INTERNATIONAL DIMENSIONS OF EC COMPETITION LAW

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FUNDAMENTALS OF EC COMPETITION DOCTRINE

Competition policy in the European Community [EC] is closely related to the proper functioning of the internal market. This market encompasses the 'four freedoms' enshrined in the original Treaty Establishing the European Economic Community [Treaty of Rome, 1957], namely, free movement of goods and free movement of persons, services and capital, including the right of establishment.

From the outset, the rules on competition have been crucial to achieving the removal of obstacles to union, although not all the original Member States were quite as enthusiastic to extend competition law beyond the coal and steel industries as was the German delegation to the 1955 Messina Conference.

The main statutory provisions of EC competition policy are Articles 85 and 86 EC Treaty on rules applying to undertakings, Article 90 on public authorities, Article 91 on dumping and Article 92 on state aid.[1] The various competition provisions have now remained virtually unaltered for more than 40 years, despite the changes wrought by the *Single European Act* 1996 and the Treaty on European Union [*Treaty of Maastricht* 1992], the exceptions being the addition of a new sub-clause in Article 92 covering the protection of "culture and heritage conservation" and a new clause in Article 3 effectively placing competition policy on the same level as industry policy [Art 3 (l)].

This immutability is perhaps not surprising, given the fact that the basic purpose of Article 85 and 86 was the establishment of a 'common market.' This basic purpose received judicial sanction when the ECC said:

> Community law looks at effect on trade between Member States in a broad and practical way, in the light of the overall aim of a common market. It is concerned with partitioning of national markets, the

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1 The provisions on competition in the EC Treaty were renumbered by virtue of Art 12 Treaty of Amsterdam, which entered into force on 1 May 1999. I have, however, continued to employ the original numbering in line with the policy of the ECJ; see Press Release No 74/98, 2/12/98.

> structure of competition across borders and the pattern of intra-Community trade. [2]

These provisions thus have a much more restricted purpose than most domestic competition laws in the various Member States. The difference is often explained as being 'conceptual,' and particularly in the United Kingdom and Denmark the 'public interest' aspect is quite significantly different. For example, the preamble to the Danish *Competition Act 1997* states: "This Act is passed in order to promote a resourceful society through effective and healthy competition", while section 1 reads: "The purpose of the Act is to promote effective social use of resources through active competition." The Danish legislation makes it quite clear that the rules on competition are subordinate to those of public authorities, especially local government authorities.[3]

However, as a consequence of the process of further market integration to convert the common market into an internal market, the need has arisen over time to address such issues as mergers.[4] This has been achieved through Commission policy, such as Council Regulations (CR) 4064/89 of 21 December 1989 on the control of concentrations (mergers) and the developing case law of the European Court of Justice [ECJ] and the Court of First Instance [CFI].

A number of other Council Regulations are particularly important in the context of application of Articles 85 and 86 EC Treaty. These include especially CR 17/62, the so-called Cartel Order, the intention of which is to "provide for balanced application of Arts. 85 and 86 in a uniform manner in the Member States," CR 1983/83 on exclusive distribution agreements and CR 1984/83 on exclusive purchasing agreements.

Intra-Community Distribution of Functions

The development of competition doctrine is, in fact, a shared responsibility. In every Member State, Community law takes precedence over domestic law, although the number of cases in which the relationship between European and national competition law is an issue suggests that the 'conceptual' differences are not insignificant.

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2 *Heathrow Airport Limited v Forte (U.K.) Limited and Others* [1998] ECC 357.

3 Italy, on the other hand, did not have any domestic competition legislation (except with regard to broadcasting, banking and publishing) until 14 October 1990, and instead applied EC law. See Amato, G. 1997, *Antitrust and the bounds of power. The dilemma of liberal democracy in the history of the market,* Hart Publishing Co., Oxford, 40, 42-43. There was, however, prewar legislation (Law No 834/32), which authorised the State to establish cartels.

4 An attempt to "control concentrations" was first made by the Commission in 1973. See Craig, P. & de Búrca, G. 1995, *EC Law. Text, Cases and Materials*, Clarendon Press, Oxford, 978-979.

The primacy of EC law was established in the two leading cases of *Van Gend en Loos*[5] and *Costa v ENEL*.[6] In the former case, the ECJ determined that Article 12 Treaty of Rome had direct effect, in other words, that individual EC citizens could seek to enforce its provisions in domestic courts. In reaching this conclusion, the ECJ overruled the objections of the three Member States, which had intervened in the case (Belgium, Germany and the Netherlands), holding that the Treaty of Rome was *sui generis*. The Court went a step further in the latter case, deciding that national law could not override Community law without challenging the very basis of the Community (the so-called concept of 'faithfulness to the Community' specified in Article 5, EC Treaty).[7]

As far as competition law specifically is concerned, the ECJ's position was clearly stated in the leading case *Wilhelm v Bundeskartellamt*:[8] where the court said: "this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels." In cases of conflict, the EC law prevails, although the Council has not yet seized the opportunity provided in Article 87 (2) (e) to establish the relationship between domestic laws of the Member States and the various Community regulations and directives.

The distribution of functions between the Community institutions and the courts of Member States is regulated, in part, by Articles 88 and 89 EC Treaty and, more directly, in CR 17/62 (as amended). If the Commission has not instituted formal proceedings, competition authorities in the Member States can apply Article 85 (1) and Article 86 EC Treaty in the same manner as domestic legislation. On the other hand, only the Commission can make decisions under Article 85 (3) EC Treaty,[9] either in individual cases or by way of block exemptions if there are overriding benefits in efficiency. There has long been opposition to this centralised authorisation process, for example, by the German Bundeskartellamt, and in a White Paper issued on 12 May 1999, the Commission itself recommended changes, because "companies have used this centralised authorisation system not only to get legal security

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5 Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

6 Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

7 See further Craig and de Búrca, 1995, *EC Law*, note 4 *supra* 151-165, 240-251. In a number of Member States there was long-running controversy over the application of EC law. In Italy, the Corte Costituzionale did not overcome its opposition until Decision No 170/84, *Granital SpA v Amministrazione della Finanze dello Stato*. The French Conseil d'État did not fall into line until 1989, in *Raoul Georges Nicolo* [1990] 1 CMLR 173.

8 Case 14/68, *Wilhelm v Bundeskartellamt* [1969] ECR 1.

9 Such decisions are, of course, subject to review by the ECJ. For a precise explanation of the distribution of functions, see European Commission DGIV, *Application of Articles 85-86 in the Member States* http://europa.eu.int/comm/dg04/lawenten/natintro/en/ints.htm (12/6/99). Exceptions are air services to third countries (CR 3975/87) and tramp shipping (CR 4056/86), in which cases exceptions can be authorised by national competition authorities.

but also to block private action before national courts and national competition authorities. This had undermined efforts to promote decentralised application of EC competition rules."[10]

The problem goes deeper than has been suggested by Commissioner Karel Van Miert's desire for "national courts, which are close to citizens and European firms, particularly small and medium-sized firms, to be able to play their full role."[11] As the German Bundeskartellamt makes clear, the "parallel application of EC Competition Law by the Commission and the competition authorities of the Member States gives rise to a range of legal and practical questions."[12] These include the need for a simultaneous declaration on possible authorisation and a decision on prohibition under Article 85 (1) EC Treaty, the enormous increase in workload as a result of the broad interpretation of the expression "between Member States" in Article 85 (1) EC Treaty and the time-consuming processes under CR 17/62, and the lack of transparency in the Commission's use of informal processes such as 'comfort letters.'[13]

It is, of course, in the interests of both the Commission and Member States to avoid parallel proceedings, which would lead not only to inefficiency but also to contradictory decisions. To this end, the Commission has issued Cooperation Notices covering relations with national courts (OJ [1993] C 39/6) and competition authorities in Member States (OJ [1997] C 313/3). In principle, cases which do not involve effects in more than one Member State and are not exempt under Article 85 (3) EC Treaty will be dealt with by national competition authorities – where these have been approved by relevant legislation.[14] Denmark and Ireland apply EC competition law by virtue of their domestic legislation, the former in line with the new Article 3 (b) based on the *Protocol on the Application of the Principles of Subsidiarity and Proportionality of the Treaty of Amsterdam.*[15] In the United Kingdom,

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10 Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No 99/027, OJ [1999] C 132/1. This has, for example, led the Irish Competition Authority to refuse to delay decisions where notification to the Commission was designed to delay domestic proceedings. See European Commission DGIV, *Application of Articles 85-86 in the Member States* http://europa.eu.int/comm/dg04/lawenten/natir/en/irp3.htm (22/6/99).

11 European Commission DGIV, *Application of Articles 85-86 in the Member States* http://europa.eu.int/comm/dg04/lawenten/natintro/en/int1.htm (11/6/99).

12 Bundeskartellamt, 'Praxis und Perspektiven der dezentralen Anwendung des EG-Wettbewerbsrechts,' Arbeitsunterlage für die Sitzung des Arbeitskreises Kartellrecht am 8. und 9. Oktober 1998, 1 June 1999 at 1.

13 *Id* at 1-2.

14 This is the situation in Belgium, France, Germany, Greece, the Netherlands, Portugal and Spain.

15 See Kenntner, M., 'Das Subsidiaritätsprotokoll des Amsterdamer Vertrags' (1998) 39 *NJW* 2871; Timmermans, Ch., 'Subsidiarity and Transparency' (1999) 22 *Fordham Int'l LJ* S106.

the Department of Trade and Industry can authorise the Office of Fair Trading to apply EC competition law in individual cases.[16]

The issue is, as the Assistant Director, Legal Division, Office of Fair Trading has pointed out, that there is a fundamental divergence of opinion between the United Kingdom and Italy on the one hand, and France and Germany on the other, concerning the desirability of a reduction in scope of Articles 85 and 86 EC Treaty and an increased role for domestic competition law as opposed to enabling national competition authorities to decide on application of Article 85, 3 EC Treaty.[17]

Extra-Community Legal Regime

To this intra-Community dimension, which by itself throws up enough jurisdictional and 'conceptual' problems, must now also increasingly be added a real international dimension.

It is crucial to any examination of the international dimension of EC competition law to understand the nature of the legal system, which has evolved in Europe since the Treaty of Rome because this explains how the Community can speak with a united voice on such matters as positive comity, mergers and convergence.

As already mentioned, the ECJ held in *Van Gend en Loos* that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields." [18] This concept has since been accepted by all new Member States. Leading decisions of the ECJ have led to an understanding of the fundamental principles of EC law as comprising the direct effect of Treaty provisions at the national level, supremacy of Community law over national law (*Costa v ENEL*) and the possibility of a claim in damages in the national courts as a remedy for a breach of EC law. In *Francovich* [19] the ECJ ordered the Italian Government to compensate the applicants for damages suffered as a consequence of its failure to implement Council Directive 80/987. This judgment effectively introduced a concept of Community remedy, a notion which it had earlier come close to developing - in effect if not intent - in *Factortame I*, when it held that the House of Lords "must disapply" a rule of English domestic law preventing it from granting interim relief.[20] These principles are complemented by the notion that the Community treaties not only govern the union of the Member States, but also "provide the basis for

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16 See Bundeskartellamt, note 4 *supra*, at 10-11.

17 Rostron, P. 'The implementation of EC competition law by national anti-trust authorities,' Paper delivered at the 15th International Anti-Trust Law Conference, Oxford, 26/9/96 http://www.oft.gov.uk/html/rsearch/sp-arch/sp-anti.htm

18 Note 5 *supra*, at 12.

19 Cases C 6/90 and C 9/90, *Frankovich and Bonifaci v Italy* [1991] ECR I-5357.

20 Case C 213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433. See also *R v Secretary of State for Transport, ex parte Factortame and Others* [1998] 3 CMLR 192, at 196-205 for the factual background to this long-running conflict.

an independent constitutional structure in the Community," to which can be added basic legal norms common to the judicial systems of the Member States.[21]

While there is a general understanding about the judicial system, which has evolved within the Community, even if there are still "paradoxical situations" [22] there remains a considerable divergence of opinion amongst the Community institutions and the Member States over the foreign relations powers. Part of the problem lies in the fact that Article 113, EC Treaty dealing with the "common commercial policy" which is at the heart of the Common Market, is quite vague. While agreements between the Community and other States or international organisations concerning the matters specified in Article 113, 1 EC Treaty, which include "measures to protect trade" do not require consultation with the European Parliament, agreements with budgetary implications or which would establish a "specific institutional framework," as was the case with the creation of the World Trade Organization [WTO], require parliamentary approval (Article 228 (3) EC Treaty). Since trade in services and protection of intellectual property were added to the matters covered in Article 113, EC Treaty by virtue of the Treaty of Amsterdam 1997, "the power to enter into international agreements in [these fields] has been transferred to the Community and forms part of the Community foreign trade policy powers".[23] Although such developments have occurred without the knowledge of Member States. There are nevertheless, those countries, such as the Netherlands, which would prefer a minimalist approach in these areas.

The practical effects of this common legal order can more clearly be seen in the application of Community competition policy in the international sphere.

Extraterritorial Enforcement

Ever since the passage of the *Sherman Anti-Trust Act 1890* (15 USC, Para 1-8) and the *Clayton Act 1914* (15 USC, Para 12-27), there has been widespread disapproval, including in EC Member States, of efforts by the United States (and, indeed, individual States of the United States) to not only extend their jurisdiction abroad, but also to seek to apply their laws to foreign companies and citizens.

Concerted opposition to the extraterritorial reach of the United States' competition law dates back to the decision by the US Atomic Energy Commission in 1964 to ban all foreign uranium purchases in favour of domestic miners. This action, legal under US domestic legislation, effectively

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21 Rodriguez Iglesias, G.C., 'Gedanken zum Entstehen einer Europäischen Rechtsordnung' (1999) 1 *NJW* 1 at 2. The author is President of the ECJ.

22 See Berge, J.S., 'Paradoxes et droit communautaire: Observations sur l'interaction des categories juridiques à partir de données récentes tirées des droits intellectuels et du droit de la concurrence' (1999) 1 *JDI* 85.

23 Bourgeois, J.H.J., 'External relations powers of the European Community' (1999) 22 *Fordham Int'l LJ* S148 at S154. The powers of the Community were, however, questioned by the ECJ in one of its decisions. See 1/94 [1995] 1 CMLR 205.

reduced the size of the global market by 70%. Additionally, the United States released uranium from its military stockpiles onto the market, further depressing prices. In 1972, uranium producers from a number of countries, including Australia, established a cartel to coordinate floor prices and quotas in an effort to stabilise world prices. Although the cartel's actions had no direct effect within the United States, where energy utilities were prohibited from sourcing their uranium from overseas, it did contribute to the steep rise in international uranium prices over the following three years. Westinghouse, which had entered into contracts to supply uranium to purchasers of its nuclear power stations in the future, badly miscalculated the market, with the result that in 1975 it faced 27 actions for breach of contract. Westinghouse, in turn, initiated private anti-trust proceedings against the cartel members, alleging that their action had harmed the United States' economy. [24]

Anti-trust law in the United States had undergone dramatic change by the time *Westinghouse* went to court. The turning point was *Alcoa*, in which Justice Learned Hand expounded the so-called 'effects doctrine'. He said:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States...On the other hand, it is settled law .. that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders... [25]

The actions complained of were intended to have an economic effect within the United States, and did in fact have such an effect.

The uranium companies from Australia, Canada, South Africa and the United Kingdom refused to appear before the United States' courts and their respective governments submitted *amicus curiae* briefs challenging jurisdiction. The US Court of Appeals, Seventh Circuit exercised jurisdiction and judgments were entered against the cartel members; eventually the matter was settled to prevent the seizure of assets in the United States and for other commercial reasons. [26] The triple damages remedies available to the person seeking to enforce the *Clayton Act*, the implications of class action procedures, civil juries, extensive discovery processes and unilateral cost

24 *Westinghouse Electric Corp v Rio Algom Ltd (In re Uranium Antitrust Litigation* 617 F.2d 1248 (7th Cir 1980). On this issue, see Pengilley, W., 'United States Trade and Antitrust Laws: A Study of International Legal Imperialism From Sherman to Helms Burton' (1998) 6 *Competition & Consumer LJ* 187 at 195-198. Action was also taken at State level, for example, in the Supreme Court of New Mexico. See *Id* at 214, n 59.

25 *United States v Aluminum Co of America* 148F 2d 416 (2nd Cir 1945) at 443. There had been a number of derogations from the *American Banana* principle in the intervening years, although no judgment had claimed jurisdiction where the anti-competitive action had occurred entirely outside the United States. See Sulcove, E., 'The Extraterritorial Reach of the Criminal Provisions of U.S. Antitrust Laws: the Impact of United States v Nippon Paper Industries' (1998) 19 (4) *U Pa J Int'l Econ L* 1067 at 1072-1073.

26 Pengilley, note 24 *supra* at 198-199.

awards, and the effect of contingency fees, [27] in general have a sobering effect on any foreign corporation subject to private action trust in the United States.

Around the time of the *Westinghouse* actions, the US Court of Appeals, Ninth Circuit had to adjudicate on the extraterritorial reach of anti-trust laws in *Timberlane*.[28] Choy J recognised that

> Despite its description as 'settled law,' *Alcoa*'s assertion has been roundly disputed by many foreign commentators as being in conflict with international law, comity, and good judgment. Nonetheless, American courts have firmly concluded that there is some extraterritorial jurisdiction under the Sherman Act.[29]

Despite the strong historical interest of the US Congress and the courts in claiming extraterritorial jurisdiction, Choy J noted that "at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."[30]

Choy J's finding was that three elements needed to be satisfied to sustain a case for the extraterritorial application of anti-trust legislation:

> A tripartite analysis seems to be indicated... the antitrust laws require in the first instance that there be *some* effect - actual or intended - on American foreign commerce... Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil violation of the antitrust laws... Third, ..whether the interests of, and links to, the United States ..are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.[31]

In 1979, the US District Court in *Dominicus*, while approving of the *Alcoa* effects test, held that that test was insufficient on its own because it failed "to take into account potential problems of international comity."[32] A basically similar approach was taken by the US Court of Appeals, Third Circuit the same year, although with an interesting and significant addendum. Weis J noted that

> When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.[33]

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[27] See Roach, K. and Trebilcock, M.J., 'Private Enforcement of Competition Laws' (1996) 34 (3) *Osgoode Hall LJ* 461; Pengilley, note 24 *supra* at 208-209.

[28] *Timberlane Lumber Co v Bank of America* 549 F.2d 597 (1976).

[29] *Id* at 610.

[30] *Id* at 609.

[31] *Id* at 613.

[32] *Dominicus Americana Bohio v Gulf & Western* 473 F.Supp 680 (1979) at 687.

[33] *Mannington Mills Inc v Congoleum Corporation* 599 F.2d 1287 (1979) at 1296.

There should, however, be a "weighing of competing interests," with a number of factors being taken into account in order to determine whether or not to exercise extraterritorial jurisdiction, including the degree of conflict with foreign law or policy, the possible effect upon foreign relations if the court exercised jurisdiction and granted relief, and whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances.[34]

These tests have not been universally accepted by United States' courts, with several Circuits expressly rejecting such an attempt to balance conflicting interests (the 'jurisdictional rule of reason' of *Timberlane I*).[35]

Largely as a consequence of the *Westinghouse* litigation, which was conducted at several levels in both the United States and Europe, and also because of United States' attempts to secure North Sea oil concessions and challenge shipping conferences,[36] several countries lodged diplomatic protests with the United States or enacted blocking and clawback legislation. Such legislation is designed either to prevent the application of foreign laws domestically or to counter the adverse effects of decisions of foreign courts.

Of particular concern to foreign governments was the discovery process of United States' grand juries, which was described by Viscount Dilhorne in *Re Westinghouse Uranium Contract* as a "fishing expedition."[37] In the *Westinghouse* proceedings against the Australian uranium producers, about 500,000 individual documents were sought.[38] The Australian Government enacted the *Foreign Proceedings (Prohibition of Certain Evidence) Act 1976*, *Foreign Anti-trust Judgments (Restriction of Enforcement) Act 1979* and *Foreign Proceedings (Excess of Jurisdiction) Act 1984*. Other countries which enacted similar blocking legislation included the United Kingdom, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Sweden, Canada, India, Mexico, New Zealand, the Philippines and South Africa.[39] This legislative vendetta was supplemented by a flurry of diplomatic

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34 *Id* at 1297-1298.

35 See Griffin, J.P., 'Extraterritoriality in U.S. and EU Antitrust Enforcement' (1999) 67 (1) *Antitrust LJ* 159 at 161. The best illustration of this divergent approach is *Laker Airways Ltd v Sabena, Belgian World Airlines* 731 F.2d 909 (DC Cir 1984). See also Roberson, E., 'Comity be Damned: the Use of Antisuit Injunctions Against the Courts of a Foreign Nation' (1998) 147 *U Pa L Rev* 409 at 422-424. There have been split decisions in some of the most important anti-trust cases before the US Supreme Court.

36 See Pengilley, note 24 *supra* at 192, 209. As Pengilley states, the real test applied by the United States is "simply whether or not the conduct does or does not serve the economic interest of the US" note 24 *supra* at 195. An earlier attempt to end shipping conferences by the United States in 1960 resulted in opposition from Canada, Denmark, France, Italy, Japan, the Netherlands, Norway, the Philippines, Sweden, the United Kingdom and West Germany.

37 [1978] AC 583 at 623.

38 Pengilley, note 24 *supra* at 208.

39 Individual Canadian provinces had enacted blocking legislation as far back as 1947, in an effort to escape United States' discovery procedures: *Business Records Protection Act, RSO 1990* (Ont); *Business Concerns Records Act, RSQ 1977* (Que).

activity, with Australia, Canada and the OECD all reaching agreements with the United States, which were designed to avoid conflicts over national interest (expressly in the case of the Australian agreement).

The British Government, in particular, took strong exception to the extraterritorial reach of courts in the United States and "the form of treble damage actions, which (it) regards as penal in nature" (*amicus curiae* brief in *Washington Public Power Supply System v Western Nuclear Inc* [1983] EEC 261), and enacted the *Protection of Trading Interests Act 1980* (UK), section of which makes clear that the "trading interests of the United Kingdom" cannot be dictated or influenced by "any overseas country" (although, of course, this is precisely what is happening within the European Community, where Council decisions on the "common commercial policy" require only a qualified majority - Article 113 (4), EC Treaty).[40]

As indicated above, the defendants in the *Westinghouse* actions eventually settled for commercial reasons, despite the efforts of the foreign national governments concerned to aid them. However, and probably due to the reaction of so many countries to the extraterritorial application of its anti-trust laws, as well as concern by the State Department, the United States Congress enacted the *Foreign Trade Antitrust Improvements Act 1982* (Pub.L. No. 97-290), which amended both the *Sherman Anti-Trust Act 1890* and the *Federal Trade Commission Act* (15 USC, Para 41-58) with regard to foreign trade and actions outside the United States. This legislation was followed in 1987 by the *Restatement (Third) of the Foreign Relations Law of the United States* (Para 403, 1988), which provided a list of eight matters - similar to those in *Timberlane I* - to be taken into account in determining jurisdiction (s 403).

For some time after *Hartford Fire*,[41] despite the fact that courts in different jurisdictions adopted varying stances on the issue of comity, there was on the whole recourse to the 'rule of reason,' or consideration of the interests of other States and the possible effect of extraterritorial jurisdiction on relations with the United States. However, the US Department of Justice and the Federal Trade Commission, the two bodies charged with administration of anti-trust legislation, still seemed intent on rigorous extraterritorial enforcement, despite continuing to negotiate bilateral cooperation agreements (with Germany) and issuing *Antitrust Enforcement Guidelines for International Operations* in April 1995, which restated the factors to be addressed in considering comity.

The *Guidelines* are, in fact, a blueprint for continuing activism. Para 3.1 states:

"with respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvements Act of 1982 ..applies to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce" (s

[40] The British Government had earlier enacted the *Shipping Contracts and Commercial Documents Act 1964* to thwart foreign discovery processes in specific sectors.

[41] *Hartford Fire Insurance Co v California* 509 US 764, 113 S. Ct. 2891 (1993).

3.1). The 'act of state' doctrine, under which export cartels (exempted under the *Webb-Pomerene Act 1918* 15 USC, Para 62-63) and export of services and goods (*Export Trading Company Act 1982* 15 USC, Para 4016) can be exempted from anti-trust legislation, is also expressly endorsed (s 3.3). With this backing, it is little wonder that courts in the United States appear to be veering towards rejecting comity as a basis for denying jurisdiction. On the contrary, the decision of the US Court of Appeals, First Circuit in *Nippon Paper*[42] raised the stakes when it reversed the District Court finding that "criminal antitrust prosecution could not be based on wholly extraterritorial conduct."[43] While recognising that a criminal prosecution for action which occurred solely in Japan was "largely uncharted terrain," the Court noted that the vertical restraint of trade with which Nippon Paper Industries was charged was illegal in both the United States and Japan and went on to find that the alleged conduct had "affected a not insignificant share (*actually* 6.1%) of the United States market" for fax paper. [44]

It must be noted, however, that it is not only in the field of competition law that the United States has resorted to extraterritorial enforcement of domestic legislation,[45] but also more generally in relation to trade (including investment and other financial transactions) by foreign countries with its 'enemies' under the *Trading With the Enemy Act, 1917* (50 USC, Para. 2), *Cuban Liberty and Democratic Solidarity Act (LIBERTAD) 1996* (or *Helms-Burton Act,* 22 USCA, Para 6021) and *Iran and Libya Sanctions Act 1996* (or *D'Amato Act,* 50 USCA, Para 1701).

During the Cold War, when it suited the United States' interests, NATO members and other countries (including Australia) were willing to align themselves with the United States in blocking 'sensitive' exports by third countries to the socialist States under COCOM.[46] Additionally, the economic blockade of Cuba and the attempt to expand the 'effects' doctrine have been opposed by both the Organization of American States and the European Community. The latter took a strong and united stance in CR 2271/96, which is intended to protect EC citizens, as well as companies incorporated in Member States, "against the effect of the extra-territorial application of

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

43 *Id.* In the District Court, Nippon Paper Industries was prosecuted under the *per se* rule, which "precludes consideration of either the effects of the restraint or the reasons for it." For a criticism of this approach, see Gluck A., 'Preserving Per Se' (1999) 108 (4) *Yale LJ* 913.

44 *Id* at 9.

45 Of course, the United States has not always been consistent in this regard. In the early 1970s, the US Government strenuously opposed Greek application of the passive personality principle to offences committed abroad affecting its citizens, but later adopted exactly the same principle in the *Comprehensive Crime Control Act, 1984* (18 USC, Para 1203) and *Omnibus Diplomatic Security and Anti-Terrorism Act, 1986* (Pub.L. No. 98-473, Para 1210).

46 Although there was a considerable relaxation of these controls as a result of the *Omnibus Trade and Competitiveness Act, 1988* (Pub.L. No. 100-418, Para 1107), they have not been lifted entirely.

legislation adopted by a third country." [47] Canada also amended its *Foreign Extraterritorial Measures Act*, RSC (1985) in 1996 to allow Canadian firms to counter-sue in domestic courts to recover damages awarded against them, [48] and Mexico followed suit. The *D'Amato Act* is another United States' legislative measure opposed by the European Community, which has extensive commercial ties with both Iran and Libya. Commission Regulation 2271/96 was extended to also protect EC citizens and companies investing or trading in those countries who have been adversely affected by decisions of the US courts. [49]

As already indicated, there are various approaches to the question of extraterritorial jurisdiction and, in general, few problems arise with respect to the territoriality or nationality principles, which are the accepted basis for competition jurisdiction in the United Kingdom, Canada and Japan. The Australian *Trade Practices Act 1974* (Cth) contains several provisions which are capable of extraterritorial application. The difference, however, lies in the lack of a capacity to enforce jurisdiction and the fact that s 5 (1) does not countenance the 'effects' doctrine.

As far as the European Community is concerned, Article 85 (1) and Article 86, EC Treaty prohibit agreements, concerted practices and abuse of dominant positions, which "may affect trade between Member States." This provision distinguishes EC competition law from the law which prevails in the individual Member States and which applies only domestically. These two Articles also apply to actions in countries outside the European Community, which are intended to, or do, effect competition within the EC, whether in a single Member State (if the abuse of a dominant position has consequences intra-EC trade) or more widely. Cartels, which have as their goal the isolation of the Community from other markets, will also fall under these provisions. It is of no consequence whether the undertakings concerned are based within or outside the EC.

The territorial scope of the competition law is regulated by Article 227, EC Treaty and extends to the Portuguese possessions of Madeira and the Azores, the Spanish possessions of Canary Isles, Ceuta and Melilla, and the French overseas departments of Guadeloupe, Guyana, Martinique, Reunion, St Pierre and Miguelon. It is important to note that EC competition law has, since 1 January 1994, also been complemented by equivalent measures in the *Agreement on the European Economic Area* [EEA]. The EEA includes Iceland, Liechtenstein and Norway and, under Article 46, EEA Agreement, the EFTA Court considers ECJ decisions authoritative in interpreting those provisions, which correspond with EC Treaty provisions (In this regard, Articles 53 and

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47 OJ [1996] L 309/39. See also Lowe, V., 'Helms-Burton and EC Regulation 2271/96' (1997) *CLJ* 248.

48 Ch 28, para 8.1, 1996 SC C-54 (Can).

49 Alexander, K.W., 'The Helms-Burton Act and the WTO Challenge: Making a Case for the United States Under the GATT National Security Exception' (1997) 11 (3) *Fla J Int'l L* 559 at 569-570.

54 EEA Agreement correspond with Articles 85 and 86 EC Treaty). There are also competition provisions in the agreements between the European Community and Switzerland (Article 23) and Israel (Article 12), which prohibit certain anti-competitive behaviour if it hinders trade between the contracting parties. The Europe Agreements concluded with the various CEEC's (Eastern European countries) also contain provisions relating to competition, which are, however, not effective. [50]

The principal doctrine applied by the ECJ in cases with an international dimension is that of 'group economic unit.' The Court first examines where the action complained of occurred, and then whether the undertaking is located within a Member State. In the case of an EC subsidiary of a parent company registered in a non-Community country, the presumption is that the two firms are one unit unless the domestic undertaking is autonomous in its decision making. This approach was endorsed by the ECJ in *Dyestuffs*, [51] in which it was held that

> When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, the prohibitions imposed by **Article 85 (1)** may be considered inapplicable in the relations between the subsidiary and the parent company, with which it then forms one economic unit. [52]

In this case the ECJ applied Community competition law on the territorial principle of jurisdiction, although Advocate General Mayras argued for the application of the 'effects' doctrine in cases where the effect within the Community was foreseeable, direct and substantial. A similar approach was followed by the Court a year later in *Europemballage Corporation & Continental Can Company Inc v Commission*, which involved proceedings for breach of Article 86 EC Treaty. 'It was held:

> Community law is applicable to such an acquisition [the US parent company instructed its subsidiary in Belgium to buy out a Dutch company] which affects the market conditions within the Community. The fact that Continental Can does not have a seat in the territory of one of the member-States does not suffice to remove it from the jurisdiction of Community law. [53]

The European Commission is not adverse to the application of the 'effects' doctrine if necessary to "catch the strategies of undertakings resident in non-Member States that are intended to avoid the establishment of commercial links with the Community and the undertakings resident there." [54] However,

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[50] European Commission DGIV, *Application of Articles 85-86 in the Member States* http://europa.eu.int/comm/dg04/lawenten/natintro/en/int1.htm (11/6/99).

[51] Case 48/69, *Imperial Chemical Industries Ltd v Commission* [1972] ECR 619.

[52] *Id* at 629.

[53] Case 6/72 [1973] ECR 215 at 222.

[54] European Commission DGIV, *Application of Articles 85-86 in the Member States* http://europe.eu.int/comm/dg04/lawenten/natintro/en/int3a.htm (11/6/99).

the ECJ has so far not formally based a decision on it, although in *Beguelin Import Co v G.L. Import Export SA* the Court advised the Tribunal de Commerce de Nice that the location outside the Community of a party to a contract was "irrelevant to the application of **Article 85 (1)** of the Treaty so long as the agreement produces *effects within the Common Market.*" [55] In fact, there is no requirement for the ECJ to rely on the 'effects' doctrine, as the scope of the territoriality principle is wide enough to cover most cases. In *Re Woodpulp* [56] therefore, although the Commission had applied the 'effects' doctrine, the ECJ held that the same conclusion could be reached using the territorial principle.

Positive Comity

The constant threat of an anti-trust suit and, since *Nippon Paper*, the real prospect of criminal proceedings,[57] not only in relation to actions which have an effect in the United States but also to those perceived to be harming United States' national interests (and not just its economic interests) in other parts of the world, is obviously not conducive to free trade.

Until comparatively recently, the US Congress, the Federal Trade Commission and even the courts hardly trade cognizance of foreign opposition to the extraterritorial reach of United States anti-trust laws. All that has now changed. There is growing recognition that the European Community is in many respects at least as powerful a trading bloc as the United States, and the EC response to the Boeing-McDonnell Douglas merger demonstrates that it has equal clout. This does not mean, however, that the Community will adopt the same approach as the United States in implementing its competition law. For a start, the *de minimis* doctrine means that only actions having a significant effect on competition or trade between Member States will fall under Article 85 (1), EC Treaty. It is also possible for anti-competition agreements to be exempted from the provisions of Article 85 (3) following analysis of their contribution "to improving the production or distribution of goods or to promoting technical or economic progress." No such possibilities exist in the United States.

One approach to which foreign governments have resorted in an effort to ameliorate the extraterritorial impact of enforcement of US anti-trust law has

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[55] Case 22/71 [1972] CMLR 81 at 90. In a case not concerned with competition but with Article 48 EC Treaty on the Free Movement of Workers, Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1975] 1 CMLR 320 the Court said "the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community" (at 333).

[56] Cases 89, 104, 114, 116-117, 125-129/85, *A. Ahlstrom Osakeyhtio and Others v Commission* [1988] 4 CMLR 901.

[57] As at late 1998, the Antitrust Division of the US Department of Justice had more than 30 grand juries examining suspected international cartel activity, a third of all its criminal investigations. See Melamed, A.D., 'An important step: a U.S./Japan bilateral antitrust cooperation agreement' paper presented to Japan Fair Trade Institute, 12 November 1998 http://www.usia.gov/topical/econ/6-com.htm (16/3/99).

been diplomatic negotiations. There has also been informal contact between competition authorities in many countries, in some instances going back over decades. The Canadian Competition Bureau, for example, has been exchanging information in competition matters with its United States' counterparts since 1959 under the so-called Fulton-Rogers Agreement. Cooperation has also occurred within the framework of the OECD and in 1967 'Recommendation of the Council Concerning Action Against Restrictive Business Practices Affecting International Trade' (OECD Doc C(78) 133/FINAL, 9/8/78) was adopted.[58] Earlier, procedural cooperation agreements were concluded between the United States and West Germany (1976, on Restrictive Business Practices), Australia (1982, on Cooperation on Antitrust Matters) and recently the European Community (1991, on Application of their Competition Laws). The United States also signed a Memorandum of Understanding with Canada (On Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, 1984).

The Enactment of the *International Antitrust Enforcement Assistance Act 1994* (15 USC Para 6201-6212) provided the impetus for the United States to expand and upgrade its bilateral agreements on competition matters. The first anti-trust mutual assistance agreement to be concluded under the new legislation was with Australia (28 April 1999). [59] This had been preceded by an agreement with Canada on 3 August 1995 under the previous regime replacing the earlier MOU (Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws). The United States subsequently moved to negotiate an assistance agreement with France.

The European Community appreciated the importance of improving relations with the United States when the New Transatlantic Agenda was adopted in December 1995. The intention was to move relations beyond consultation to joint action, including all aspects of world trade and also closer economic ties. The creation of the Transatlantic Business Dialogue was one measure adopted. Another was the Joint Action Plan, which required the two sides to "examine the options for deepening cooperation on competition matters, including the possibility of a further agreement."[60] All hope was dashed, however, by the enactment of the *Helms-Burton Act* and *D'Amato Act* in 1996, which seriously impacted on investment and trade by EC Member States in Cuba, Iran and Libya.

The European Community reaction to this renewed activism by the United States was to file a complaint with the WTO on the grounds that the *Helms-*

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58 This recommendation has been revised subsequently a number of times and is now termed 'Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade,' OECD Doc C(95)130/FINAL, 27-28/7/95.

59 Australia also has cooperation agreements with New Zealand and Taipei.

60 Van Miert, K., 'Transatlantic Relations and Competition Policy' speech to American Chamber of Commerce in Belgium, 26/11/96

http://europa.eu.int/comm/dg04/speech/six/en/sp96060.htm (12/6/99).

Burton Act (and, in particular, the secondary boycott provisions of Title III) was inconsistent with the obligations of the United States under the WTO Agreement.[61] On 20 February 1997, the WTO Dispute Settlement Body established a Panel under Annex 2, Article 6 comprising three members, ie Switzerland, Singapore and New Zealand to examine the complaint. On 11 April 1997, an agreement was reached between EC Trade Commissioner Sir Leon Brittan and US Under-Secretary of Commerce Stuart Eizenstat on a suspension of the proceedings of the Panel to allow President Clinton to negotiate with Congress on a suspension of Title IV (requiring exclusion from the United States if expropriated property was not divested). [62] Agreement was finally reached between the two sides in London on 10 May 1998. In return for a US undertaking not to impose sanctions, the European Community agreed to withdraw its complaint with the WTO.

The following month, an Agreement, *Application of Positive Comity Principles in the Enforcement of their Competition Laws* was concluded between the European Communities and the United States. [63] The new Agreement expands on the positive comity provisions in Article V of the more general 1991 Agreement, which remains in force (Article VI of the new Agreement), setting out more clearly the procedure to be followed. Traditionally, comity has referred to the willingness of a court or competition authority considering the extraterritorial enforcement of competition laws to balance the relevant interests of the foreign country (or countries). Positive comity expands this concept to include the possibility of the competition authorities in one country requesting their counterpart in another country to investigate and, if necessary, remedy anti-competitive actions in accordance with its own legislation. While there is no obligation to do so, the presumption is that the party making the request will suspend its own investigations. At the same time, a positive comity request does not have to be entertained by the party of whom it is requested. [64]

Unlike the 1991 Agreement, which contained a provision on enforcement activities involving mergers or acquisitions (Article II, 2 (c), the new Agreement does not deal with state aid or mergers, since existing merger legislation in both the EC and the United States does not permit a deferral of action. This is one of a number of provisions, which has been criticised by

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61 The US threatened to invoke the GATT national security exception in response. A suggested approach to dealing with such a situation is the development of 'institutional comity,' which would allow an objective assessment of national security claims. See Perez, A.F., 'WTO and U.N. Law: Institutional Comity in National Security' (1998) 23 *Yale J Int'l L* 301. Canada and Mexico also consider that it violates the NAFTA Agreement, *Id*.

62 The President was already empowered under s 306(c)(1)(b) of Title III to suspend the right of expropriated property owners to bring actions against foreigners in US courts. See Alexander, note 45 *supra* at 564-565.

63 OJ L 173, 18/6/98, p. 0028-0031. The Agreement was signed in Washington on 4 June 1998, having been signed in Brussels for the Council the previous day.

64 See Kiriazis, G., 'Positive Comity in EU/US Cooperation in Competition Matters' (1998) 3 *Competition Policy Newsletter* 11.

the International Chamber of Commerce (ICC). The ICC has questioned how the two Agreements can operate simultaneously in view of such an inconsistency. Another major concern is the need for transparency tempered with "the great importance that the business community places on the protection of its confidential information." [65]

There has been little formal use of these new arrangements so far, although the US Federal Trade Commission has lodged informal requests with both the European Commission (in connection with the long-running dispute between Marathon Oil Company and the Heimdal Consortium over exploitation of North Sea gas) [66] and with competition authorities in individual EC Member States.

For its part, the European Commission has also extended the range and scope of its agreements in the field of competition law. The early *Framework Agreement for Commercial and Economic Cooperation between the European Communities and Canada* (CR (EEC) 2300/76 of 20 September 1976) contained in Article II, (2) the provision that the Contracting parties would "use their best endeavours to discourage restrictions of competition." A new Agreement has now been negotiated in line with the objectives expressed in the EU/Canada Joint Action Plan. [67] Agreements have also been concluded, either bilaterally or on the basis of the OECD Recommendation, with Australia, Japan, Switzerland and Russia (this last designated Partnership and Co-operation Agreement). Other agreements exist with Moldova, the Republic of Cyprus and Kazakhstan. Provisions on consultation and positive comity have also been incorporated into the Europe Agreements between the European Communities and the CEEC's (Eastern European countries).

Mergers

At the time the Treaty of Rome was concluded, mergers were of little concern in Western Europe. The need for industry to recover from the ravages of war meant that any fusion was welcome, especially if it led to closer economic integration. Neither Article 85 nor Article 86 EC Treaty *specifically* address the issue of mergers, although beginning with *Continental Can,* the ECJ was obliged to bring the action within the framework of Article 86 EC Treaty, rejecting the argument that the proposed acquisition did not give rise to abuse by establishing a link to Article 3 (f) prohibiting the "distortion" of competition. [68] This was clearly an inadequate approach to dealing with the

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[65] 'ICC Comments on EU-US Positive Comity Agreement' (1997) *ICC Business World* [Doc No 225/467, 12/3/97] http://www.iccwbo.org/Cust/html (16/3/99).

[66] See 'Testimony of Marathon Oil Company Before the Antitrust, Business Rights, and Competition Subcommittee, Senate Judiciary Committee, 2/10/98' http://www.senate.gov/~judiciary/madison.htm (13/4/99).

[67] See 'Co-operation Agreements' [1998] 5 CMLR 138.

[68] Case 6/72 [1973] ECR 215 at 242-245.

growing problem of mergers, particularly horizontal mergers, and the Commission urged the Council to promulgate regulations to cover this area. [69]

Agreement in the Council was slow in coming due to differences over the division of responsibility between the Community and the Member States, over the nature of control and the issue whether non-competition factors should be taken into account.[70] However, the ECJ decision in *BAT*,[71] in which the Court found that acquisition of stock could be examined under Article 85 EC Treaty, and a fear of inconsistent decisions in merger cases, prompted all sides to reflect over the matter. The outcome was the promulgation of Council Regulation 4064/89 of 21 December 1989 on the Control of Concentration between Undertakings [Merger Regulation],[72] which applied to all industries except those covered by Articles 65 and 66 of the *Treaty Establishing the European Coal and Steel Community*, 1951. A separate Commission Regulation 2367/90 of 25 July 1990[73] was also adopted to regulate the procedures to be followed in merger cases.

The Merger Regulation follows a similar approach to that of the United States without, however, the same decentralised enforcement decision making which exists there. [74] A clear distinction is drawn between concentrations with a "Community dimension," which are dealt with by the Commission (more specifically, DGIV, Directorate B: Merger Task Force), with appeals from its decisions to the CFI, and less significant cases which can be handled by competition authorities in the Member States. Article 9 (included at the insistence of Germany), also allows the Commission to refer a matter with a 'Community dimension' to a national authority if the proposed concentration "threatens to create or to strengthen a dominant position" within a Member State, "which presents all the characteristics of a distinct market." The one possible exception is the position, under Article 21, 3, which allows Member States to take separate measures to protect their interests in such fields as public security and ownership of the press, subject to such measures being compatible with Community law.

All manner of acquisition strategies are covered, including mergers, takeovers, partial control of interest and some joint ventures (as defined in Article 3(2)). In accordance with Article 1 (2), proposed mergers fall under the Regulation if the undertakings concerned meet the following criteria: (a) a

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69 Some of the difficulties are discussed in Baches Opi, S., 'Merger control in the United States and European Union: how should the United States' experience influence the enforcement of the Council merger regulation?' (1997) 6 (2) *J of Transnational L & Policy* 223 at 236 n 70.

70 Craig and de Búrca, note 4 *supra* at 978.

71 Cases 142 and 156/84, *British and American Tobacco and R.J. Reynolds Inc v Commission* [1987] ECR 4487.

72 OJ [1990] L 257/14; OJ [1989] L395/1).

73 OJ [1990] L 219/5.

74 See Kovacic, W.E., 'Merger enforcement in transition: antitrust controls on acquisitions in emerging economies' (1998) 66 *U Cincinnati LR* 1075 at 1079.

combined worldwide turnover of more than ECU 5000 million, and (b) at least two of the undertakings have Community-wide turnovers of more than ECU 250 million each (unless each undertaking obtains more than two-thirds of its Community-wide turnover in a single Member State). Turnover is calculated on the basis of amounts derived from the sale of products and the provision of services to consumers in the Community (Article 5).

Notice must be given to the Commission of any proposed merger falling within the specified scope. The Commission must then determine within one month whether it will commence proceedings. The Commission then determines the relevant product and geographic market, looking at such matters as transport costs and import barriers, before examining the market structure and the impact the merger would have on competition. Market concentration is less a factor than a dominant position in the market. Other factors then assessed are barriers to entry and any efficiency gains to consumers, which would result from the merger. [75] As already suggested, this procedure closely matches that followed in the United States.

There is no requirement for a presence in the European Community, so that a proposed concentration between foreign undertakings will be judged on the basis whether worldwide and Community-wide turnovers exceed the levels specified in Article 1 (2). Although the Merger Regulation does not refer to extraterritorial enforcement of its provisions, the Commission has claimed jurisdiction in proposed mergers where none of the parties had interests within the Community. For example, on 24 April 1996, the Commission ruled against the proposed merger of the South African subsidiaries of the British firm Lonrho plc and the South African company Gencor Ltd on the ground that it would result in "collective dominant position" on the world market for platinum and rhodium. [76] Gencor appealed to the CFI against the Commission's ruling, alleging a lack of jurisdiction. The merger was taking place outside the European Community and had not been opposed by the South African Competition Board. The Court found that both Gencor and Lonrho met the sales thresholds specified in the Merger Regulation. The important factor was sales within the Community rather than production there. Further, the point of the legislation was to combat concentrations, which might distort the common market in a foreseeable, immediate and substantial manner. The appeal was therefore dismissed. [77]

A much more controversial case concerned the proposed merger between Boeing Corporation and McDonnell Douglas Corporation. On 1 July 1997, the US Federal Trade Commission approved the merger on the ground that it

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[75] See Snyder, D., 'Mergers and acquisitions in the European Community and the United States: a movement toward a uniform enforcement body?' (1997) 29 *Law & Policy in Int'l Bus* 115 at 124-132. Also, Baches Opi, 'Merger control in the United States and European Union' at 247-278.

[76] Case IV/M619, *Gencor/Lonrho*, 24/4/1996.

[77] CFI, Press Release No 21/99, 25 March 1999, Judgment of the Court of First Instance in Case T-102/96, *Gencor v Commission*. Normally, if a Commission ruling is accepted by the parties, a settlement is negotiated, usually involving divestiture.

would have little effect on competition or create a monopoly in either the commercial or military aircraft markets. The position of the companies was that, even if the merger had substantial anti-competitive costs, it "represented an opportunity to externalise costs." The argument runs as follows:

> There is an incentive for the United States to approve (such a) merger, even if it has substantial anticompetitive effects. The incentive stems from the ability to externalize the costs of the anticompetitive merger onto other nations, while internalizing many of the benefits. Normally, if all costs and benefits are considered, the DOJ or FTC would reject an anticompetitive merger if the merger would result in allocative inefficiencies that create losses for consumers. However, if most of the losses can be externalized onto consumers in other countries, while most of the gains can be internalized in the United States, then the merger might be approved in order to accomplish national welfare gains. [78]

Whatever the thinking behind the United States FTC decision, the European Commission initiated proceedings under the Merger Regulation, alleging that the exclusive supply contracts that Boeing had signed with three US airlines (the first a month before the merger was announced) strengthened the firm's dominant position in the global market for wide-bodied commercial aircraft. The Commission prevailed, forcing Boeing to enter into a settlement, which involved an agreement to:

1) refrain from entering exclusive supply contracts until 2007, and not enforce the exclusivity rights in its existing contracts with three U.S. airlines.
2) (not relevant for our purposes)
3) maintain DAC, the commercial aircraft manufacturing unit of McDonnell Douglas, as a separate legal entity for a period of ten years.
4) refrain from using its dominant position to abuse relationships with customers and suppliers. [79]

Having achieved the desired undertakings, the Commission approved the merger on 23 July 1997. The extraterritorial enforcement stance of the European Community was severely criticised in the United States, but the Commission made it clear that it had taken comity into account in reaching its decision. In the light of concerns expressed by the United States Government, it had limited its proceedings to the "civil side of the operation..(and had not) pursued further the concerns it expressed in its Statement of Objections concerning the effect of the concentration on the international market for fighter aircraft." [80]

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[78] Snyder, note 75 *supra* at 137.

[79] 'The Boeing/McDonnell Douglas merger review: a serious stretch of European competition power' (1998) 24 (2) *Brook J Int'l L* 593 at 599.

[80] Cited in Griffin, note 35 *supra* at 179.

In January 1996, Commissioner Van Miert had issued a Green Paper containing proposed changes to the regulatory framework for concentrations, following discussions with the Member States, companies and industry associations. Major matters for consideration were a reduction in the turnover threshold levels and inclusion of cooperative joint ventures in the Merger Regulation. The Green Paper noted that national systems of merger control were very divergent. Three countries (Denmark, Finland and Luxembourg) had no domestic legislation on mergers, and the Dutch law had not yet entered into force. Notification was not obligatory in France, Spain and the United Kingdom. In only two countries (Austria and Sweden) was the final decision made by a judicial body. Turnover thresholds varied widely, as did process times. A unified approach in accordance with the principle of subsidiary would result in greater efficiency and legal certainty. [81]

The resulting amendments to the Merger Regulation were adopted by the Council in June 1997 and entered into force on 1 March 1998.[82] As anticipated, the scope of the Merger Regulation was extended to include full-function joint ventures with a 'Community dimension,' and already a number of telecommunications sector cases have been examined by the Commission. [83] Several procedural changes were also included to avoid multiple notifications and improve the process of notifying the Commission. Although these changes are, they are unlikely to silence the growing call - from the German Bundeskartellamt, now supported by other Member States - for an independent European Cartel Authority. [84]

Convergence

From the exposition above, it is clear that despite broadly similar competition objectives around the world, there are considerable differences in legislation, judicial interpretation and enforcement. However, the globalisation of trade makes it imperative to ensure that fair and effective competition rules apply at the international level. Issues of jurisdiction and state sovereignty also need to be addressed if further conflict is to be avoided. One possible approach, which has widespread support, is the development of multinational rules. This issue was originally addressed in Article 46 of the *Charter for the International Trade Organisation* 1948 [Havana Charter], but never came to fruition. More recently, the OECD, UNCTAD, APEC and the WTO have all been involved in examination of this matter, conceding although, that progress towards a global harmonisation of rules will take some time.

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81 http://europa.eu.int/en/record/green/gp005enp.html (15/6/99).

82 *Merger Control (Procedure) Regulation 1998* [1998] 4 CMLR 542.

83 See Denness, J., 'Application of the new Article 2(4) of the Merger Regulation - a review of the first ten cases' (1998) 3 *Competition Policy Newsletter* 30.

84 The chances of this happening are not favourable in light of the attitude of the Commission to the establishment of a European Competition Agency. See Commissioner Van Miert's reply to a question by Amedeo Amadeo MEP in the European Parliament on 4 June 1997 in [1998] 4 CMLR 477 at 496.

It is far from clear, however, whether agreement can be reached on a range of rules, such as the so-called *Munich Code*, which could be enforced through an international dispute settlement procedure. One of the problems, even with regard to existing cooperative arrangements, as repeatedly mentioned in public fora by officials from the UK Office of Fair Trading, is the concern of business about possible disclosure of commercially confidential information to other competition authorities. The Confederation of British Industry argues that "there is a risk that information provided to European authorities and disclosed to the United States agencies will be misunderstood, misinterpreted or put to inappropriate or improper use." [85] This problem would only be exacerbated by globalisation of competition enforcement, unless satisfactory procedural safeguards could be agreed.

A further problem associated with any potential 'world competition code' proposal is that the motives of its supporters can be questioned. This is precisely what occurred in relation to the US Green Paper on Internet Governance, released by the Department of Commerce on 20 February 1998, which the European Community saw as seeking to "consolidate permanent US jurisdiction over the Internet as a whole" (including dispute resolution and use of trademarks). [86]

The view from Europe, in the words of Commissioner van Miert, is that the "problem is not, as suggested by some business representatives, whether to work on further convergence before entering closer cooperation agreements, but how to adjust the degree of cooperation to the existing level of convergence." [87] This is why bilateral agreements between countries taking a common view of policy and sharing a commitment to enforcement, as well as possessing similar business cultures, such as that between Australia and New Zealand (ANZCERTA) and the Canada-Chile Free Trade Agreement, are so successful. In both cases, anti-dumping laws have been replaced by normal competition provisions.

However, the European Commission also appears to believe that "an international framework of competition rules needs to be established as a complement to trade liberalization." [88] This thinking was behind its proposal on 18 June 1996 that the WTO create a working group to examine the connection between trade and competition policy (subsequently established as the Working Group on Trade and Competition).

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[85] Bridgeman, J.S., 'International Co-operation on Competition Law-policy' paper delivered at the Global Forum for Competition and Trade, New Delhi, 18 March 1997 http://www.oft.gov.uk/html/rsearch/sp-arch/sp-india.htm (13/4/99).

[86] 'European Commission proposes a Draft Reply of the EU and its Member States to the US Green Paper on Internet Governance', Brussels, DN: IP/98/184, 25/2/98 http://www.ispo.cec.be/eif/dns/ip98184.html (31/5/99).

[87] Van Miert, K., 'Transatlantic Relations and Competition Policy.' Note 86 *supra*

[88] Van Miert, K., 'Globalization of competition: the need for global governance' paper delivered at Vrije Universiteit Brussel, 25 March 1998 http://europa.eu.int/comm/dg04/speech/eight/en/sp98052.htm (14/3/99).

CONCLUSION

An examination of EC competition policy in its international dimensions reveals the importance of having bilateral agreements with the European Community, as well as with the competition authorities in the various Member States because enforcement of the Treaty provisions takes place at both levels.

The Community rules on mergers and joint ventures probably is the area of the greatest potential concern for foreign countries since the Commission and CFI have made it quite clear that they are prepared to enforce the Merger Regulation extraterritorially when there is a Community dimension to the proposed merger. This approach is, of course, tempered by a willingness to entertain a positive comity request.

Finally, one other aspect of EC competition policy with possible implications for foreign firms, is the concept of 'single economic entity,' which allows the Commission to consider subsidiaries of a parent company registered outside the Community as one unit for the purposes of proceedings under Articles 85 and 86, EC Treaty.