

# BUSINESS LAW TODAY

## The Increasing Importance of EU Competition Law for U.S. Companies

By [Andre Fiebig](#)

The United States has traditionally been considered the world's antitrust policeman. The U.S. antitrust authorities have frequently applied the U.S. Sherman Act to foreign conduct that restrains competition in the United States. This extraterritorial reach of U.S. antitrust laws has for a long time been met with the approval of the U.S. courts. Moreover, due to the liberal pleading rules, treble damages, contingency fees, and extremely low risk of having to pay the winner's legal fees, foreign parties have tended to bring their claims in the United States even though the countries where they are located and where they suffered the injury have adopted competition laws prohibiting such conduct. However, things are changing significantly in the international antitrust world. U.S. courts are increasingly refusing to entertain claims brought by foreign plaintiffs for harm incurred overseas. Even claims brought by U.S. companies for injuries suffered by their foreign subsidiaries related to violations of U.S. antitrust law are being rejected. See, e.g., *Motorola Mobility v. AU Optronics*, 775 F.3d 816 (7th Cir. 2014). At the same time that the U.S. courts are narrowing extraterritorial jurisdiction in antitrust cases, foreign jurisdictions—in particular the European Union (EU)—are expanding their enforcement efforts. The effect of this will likely be more competi-

tion law litigation in multiple jurisdictions involving the same anticompetitive conduct.

### Hostility to U.S. Effects Test

Initially, the application of U.S. antitrust law was thought to be limited to the territory of the United States. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). This was based on the notion of strict territoriality in international law: a state's jurisdiction was limited to events occurring within its borders. By 1945, however, things had changed. The United States and its allies had won the war and the United States clearly emerged as the world's economic leader. Strict territoriality was no longer appropriate in the antitrust world because anticompetitive conduct and the negative effects of such conduct could occur in two different territories. Two European competitors could fix the prices for their products sold in the United States without a physical presence in the United States.

Judge Learned Hand solved this problem by proclaiming: "It is settled case 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 which the state reprehends." *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (*Alcoa*). This departure from strict territori-

ality (which came to be known as the effects test) created hostility in Europe—particularly in those jurisdictions that were not entirely convinced on competition law. The main argument raised by the Europeans was that the extraterritorial application of U.S. law was an affront to their sovereignty. The hostility resulted in blocking statutes preventing U.S. discovery of evidence located in Europe and refusal to recognize judgments of U.S. courts in antitrust cases.

### Constructive Territoriality

Things changed for the Europeans, however, once they got serious about the enforcement of their competition laws. In the 1972 case *ICI v. Commission*, 1972 E.C.R. 619, the European Court of Justice (ECJ) was faced with the same basic dilemma addressed by Learned Hand in *Alcoa*: how to apply domestic law to conduct occurring outside the EU (then the EEC) without violating the territoriality principle at the core of public international law. The ECJ also had to contend with years of criticism of the United States from Europeans for allegedly ignoring the territorial restraints that public international law imposes on the exercise of jurisdiction to conduct occurring outside their borders. The ECJ solved the dilemma by introducing the single economic entity test: European competition law could be applied to foreign

conduct consistently with the territoriality principle by treating the foreign companies and their European affiliates as a single economic entity. The presence of the affiliate in the EU was considered to be consistent with the territoriality principle even though the affiliate was not involved in the anticompetitive conduct. This theory was convenient for two reasons. First, it allowed the Europeans to defend themselves against claims of hypocrisy after years of criticism of the United States for applying its laws extraterritorially. Second, it allowed the EEC to address foreign conduct violating the European competition laws while at the same time continuing to be able to claim adherence to public international law.

### Introduction of the Implementation Test

By the late 1980s, the expansion of the EEC combined with globalization placed the Europeans in a similar position as the United States at the time of the introduction of the effects test by Judge Hand in *Alcoa*. The Europeans had gotten serious about the enforcement of competition law and their economies had grown considerably. The shortcoming of the single economic entity test was that it required the physical presence on the EU of at least one affiliate of the perpetrating firms. Globalization meant, however, that firms no longer needed a physical presence in each of the jurisdictions in which they were located. This meant that a company engaging in anticompetitive conduct in global markets were not physically present in those markets and had no subsidiaries or affiliates that were present in those markets. The Europeans needed a new theory to legitimize the extraterritorial application of their competition laws. The ECJ delivered this in *Åhlström Osukeyhtiö v. Commission*, 1988 E.C.R. 5193 (often referred to as the “Woodpulp” case). The problem for the ECJ in *Woodpulp* was, however, that after decades of criticism of the U.S. effects test, it needed to avoid simply adopting Judge Hand’s effects test. So in an exercise of pure semantics the ECJ introduced what it calls the “implementation test”: the European Commission and courts may apply EU competition rules to conduct occurring outside the EU if the anticompetitive conduct is

“implemented” in the EU. Despite the difference in nomenclature, the circumstances in which anticompetitive conduct is considered to be “implemented” in the EU are essentially the same as the circumstances giving rise to an effect under the U.S. effects test: where are the products or services sold? *InnoLux Corp. v. Commission*, ECLI:EU:C:2015:451 at ¶73; *LG Electronics, Inc. v. Commission*, ECLI:EU:T:2015:609 at ¶146.

### Judicial Restraint

Ironically, since *Woodpulp*, the ECJ has recognized fewer constraints on the extraterritorial application of EU competition law than the U.S. courts have placed on the extraterritorial application of the Sherman Act. Judicial comity, a doctrine according to which courts unilaterally restrict the exercise of their jurisdiction in deference to another jurisdiction based on respect for the sovereignty of the other state, is frequently considered by U.S. courts. According to the Supreme Court, the extraterritorial application of U.S. antitrust law “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.” *Hoffmann-LaRoche v. Empagran*, 542 U.S. 155, 165 (2004). In the EU, by contrast, judicial comity does not play much of a role in competition cases. If the conduct violates the EU competition laws, jurisdiction will be exercised without consideration of the interests of other countries.

Equally ironic is that U.S. jurisprudence gives greater credence to compliance with public international law in antitrust cases than does EU jurisprudence. In the United States, the effects test and the limitations imposed by the Foreign Trade Antitrust Improvements Act are examined *in addition to* the elements of a Sherman Act violation. In other words, even if the anticompetitive conduct may have a negative effect on interstate commerce, a U.S. court will go one step further and examine whether jurisdiction is proper. In the EU, the public international law limitations of jurisdiction tend to be subsumed by the EU courts in the substantive analysis of the offense without an additional analysis. *Industries chimiques du fluor v. Comm’n*, ECLI:EU:T:2013:322

at ¶216. In *InnoLux Corp. v. Commission*, ECLI:EU:C:2015:451 at ¶72 for example, the ECJ seemed to state that *Woodpulp* merely requires that the requirements of a violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) are fulfilled in order to give the commission jurisdiction:

[I]t is apparent from the case-law of the Court of Justice that when undertakings which are established outside the EEA, but which produce goods that are sold within the EEA to third parties, collude on the prices they charge to their customers in the EEA and put that collusion into effect by selling at prices which are actually coordinated, they are taking part in collusion which has the object and effect of restricting competition within the internal market within the meaning of Article 101 TFEU and which the Commission has territorial jurisdiction to proceed against.

Even in merger cases, the European Commission and the EU courts tend to assume that if the thresholds for filing a merger notification are fulfilled, the “concentration” has a sufficient effect in the EU to justify the application of the EU merger control regulation. *Gencor v. Comm’n*, 1999 E.C.R. II-759. In EU law as interpreted by the ECJ, international law does not require an additional test to be applied. Many non-EU transactions to which the EU Merger Control Regulation applies have no effect in the EU. See, e.g., Case M.2133, *Hicks/Bear Stearns/Johns Manville*, Sept. 25, 2000; Case M.1951, *BT/Japan Telecom/Vodafone*, Sept. 1, 2000; Case M.1926, *Tyco/Telefonica/JV*, Aug. 11, 2000. In *Inchape/Gestetner Holdings*, two companies proposed establishing a joint venture in Asia to sell and service office equipment to Asian customers. As the transaction constituted a concentration with an EU dimension, it had to be notified to the European Commission under the EU Merger Control Regulation. In its assessment of the proposed joint venture, the commission concluded: “Indeed, since the joint venture will only operate in the

Far East and the Pacific, the regional nature of the geographic markets involved in this matter eliminates any impact on competition in the European Union.” Case M.583, *Inchape/Gestetner Holdings*, June 1, 1995 at ¶16. One wonders whether the parties would have been sanctioned for not notifying the joint venture based on the argument that it has no effect in the EU and is not being implemented there.

### Contraction of U.S. Extraterritorial Jurisdiction

As the Europeans have been expanding their extraterritorial jurisdiction, the U.S. courts have been on a contraction course. The liberal pleading rules, broad discovery, treble damages, contingency fees, and class actions have made the United States the Mecca for private antitrust cases. In *Hoffmann-LaRoche v. Empagran*, 542 U.S. 155, 165 (2004), for example, foreign purchasers of cartelized products acquired outside the United States from foreign sellers brought their claims in the United States and not in the country where the injury was suffered.

U.S. courts are increasingly refusing to hear cases based on foreign conduct which several decades ago they would have entertained. *Motorola Mobility v. AU Optronics* is a recent example of this contraction. In that case, a foreign subsidiary of Motorola Mobility acquired LCD screens which it assembled into Motorola mobile phones sold into the United States. The Seventh Circuit held that the U.S. Sherman Act was not applicable to foreign LCD screen manufacturers who had conspired to fix the prices of those LCD screens. According to Judge Posner, author of the opinion: “No longer is the United States the world’s competition policeman.” *Motorola Mobility v. AU Optronics*, 775 F.3d 816, 826 (7th Cir. 2014).

### Implications of Expanded EU Extraterritorial Jurisdiction

The expansive extraterritorial application of EU competition law together with contracting U.S. extraterritorial jurisdiction will facilitate increased private litigation in Europe commensurate with the objectives of the European Commission. As of December 27,

2016, the new EU Damages Directive requires all EU member states to “ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.” Directive 2014/104/EU, 2014 O.J. (L 349) 1.

This legislative development is not as insignificant as it may first appear to a U.S. observer. Consumers and companies injured by violations of EU competition law have generally not been able to bring a private claim in Europe for the injuries they suffered as a result of the anticompetitive conduct. In those member states where such private claims were theoretically possible, plaintiffs experienced significant hurdles. Consequently, private competition law claims were virtually nonexistent. The dominant view was that competition law is a public law which should be enforced by the public enforcement agencies. The Damages Directive is designed to promote more private cases to supplement the enforcement efforts of the European Commission and the national competition authorities.

In addition, the European Commission has issued a recommendation to the EU member states encouraging them to do more to facilitate collective actions. Although collective actions as envisaged by the recommendation can be roughly compared to U.S. class actions, they differ in several critical aspects. Out of fear of facilitating the perceived abuses associated with U.S.-style class actions, the Commission recommendation requires that each class member affirmatively opt-into the class in order to be bound by the result. Moreover, the recommendation prohibits contingency fees and the injured parties are limited to compensatory damages. Unfortunately these attributes of U.S.-style class actions which facilitate their abuse are the preconditions for the achievement of the public objectives which class actions were designed to achieve. Consequently, collective actions in the EU are moving toward a system in which third parties (claim aggregators) acquire the rights of several parties to bring a lawsuit. Although these claim aggregation agents are encountering resistance in Europe, once they break

through, the European cases that the U.S. courts are increasingly reluctant to hear will be brought in the EU.

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### ADDITIONAL RESOURCES

For other materials related to this topic, please refer to the following.

#### ABA Web Store

##### EU Business Law

To help you gain a unique and comprehensive understanding of European Union business law issues from both an analytical and practical perspective ranging from the free movement principles to electronic commerce and consumer protection. Practice areas covered include commercial, transactional, intellectual property, data privacy, compliance, antitrust, and more. A useful reference for lawyers, academics, and students whether experienced or new to EU law.

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#### Business Law Section Program Library

##### Antitrust Issues in the Internet Age (PDF) (Audio)

Presented by: Antitrust Law, Cyberspace Law, Corporate Compliance

Location: 2015 Annual Meeting

##### FTAIA Litigation and Effects on Future Competition Enforcement (PDF) (Audio)

Presented by: White-Collar Crime, Antitrust Law

Location: 2014 Annual Meeting