [1998] E.C.L.R. 306, 308-309 and Fiebig *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestion for Reform* [1998] E.C.L.R. 323, 327.

²⁷³ Bavasso, *supra* note 269, 245.

²⁷⁴ See Debra A. Valentine *Jurisdiction and Enforcement: Building a Cooperative Framework for Oversight in Mergers - The answer to Extraterritorial Issues in Merger Review* 6 Geo. Mason L. Rev. 525, 525-529.

transactions without effects or implementation within the EU.”²⁷⁵ In other words, the far-reaching jurisdictional scope of regulation 4064/89 is said to have proved a powerful instrument to exploit the pre-merger notification requirement and impose conditions that favor so called European champions (namely, Airbus).²⁷⁶ In this sense, asserting jurisdiction on a formally legal basis would be worthless, especially in the light of the extremely narrow time frame that is peculiar of concentration transactions (which implies that the Commission can effectively condition its assent to the concentration without the Court’s review).²⁷⁷

One could concede that, despite Commission’s officials statements to the contrary, the fate of Airbus was indeed a concern. Yet, the question remains of whether ensuring that Airbus would not be completely annihilated by the merger was in fact a protectionist, chauvinist move or an attempt to protect the manufacturers’ clients (the airlines) and ultimately the passengers at large. In other words, while critics maintain that the Commission at best protected Boeing’s only competitor (which would be against the assumption that antitrust must police competition, not defend competitors), others justify the Commission’s fear that Boeing may behave predatorily in the future.

While the Federal Trade Commission found that MDC was no more a competitive force due to the lack of research and investments, the Commission found that its presence

²⁷⁵ Sondra Roberto *The Boeing/ McDonnell Douglas Merger Review: A Serious Stretch of European Competition Powers* 24 Brook. J. Int’l L. 593.

²⁷⁶ It has been also commented that the Community’s jurisdiction *to prohibit* anticompetitive concentrations (which is almost impossible to be found to infringe International Law as interpreted by the EC) should be regarded separately from jurisdiction *to compel* notifications and fine firms that do not notify the merger. From this perspective, jurisdiction to compel notification infringes International Law in that it requires all firms that sell within the EC to notify the Commission and incur significant costs regardless of their market share and the anticompetitive potential of the transaction. This, however, would not be the case in *Boeing*, where an already dominant firm was involved. See Andre R. Fiebig *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestion for Reform* [1998] E.C.L.R. 323, 328.

²⁷⁷ Concern for the powers of the Commission in the application of regulation 4064 is widespread for fear of protectionist attitude. See Thomas P. O’Toole *The Long Arm of the Law - European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas* 11 Transnat’l Law. 203. 219-222.

in the aerospace industry affected a market whose peculiarity consists of the fact that manufacturers bid to conclude supply contracts. In this sense, it had been observed that both Airbus and Boeing had to bid lower prices to obtain a supply contract whenever they knew that MDC would present its offer as well, which of course meant lower prices for the supply. In the main, airlines reported that the influence of MDC was of “major” or “significant importance.”²⁷⁸

That the presence of more bidders increased price competition was confirmed by a specific study, which found that downward pressure on prices brought about by MDC’s bidding averaged 7%.²⁷⁹ Also, both agencies recognized that the aerospace industry is unlikely to be characterized by new entrants in the foreseeable future (as the fact that the only entrant of the past decades was Airbus, a publicly-sponsored consortium supported by four governments, indirectly confirms). Boeing recognized that there are “massive barriers to entry”, due to huge initial development and investment costs, safety regulations, sunk costs.²⁸⁰

One - if not the - most debated issue was the existence of exclusivity long term contracts between Boeing and the three biggest airlines of the world. Such contracts had actually been concluded before the proposed merger; since all parties to those deals were American companies, many suspected that the Commission exploited the merger to reach conduct that could have had article 86 relevance had not those deals been out of the scope of the implementation doctrine. As a matter of fact, much of the Commission’s final decision concerned Boeing’s individual dominance, based on its presence in all the segments of the aircraft market, its completely unchallenged presence in the top segment

²⁷⁸ “Although, as outlined above, the market share of MDC has been continuously declining, it appears that the impact of MDC on the conditions of competition in the market for large commercial aircraft was *higher than reflected by its market share* in 1996.” *Boeing*, § 58 (emphasis added).

²⁷⁹ *Id.*

²⁸⁰ *Id.*, § 49.

(that of the 747s), and the fact that almost two thirds of the fleet in service were Boeing aircraft (which implies a much higher chance of maintaining those customers).²⁸¹

Based on those criteria (especially as set forth in paragraphs 38-41, dealing with the importance of supplying “families” of aircraft and with the influence of the fleet in service over new purchases), the Commission found that Boeing’s dominance was bound to increase because by merging with MCD Boeing would have acquired a quasi-monopolistic share of the fleet in service, thereby in all likelihood securing itself a quasi-monopolistic hold of the growing future market.

This strengthening was found to be unacceptable, especially in the light of the fact that there appeared to be limits to new competitor’s ability to open inroads into Boeing’s market share in spite of lower prices and other contractual conditions. In other words, the nature of the aircraft market is such that airlines were highly inclined to maintain a loyal attitude to a given supplier. The Commission reasoned that the only competitor’s persistent difficulty in opening inroads in the biggest airlines’ fleets was bound to increase if Boeing could add to its dominance MDC’s strength on the market and the defense contracts that both companies had (which implies publicly funded research).

The Commission in fact acknowledged that MDC’s presence on the market, in spite of its positive effect on price competition, was bound to end soon and that it was becoming increasingly unlikely that any other firm would acquire it.²⁸² Yet, the potential for an anticompetitive concentration was found to rest on the fact that it was the dominant Boeing that was merging with MDC. Intellectual property, defense contracts, buying power added to their respective market share in the civil aircraft market. The Commission required *inter alia* that the two entities continue to exist as independent entities, that Boeing relinquish enforcement of the exclusivity deals and do not conclude similar

²⁸¹ *Id.*, §§ 36-52.

²⁸² *Id.*, §§ 58-60.

agreements for ten years, that it do not leverage MDC's market share to force replacement of existing MDC aircraft with Boeing's and that it do not leverage its buying power to keep suppliers to provide Airbus equipment and parts.²⁸³

Leaving aside the dispute of whether the Commission's conclusions were arbitrary, it should be noted that the decision considered both the airlines' need to have more bidders to keep price competition higher and Airbus' need to find suppliers for parts. Going back to the relation between the exertion of jurisdiction and the substantive application of the regulation, it appears that unlike US authorities "the Commission has evaluated effects on competition as encompassing effects on *both direct customers and competitors*".²⁸⁴ Unquestionably, this is considerably different from the cited US policy of protecting competition, not competitors. Even though the conclusion seems 'suspect', since the only competitor to be protected happened to be Airbus, it is reminded that *Boeing* was by no means unique in this (see the discussion under article 86 *supra*). Leaving charges of protectionism aside, it must be noted that the Commission's approach has ramifications on the scope of its jurisdiction: The broadening of the range of interests that need to be evaluated and safeguarded results in a "broader basis for jurisdiction or, conversely, a narrower scope for restraint".²⁸⁵

Before concluding it should be noted that only one month prior to the *Boeing* decision the Council had enacted a regulation partially amending the merger control regulation, effective on March 1998.²⁸⁶ The amendment concerned the broadening of the notion of concentrative joint venture and the redefinition Community dimension criterion. Neither amendment would have affected *Boeing* in any fashion. The

²⁸³ *Id.*, §§ 114-119.

²⁸⁴ Bavasso, *supra* note 269, 246 (emphasis added).

²⁸⁵ *Id.*

²⁸⁶ Regulation 1310/97, 1997 O.J. L 180, 1.

Commission's proposal (refused by the Council) aimed at allowing it to exert jurisdiction on virtually any transnational concentration regardless of turnover thresholds.

The Council however agreed to afford the Commission a broader jurisdictional basis. While the effects of the amendment largely affect the relationship between the Commission and the antitrust authorities of the single Member States (that is, the amendment regards more directly subsidiarity than extraterritoriality), it suggests that the Community is determined to aggressively bring transnational concentrations under its control to the greatest extent possible.²⁸⁷

In comparison with the original text of the regulation, the more active role of the Commission is also reflected by the formalization of the power to negotiate the conditions for the conclusion of the merger during the very first stage of the procedure (something that already happened in practice) and to declare the concentration compatible with the common market at the end of that first exam.²⁸⁸ Likewise, while the concentration is suspended until it is declared compatible,²⁸⁹ the Commission now has broader discretion in allowing waivers to the suspension (since the waiver does not have to depend on the detriment deriving from the suspension to the interested parties), which may well enhance the Commission's negotiating power.²⁹⁰

²⁸⁷ See Francesco Stella Attuali Tendenze della Normativa Comunitaria e Nazionale in Tema di Concorrenza (1997).

²⁸⁸ Regulation 4064/89, article 8.

²⁸⁹ Regulation 4064/89, article 7.

²⁹⁰ Regulation 4064/89 article 7 § 4.

CONCLUSIONS

In conclusion, it must be preliminarily confirmed that, as assumed, no discriminatory standards exist in the application of EC Competition Law. No one of the cases that have been examined contained language or reasoning suggesting that, albeit in some unspoken way, the EC willingly disfavors firms that are based outside the EC and possibly compete with EC undertakings. However, it cannot be omitted that not all commentators agree that this holds true in the *Boeing* case, which many regard as a clear example of protectionism of a “national champion”.

Of the first of the two main issues that were examined, the way the EC exerts jurisdiction with respect to extra-Communitarian entities, the peculiarities of the “European way” and the results this provides were discussed in chapter two. With particular regard to the application of EC law to US firms, the existence of the EC/US agreement was found to be a plus for legal entities of the two sides of the Atlantic. The aspect that appears to be unprecedented about the EC/US agreement is the possibility for private businesses to make strategic choices once they have been caught by enforcement agencies and evaluate whether it is preferable to consent to a limitation of their rights in the light of the chance to negotiate, at least to some extent, the legal consequences of the violation at issue.

It appears that, at least to some extent, transnational firms will be in a much more active position while dealing with the Commission. It is not surprising then that at the time of the *Boeing* case business newspapers were filled with reports concerning the ongoing negotiation between the Commission and Boeing officials. In spite of the outcome in that particular case, the indication is clear that for the future major transnational businesses may elect to discuss certain proposed transactions with the

Commission prior to their implementation. In practice, this will mainly concern mergers and acquisitions on account of the fact that merger statutes, unlike those prohibiting anticompetitive agreements or abuses of dominant position (monopolization and the like within the US), are ‘incipiency statutes’, focused as they are on events yet to happen.

As far as the case-oriented analysis that has been carried out is concerned, the conclusions are somewhat less obvious. To hold that non-EC firms are or will typically be treated in a certain way only because this has happened at least once in a given case would be arbitrary and in all likelihood plainly wrong. If the *raison d’être* of Competition Law is protecting the market, it cannot make a difference whether the firms that affect it are based within the EC or not.

All along chapter three there are references to the highly biased character of EC law. It is said to be characterized by clearly regulatory purposes that go well beyond the goal of policing the competitive conditions of a market. This of course does not concern transnational businesses only. Yet, the premises and the political will to grant the Commission specially intrusive powers are there and, particularly today that the Member States have national antitrust authorities, they hint at some kind of reshaping of the Commission’s role.

As explained in chapter three, often the Commission will in fact intervene in cases that have a particularly evident transnational character, as opposed to those whose anticompetitive consequences are more likely to be perceived within one Member State (or more than one, as long as it remains a “local” case). If anything at all can be said about the application of EC Competition Law to transnational businesses, it would be probably safe to note that the Commission has been showing more interest in them. This is likely to be due to the ever-increasing international commerce and to the fact that at least one of the most important (and peculiar) goals of EC-style antitrust is now an achievement rather than an objective: market integration.

The Commission's special attention to large transnational firms is confirmed by its willingness to entertain in-depth relationships with them. As noted under the relevant section, this was institutionalized in the case of the merger regulation, which currently covers the bulk of all the transatlantic relations that concern Competition Law.

Unquestionably, by doing so no discriminatorily special treatment was reserved to larger undertakings. At the same time, the fact that their size (and that of their turnover) matters, which it would be unreasonable to ignore, has been given proper acknowledgement.

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