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EXTRATERRITORIAL APPLICATION OF COMPETITION LAW: DIFFERENT ANGLES – SAME CONCLUSION

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Abstract

Different interests of countries, economic implications, consolidation between international trade and competition and the sovereign rights of countries brought a complex issue. Therefore, an odd situation for competition law have arisen – how can different competition laws of different countries protect their local markets from anticompetitive harm which is caused by the conduct of foreign companies, while the conduct of their large businesses (national champions) abroad can bring substantial welfare and development for their local economies. The examples of extraterritorial application of competition law, measures taken and propositions on how to address this dilemma will be considered in this article.

Key words

Extraterritorial competition law, application to foreign conducts, U.S. Antitrust law; EU Competition law, sovereign rights, economy; trade barriers; development;

I. Introduction

The recent and one of the largest mergers of all time - AT&T’s deal to buy T-Mobile USA for $39 billion from Deutsche Telekom, again brings concerns in competition law towards the impact of such mergers not only to country’s local market, but also the impact to other, rather distant economies and consumer welfare. Globalisation, huge increase in international trade and evolvement of large, multinational corporations brought substantive international competition issues and questions of extraterritorial application of competition provisions where no clear answers could be found. The main problem of extraterritorial application of competition law is the clash of different interests of countries and businesses of different nationalities. Thus such contradiction of various interests also brings the broader question – has the world economy reached a point where the global welfare is more important than national interests of countries? However, it can be argued that large multinational companies have not and will not, in the near future, adhere to principles of social responsibility. Thereby, an odd situation for competition law have arisen – how can different competition laws of different countries protect their local markets from anticompetitive harm which is caused by the conduct of foreign companies, while the conduct of their large businesses (national champions) abroad can bring substantial welfare and development for their local economies. Is it a game with no winners? The answer would depend on the prize which is pursed – national interests and strong local economy or global protection of competition and global consumer welfare. The examples of extraterritorial application of competition law, measures taken and propositions on how to address this dilemma will be considered thereinafter.

II. The Game theory

Before considering the examples of extraterritorial application of competition laws, the theoretical analysis of such dilemma could be a starting point which could explain the problem more clearly. As it was mentioned, the substantial problem and the dilemma of extraterritorial application of competition law is that there are theoretically two players – the country which wants to apply its competition law to the conduct of foreign companies because such conduct causes harm to countries economy and; the other player – a company or a country of which such company is originated. The objective of the second player is the development of local strong economy which could be achieved trough strong industry and accordingly – financially strong companies.

This is a clear example of the famous Game theory which argues that player's success in making choices depends on the choices of other players. The basic solution concept in this situation could be the "Nash equilibrium", which has become the central solution concept in game theory[1]. "Nash equilibrium" suggests that the best solution of such game involving two or more players, is that each player is assumed to know the equilibrium strategies of the other players, and no player has anything to gain by changing only his own strategy unilaterally.

Therefore, in extraterritorial application of competition law, such equilibrium (the best possible solution for both countries) could be presented by a simple example – EU and U.S. are in the "Nash equilibrium" if EU is making the best decision it can, taking into account U.S. decision (after considerable opposition, approving the merger of Boeing/McDonnell Douglas), and U.S is making the best decision it can, taking into account EU decision (exchange of information in Microsoft case in 1993 – 1994). However, "Nash equilibrium" does not necessarily mean the best cumulative payoff for all the players involved; in many cases all the players might improve their payoffs if they could somehow agree on strategies different from the "Nash

[1] Algorithmic game theory. Noam Nisan. 2007. p. 18;

equilibrium" (e.g., regional competition agreement or multinational competition agreement).

Consequently, having defined the problem and observed the probable solutions in theory, the recourse to practical extraterritorial application of competition law now can be done. It will be observed that practical examples do not conform to the "Nash equilibrium" or the best possible solution for countries. Concurrent decisions of different competition authorities, the wide-ranging application of U.S. antitrust law to other jurisdictions and blocking statutes enacted by other countries[2] would illustrate that the basic solution concept mentioned above is yet not possible because of lack of agreements and consensus among different countries which could be advantageous for distant markets.

III. Extraterritorial application of EU competition law

One of the largest and strongest economies in the world, the EU market, is often influenced by the conducts of undertakings made abroad. Provisions of EU competition law do not explicitly state that EU's competition provisions would apply to conducts made abroad. However, as EU is the major player in an increasingly globalised world economy, competition policy must also adopt a global outlook[3]. EU's competition law has been and is applied more and more often in recent years, especially in merger and acquisition cases. There are clear examples that EU commission has sought to punish all types of anticompetitive situations, regardless of the

[2] Extraterritoriality, Institutions, and Convergence in International Competition Policy. William E. Kovacic.. Annual Meeting of the American Society of International Law in Washington, D.C., 2003;
[3] The European Commission's 2008 Report on Competition Policy, para 164;

nationality or the place of incorporation of the firm(s) concerned[4].

The *implementation doctrine*

One of the first cases in EU which comprises the case law on extraterritorial application of EU competition law was the *Wood Pulp* case[5]. Forty-one non EU (EC) producers of bleached sulfate wood pulp, Finish and U.S. trade associations had engaged in concerted practices to fix the price of wood pulp. The EU commission, after establishing that such practice violated the Article 85 (1) of the EEC Treaty (Article 101 of TFEU), had approached this issue with the *effects doctrine* and stated that the effects of the agreements and practices on prices announced and/or charged to customers within the EEC was not only substantial but intended, and was the primary and direct result of the agreements and practices[6]. However, the Court of Justice of European communities (now ECJ) based it's reasoning on the *implementation doctrine*. Pursuant to this doctrine, which is based on the territoriality principle, agreements and practices infringe Articles 101 and 101(2) of TFEU notwithstanding their geographic origin and the decisive aspect is whether they are *implemented* within the EU and trade between Member States is affected. The Court argued that:

"it should be observed that an infringement of Article [81], such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had

[4] International and Comparative Competition Law. Maher M. Dabbah. 2010, p. 200;
[5] A. Ahlström Osakeyhtiö and others v Commission of the European Communities. Joined cases 89, 104, 114, 116, 117 and 125 to 129/85. Court of Justice of European communities, 1988;
[6] Wood Pulp Case, The; Vollmer, Andrew N.; Sandage, John Byron, 23 Int'l L. 721 (1989);

recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community. Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law"[7].

It can be argued that the decision of *Wood Pulp* case has substantially broadened the application of EU competition law to conducts and undertakings of foreign origin. In addition, taking into account the size and influence possessed by EU market, it appears that the commission can address almost any alleged global pricing scheme under the claim that the scheme affects competition among the member states of EU[8].

Furthermore, no clear distinction can be made between the *effects doctrine,* broadly used by U.S. competition authorities, because effects of the agreements and practices which are substantial and intended to cause anticompetitive harm posses the same characteristics when they are "implemented". However, it can be argued that ECJ decided to use the *implementation doctrine* instead, because of lessons learned from U.S. practice which had incurred a hostile rejection by other countries towards the application of the *effects doctrine*, an issue which will be addressed thereinafter.

The *economic entity doctrine*

Another instrument used by EU competition law in the context of extraterritorial application of EU competition provisions is the *economic entity doctrine*. *Dyestuffs*[9] is a landmark decision which dealt with price fixing issue where the

[7] *Wood Pulp,* paras 16-18.
[8] Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings, The; Breibart, Evan. 19 Ga. J. Int'l & Comp. L. 149 (1989);
[9] ICI v. Commission, Case 48-69, 1972;

question arose whether the commission had jurisdiction over non-EC (EU) parent undertakings by attributing liability to them for the illegal price fixing of dyestuffs by their subsidiaries located in the EC (EU). As in *Wood Pulp* court was suggested to apply the *effects doctrine*, however, the substantive issue to prove and to base commission's and courts jurisdiction over price fixing conduct was whether the non-EC parent undertakings exercised control over its subsidiaries. Court stated 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, especially where the subsidiary does not determine its market conduct independently but in all material respects carries out the instructions given to it by the parent company"[10].

As can be observed from the reasoning above, a finding that there is a single economic entity brings a non-EC undertaking within the scope of the EU competition law provisions[11]. However, an issue of the control of the subsidiaries is a complex one. Firstly, there could be difficulties in proving the required extent of the control, for example, in franchise agreements or licensing or patent agreements. In addition, it would be difficult to define the required control element in the market of services provided by individuals from foreign companies. Thus a complex assessment and cooperation with other counties must be taken into account.

The *effects doctrine* in EU

There could be situations in which there would be no "implementation" within the EU market. The commission probably would utilize the "effects" theory to challenge the

[10] Ibid, para 132;
[11] Extraterritoriality, Comity and Cooperation in EC Competition Law. Damien Geradin, Marc Reysen and David Henry. (2008). p. 5, SSRN: http://ssrn.com/abstract=1175003;

conduct, for example, the concerted refusals to buy from, or export to, the EU and agreements to restrict non-EU production in order to create a scarcity outside the EU that would raise prices within the EU[12]. As stated above, the ECJ had been advised to apply the *effects doctrine* in a number of cases. In its broadest terms, the *effects doctrine* states that a country is enabled to extraterritorial application of it's competition provisions when the anticompetitive effect on it's market is direct, substantial and reasonably foreseeable.

"the application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and foreseeable effect in the Community. The fact that, in a world market, other parts of the world are affected by the concentration cannot prevent the Community from exercising its control over a concentration which substantially affects competition within the common market by creating a dominant position [13]"

This was the reasoning of the Court of First Instance (CFI) in *Gencor*[14] case where CFI had adopted the *effects doctrine* in a case of merger of two foreign companies in South Africa. EU commission applied Council Regulation on the control of concentrations between undertakings[15], which stated that a concentration has a community dimension if the combined aggregate worldwide turnover of all the undertakings involved exceeds 5 billion Euros and the aggregate community-wide turnover of each of at least two of the undertakings involved exceeds 250 million Euros, unless each of the undertakings has more than two-thirds of their community-wide turnover within the same European member state. This

[12] EC and U.S. Extraterritoriality: Activism and Cooperation. Joseph P. Griffin. Fordham International Law Journal Volume 17, Issue 2 1993 Article 4, p. 379;
[13] *Gencor* Judgement, para 90;
[14] T-102/96, Gencor Ltd v Commission, (1999) E.C.R;
[15] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

criterion applies to all firms irrespective of the place where they are registered and produce[16].

Decision of CFI in *Gencor* was criticised because CFI had adopted the *effects doctrine*, which was mainly used by U.S. competition authorities and which had never expressly been accepted by the EU courts[17]. Also, it is argued that the application of the *effects doctrine* could be avoided while using only the *implementation doctrine* brought in the *Wood Pulp* which could have reached the same conclusions in this case[18]. However, other views suggest that CFI used the *effects doctrine* in *Gencor* case because the thresholds alone, which were set in Council Regulation, did not properly constituted the effect on EU market[19] and the *effects doctrine* proved an adequate tool to justify the extraterritorial application of EU competition provisions.

To sum up, the aforementioned examples of the extraterritorial application of EU competition law clearly states that there are a number of instruments in EU commission's toolkit. Therefore, the extent of extraterritorial application of EU competition rules is hardly identifiable, taking into account the size of EU's market and it's close correlation with other major markets in world economy. Thus, such correlation had brought and will in the near future bring a lot of contradictions with provisions of competition of other countries, especially such as the U.S. Antitrust law which will be addressed below.

[16] Ibid, article 1;
[17] Competition law of the European Community. Ivo Van Bael, Van Bael & Bellis. 2005, p. 776;
[18] The European Commission's jurisdiction to scrutinise mergers. Morten P. Broberg. 2003, p. 268-269;
[19] Asserting jurisdiction: international and European legal perspectives. Patrick Capps, Malcolm David Evans, Stratos V. Konstadinidis. 2003. p. 116-117;

IV. Extraterritorial application of U.S. Antitrust law

Extraterritorial application of U.S. antitrust provisions is considered as controversial. This view could be influenced by the fact that U.S. antitrust authorities were the first ones who pioneered such measures. Approach taken by U.S. authorities was criticised rapidly by other countries. However, it can be argued that the main reason of such hostile rejection of the extraterritorial application of U.S. antitrust law is the *effects doctrine*, which was the main tool of U.S. antitrust authorities while justifying their jurisdiction towards anticompetitive conducts abroad. Furthermore, it is argued that U.S. authorities used their main antitrust law – the Sherman Act[20] not only to protect their market competition, but also to protect and expand their trade interests[21]. The *Kodak – Fuji* dispute is a perfect example, which will be analysed after considering the main case law which will illustrate the extraterritorial application of U.S. antitrust law.

Alcoa case

One of the first examples to consider while analysing the extraterritorial application of U.S. antitrust provisions is the *Alcoa case*[22]. Alcoa, a U.S. company, was engaged in an international cartel with several Canadian and European aluminium producers to monopolize the aluminium market. However, Alcoa argued that most of the cartel's activities took place outside the US, and such activities were beyond the reach of US jurisdiction. Therefore, Justice Learned Hand changed the pre-existing view that the Sherman Act applied only within the territorial limits of the U.S. In addition, he stated that if the effects of conspiracy were felt within the

[20] Sherman Antitrust Act of 1890, 15 U.S.C.;
[21] Antitrust Enforcement and Nonenforcement as a Barrier to Imports – with Illustrations from the Japanese Film Dispute. Donald I. Baker and W. Todd Miller. Empirica, Volume 24, issue 1, p. 83-108;
[22] United States v. Aluminum Co. of America (Alcoa) 148 F.2d 416 (1945);

U.S., the U.S. courts had jurisdiction over such conspiracy and as long as the conspirators intended and foresaw the effects on U.S. markets, the jurisdictional test was satisfied[23].

Although the *effects doctrine* elaborated in the *Alcoa* case was criticized by many as an excess of jurisdiction under public international law, since the *Alcoa* case, U.S. courts have continued to follow the new jurisdictional formula of the *effects doctrine*[24]. It can be argued that *Alcoa* case had opened the gate for extraterritorial application of competition provisions towards conducts made abroad and also encouraged other countries to take similar approach. In addition, the decision in *Alcoa* case had a vast international response, because other countries had made efforts to block such "long hand" of U.S. antitrust law and enacted various national law provisions (such as The Protection of Trading Interest law 1980 enacted in UK), the objective of which was to control the extent of application of U.S. antitrust law in their jurisdictions. However, it can be argued that such measures taken by other countries now can be considered as obsolete, because recently countries are following the cooperation approach rather than blocking measures.

Timberlane case

Another case which can illustrate the U.S. practice of antitrust extraterritoriality is the *Timberlane case*[25]. Timberlane bought assets in Honduras for harvesting timber purposes and planned to import timber into the U.S. However, some other Honduran timber companies, (who were financed by Bank of America), conspired against Timberlane in order to

[23] The International Law on Foreign Investment. M. Sornarajah. 2010. p. 155-156;
[24] International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy. Takaaki Kojima. Fellowship Paper, Weatherhead Center for International Affairs, 2001-2002, p. 3-4;
[25] Timberlane Lumber Co. v. Bank of America 549 F.2d 597 (1976);

drive them out of business. Consequently, Timberlane sued Bank of America in the U.S. for violating anti-trust laws. After the appeal, The Appellate Court found they had jurisdiction in a case.

As it was mentioned above, after the *Alcoa* case, U.S. antitrust authorities were under pressure from other countries because of the broad application of the Sherman Act to conducts made abroad. Thus, The Appellate Court took a different approach to consider whether U.S. antitrust law could be applied in *Timberlane case.* Some authors argue that in *Timberlane case* the judicial response to the apparent expanding reach of the Sherman Act took the form of the jurisdictional "rule of reason," which some referred to as declining jurisdiction on grounds of "comity"[26]. It is argued that the Appellate Court considered comity principles because of the arguments which were forwarded:

"The effects test by itself is incomplete because it fails to consider other nations' interests. A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be some effect actual or intended on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. 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, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States including the magnitude of the effect on American foreign commerce are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority[27].“

Some authors argued that in *Timberlane,* the decision was based in large part on the mere fact of conflict

[26] Extraterritoriality in U.S. Jurisprudence. Mark S. Popofsky. 3 issues in competition law and policy 2417 (ABA Section of Antitrust Law 2008); p. 2423;
[27] *Timberlane* judgement, para 67-72;

with foreign law and the relative significance of the effects on U.S. foreign commerce as compared with the effect on the Honduran economy[28]. However, what is interesting in this case is that comity principle (or a similar arguments of the principle of comity) was applied in a dispute were there were no state bodies. Whereas the principle of comity is an instrument to be applied in international field of law in the disputes of national countries' interests, however, it can be observed that the special extraterritorial application of competition provisions enables private parties or so called non-state actors to use special provisions of international law. Again, it brings a question of whether competition law should be used to protect national trade industry, including private businesses, or the competition itself. This question could be considered with reference to *Kodak – Fuji* dispute.

V. Extraterritorial application of competition law and economy

Kodak – Fuji dispute

In 1995, Kodak filled a claim to U.S. authorities claiming that Japan's Fuji was restricting Kodak's access to Japanese market for photographic film and paper. The allegations of Kodak focused on Fuji's exclusive distribution agreements with retailers of Japan and resale price maintenance. In addition, Kodak also claimed that since Fuji had a dominant position of 75% of Japan's market, Fuji precluded Kodak from selling via regular retail system in Japan[29].

Firstly, it is hard to define and distinguish this dispute – whether it is a trade barrier's related dispute or

[28] Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing; Sennett, Michael; Gavil, Andrew I. 19 Int'l L. 1185 (1985), p. 1190;
[29] The objectives of competition policy. Claus-Dieter Ehlermann, Laraine L. Laudati. 1998, p. 207;

competition related dispute. Therefore, this case example illustrates that extraterritorial application of competition law is closely correlated with international trade and could not be separable. Secondly, it is hard to decide what institutions should deal with this dispute. If one would argue that it is a trade related dispute, then WTO's dispute settlement mechanism would be the appropriate tribunal competent to settle this dispute. However, if one would argue that it is a competition related dispute, then countries' competition authorities should cooperate and deal with this dispute. Thirdly, a substantial question is what market - U.S. or Japanese is or could be affected in this kind of dispute. U.S. would claim that their export market is affected because their firms are precluded from engaging in foreign markets. Japan would claim that their market would be affected because of foreign imports which could cause harm to their local businesses (same argument was brought by EU in reference to the prohibitions of imports of textile products from China).

Although finally the dispute was brought to WTO, it is important to see where the competition law should stand in this dispute. The heart of the dispute in the case was the alleged lack of competition enforcement by Japan in the situation which was considered to have given Fuji an advantage over Kodak in the Japanese market[30]. Therefore, using (or as in this case - not using) countries local competition law provisions became a tool of trade barrier imposed to protect local business and it's interests. As some authors suggest, the defending country which have used it's competition law to protect it's market could argue that it needs protection from foreign competition in order to develop country's market and it had

[30] International and Comparative Competition Law. Maher M. Dabbah. 2010, p. 661;

sovereign right to regulate it's market in the public interest even if such measures could restrain trade[31].

Accordingly, it can be argued that extraterritorial application of competition law is in the constant collision with sovereign countries' rights to manage it's market as it seems appropriate and best for it's interests. There are other examples of this problem, for example, China's rare metal exports.

China's rare metal exports

China mines over 95% of the world‘s rare earth minerals which are mainly used in gadget technology like mobile phones, TV's, hybrid cars, catalytic converters, superconductors, and precision-guided weapons. However, depending on the type of rare earth mined, a tax of 30 Yuan or 60 Yuan per metric ton will be levied starting April 1, 2011. It is argued that such new tax and quota will substantially raise prices of such rear minerals. Because of the especially strong position of China as a supplier, these restrictions will not only increase global prices for these materials but it would also distort worldwide competition for the downstream industries[32].Chinese government argued that the objective of such new tax is to preserve country's national resources and the environment. Also Chinese government argued that they need these resources to develop their own economy and achieve energy efficiency. In reaction to this the EU, together with Mexico and the U.S., requested formal WTO consultations on 23 June 2009. Since these discussions did not lead to an amicable solution, a request was made on 21 December 2009

[31] Economic Law as an Economic Good: Its Rule Function and Its Tool Function in the Competition of Systems. Marc Bungenberg, Karl Meessen, Adelheid Puttler. 2009, p. 262;
[32] European Commission Directorate-General for Trade Raw materials policy 2009 annual report

for the establishment of a dispute settlement panel at the WTO[33].

It can be argued that since China mines over 95% of the world's rare earth minerals, it has a dominant position. Article 102 of TFEU states that "*any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States*". This Article is aimed at preventing undertakings that hold a dominant position in a market from abusing that position. Therefore it can also be argued that such tax imposed by Chinese government will have direct effects in EU market and consumers or "*an immediate and foreseeable effect in the Community"* – as it was stated in *Gencor* Judgement. In addition, the U.S. could also claim that such measures taken by Chinese government would have the effects in U.S. - if the effects of conspiracy were felt within the U.S., then the U.S. courts had jurisdiction over such conspiracy and as long as the conspirators intended and foresaw the effects on U.S. markets, as it was stated in *Alcoa*.

Although the first impression would state that since the conduct of Chinese government had the effects in EU or U.S. market, extraterritorial application of competition laws, whether by EU or U.S, could be possible, but the precedents of cases such as *Gencor* or *Alcoa* are substantially different and unlikely applicable in this situation. Firstly, the conduct in question (tax on exports) was imposed by the government and there were no agreement or concerted practise between Chinese producers. Secondly, nor there was any agreement to fix prices, nor there was any conspiracy. Furthermore, as in *Kodak – Fuji* dispute, the conduct in question is more trade related dispute

[33] Ibid p. 17;

than it is competition related dispute and should be dealt with in WTO's dispute settlement mechanism.

On the other hand, one factor that should be taken into account is that in China, the producers or rare minerals are mainly state owned bodies and, in the context of international law, it could be a very complex issue to extraterritorially apply competition provisions towards state bodies. In addition the same question of country's sovereign right to regulate it's market in the public interest is of great importance.

Applying competition provisions to OPEC

Article 101 of TFEU states that it applies to all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

The OPEC is an intergovernmental organisation which consists of 12 member countries on the whole including Indonesia, Algeria, Nigeria, Qatar, United Arab Emirates and Libya. The Organisation supplies about 40% of world oil output and about 70% of world petroleum reserves are located within OPEC nations[34]. OPEC aims to influence and maintain the price of oil through the control of production levels to generate revenue, which goes towards meeting the development needs of its members[35].

As stated above, OPEC has a major influence in the global oil market. However, there is no clear consensus whether OPEC is a cartel. While some authors suggest that OPEC is neither a cartel nor exhibits any sign of market

[34] http://www.opec.org, last visited: 30.03.2011;
[35] OPEC as a Cartel: Can U.S. Antitrust Laws Be Applied Extraterritorially? Emma Ukpanah. CAR (CEPMLP Annual Review), 2002, p. 5;

domination, market control, or monopoly[36] or that 40% of world output is insufficient to establish an effective cartel[37], others argue that OPEC is probably the best-known example of an international cartel[38].

Though if one would consider OPEC as a cartel then the extraterritorial application of competition provisions should be analysed. Some authors suggest that in order to apply competition law to OPEC, three tier test should be applied – can OPEC member states be classified as undertakings? Is OPEC itself an association of undertakings as stated in Article 101 of TFEU? Is EU competition law is also applied to conduct which occurs outside common market?[39]

The last question was already answered while considering the *implementation* and the *effects doctrine* in EU. As for the first two questions the answer would depend on whether the entity is engaged in economic activity, regardless of its legal form, object, or means of financing[40].

Therefore, the main question is whether OPEC is engaged in economic activity. As some U.S. commentators argued – "it is hard to imagine an activity that is more obviously commercial then selling oil for profit"[41]. However, it is difficult to conclude whether OPEC activity is purely economic, because the acts of OPEC are adopted by sovereign states (not private bodies) towards management of their natural resources. Thus the same argument as of China's exportation of

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[36] OPEC in the Epoch of Globalization: An Event Study of Global Oil Prices. Cyrus Bina, Minh Vo. Global Economy Journal, Volume 7, Issue 1, 2007, Article 2;
[37] International Economics. Robert J. Carbaugh. 2008, p.243;
[38] International relations: the key concepts. Martin Griffiths, Terry O'Callaghan. 2002, p.230;
[39] European Yearbook of International Economic Law 2010, Christoph Herrmann, p. 189;
[40] Höfner and Elser v Macrotron GmbH [1991] ECR I-1979 C-41/90;
[41] Congressional Record, proceedings and debates of the 107th congress first session, volume 147, part 4, March 30, 2001;

their rare minerals could be forwarded. It is countries' sovereign right to manage and decide how to sell their recourses as long as it doest infringe bilateral or multilateral agreements.

To sum up, it can be argued that extraterritorial application of competition provisions often collide with sovereign rights of states and countries' trade policies. Thus there is a lack of cooperation between states which could be advantageous in such disputes. Possible solutions of this problem and ways to facilitate protection of competition between different states' markets will be addressed next.

VI. Developments and possible solutions

As it was mentioned above, extraterritorial application of competition law is a complex issue in the context of international economic relations between states, because different countries have different interests. Such examples as *Boeing/MacDonnell*, *GE/Honeywell* or *Oracle/Sun* mergers, where U.S. and EU did not agree whether such mergers could have anticompetitive effects on competition, illustrates that, notwithstanding the protest of a trade partner, mergers still went trough and extraterritorial application of EU's competition law was just of formal character and did not bring any practical protection to EU market. However, while there is no multilateral agreement on global competition, the way forward could only be facilitated trough cooperation. Albeit there are a number of cooperation agreements between states, such as US – EU Cooperation agreements[42], they are mainly based on the principle of comity. It can be argued that the principle of comity is no longer effective to solve problems in modern economy.

[42] 1991 EU/US Competition Cooperation Agreement, 1998 EU/US Positive Comity Agreement, Administrative Arrangement on Attendance (AAA);

The principle of comity

The principle of comity is divided into two parts: the "traditional comity" procedure - by virtue of which each Party undertakes to take into account the important interests of the other Party when it takes measures to enforce its competition rules[43]; and "positive comity" procedure - by virtue of which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting Party[44].

While this principle could sound promising, in reality, number of examples showed that when there are national interests on the one side of the scale, ant interests of foreign country on the other side of the scale, the later has always less weight. As some authors argue – “the twilight of comity is upon us because the war has long since been fought to a draw”[45].

Cooperation and developments

There were numerous attempts to facilitate dialogue and cooperation in competition between different countries. For example, The International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD) and other international organizations have provided forums for the discussion of the best practices and the proselytisation of competition law. These initiatives all

43 1991 EU/US Competition Cooperation Agreement, Article VI;
44 Ibid, Article V;
45 The Twilight of Comity, Spencer Weber Waller. Columbia Journal of Transnational Law, Vol. 38, p. 563, 2000, p. 578;

have some value and contribute to the solution of some international competition law problems[46].

However, as it was argued, extraterritorial application of competition law is closely correlated with international trade. Therefore, WTO could play an important role in the disputes of anticompetitive behaviour by different countries. Such competition disputes and problems as *Kodak – Fuji*, OPEC cartel or Chinese export of rare minerals could be brought to WTO's dispute settlement body which has a long and successful practice of adjudication of complex cross-border disputes. Thus there is a need of competition provisions in WTO law.

There were initiatives, especially by EU, to enact an agreement on competition policy which formed the background to the Singapore Declaration in 1997. However, there was an opposition by U.S. which argued that there was still a lack of experience on the part of developing countries concerning competition law and policy[47]. It is also argued that such an agreement may lead both to a less competitive world trading system and, more importantly, to a lower level of world welfare[48]. Furthermore, there was a hostile rejection of such agreement by NGO's which argued that:

"the rich countries want their companies to be able to enter any country and compete 'equally' with local firms. Developing countries fear that granting such treatment to big foreign firms would mean that local firms would have to struggle to survive

[46] Editorial - Globalisation, International Enforcement and Extraterritoriality. Chris Noonan. Competition Law Review, Volume 5 - Issue 2, 2009, p. 150;
[47] The International Dimension of EU Competition Law and Policy. Anestis S. Papadopoulos. 2010, p. 226-226;
[48] Competition Policy and the WTO: Is there a need for a multilateral agreement? Sanoussi Bilal, Marcelo Olarreaga, Working Paper 98/W/02, EIPA, 1998;

and that in the end the foreign monopolies will get even more powerful''[49].

Although there is an opposition towards such an agreement, there are some competition provisions in WTO law – such as the WTO Pro-competitive Regulatory Principles[50]. The *Telmex*[51] case in 2004 was one of the first cases where WTO competition provisions were applied. WTO Dispute Settlement Panel has found that Mexico has not done enough to prevent anti-competitive practices in its market that impede the entry of foreign competitors. What is important in this case is that, taking into account the broad character of WTO's Pro-competitive Regulatory Principles, the WTO panel made detailed findings on market definition, explained what constitutes a "major supplier," expanded the definition of "anticompetitive practices" and – overruling the state action doctrine – held that governments could not require businesses to engage in anticompetitive conduct[52]. Thus it can be argued that the *Telmex* case precedent could bring a fertile soil for future disputes of international competition issues.

Therefore, it can be argued that while WTO is not yet ready to adopt a multinational competition policy, the issues of extraterritorial application of competition law should find other ways to proceed.

Possible solutions

One of the most successful examples of cooperation between different competition authorities form

[49] Developing countries resist WTO agreement on 'Competition policy'. Martin Khor, the Third World Network, 1999; http://www.twnside.org.sg/; last visited: 03.2011;
[50] Reference Paper on Pro-Competitive Regulatory Principles-Feb. 15, 1997;
[51] "Mexico-Measures Affecting Telecommunications Services," WT/DS204/R (Apr. 2, 2004);
[52] WTO decides its first competition case, with disappointing results. Philip Marsden, May 2004 issue of Competition Law Insight;

different countries is the European Competition Network (ECN) where The European Commission and the national competition authorities in all EU Member States cooperate with each other. Cooperation includes such means as informing each other of new cases and envisaged enforcement decisions, coordinating investigations, where necessary, helping each other with investigations, exchanging evidence and other information[53]. It is a two-tier system whereby the Commission and Member State's national competition authorities have parallel competence to apply Articles 101 and 102 of TFEU in a particular case. The Commission will deal with a case if more than three Member States are substantially affected by an agreement or practice, if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission or Community interest requires the adoption of a Commission decision to develop Community competition policy[54].

Such system could be a very good example and a model to adopt for a global cooperation. However, this model would require the establishment of a global authority which could have similar rights and duties as those possessed by EU commission in ECN. The above mentioned International Competition Network (ICN) could be a proper basis for establishment of such authority, because it is already a competent body where a number of major players of global community cooperate and exchange their views. Alternatively, such authority could be established under WTO law (taking into account the correlation between trade and competition), because it is already the most important dispute settlement body in international trade disputes with a substantial number of member countries.

[53] "Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities";
[54] Ibid, para 19;

Another solution for extraterritorial application of competition provisions could be the successful example of international commercial arbitration. First of all, in order to facilitate cooperation between different competition authorities, there should be similar competition laws and provisions in distant countries. The example of UNCITRAL Model law of international commercial arbitration which is a model for proper and modern arbitration statute accepted by a substantial number of countries legislators could be one of the solutions for competition law. Such model law of competition provisions could be adopted in order to escape different interpretations and different policies of competition between distant economies.

In addition, in order to enforce decisions made in other States by their competition authorities, the New York Convention[55] could also be a perfect example and a model needed for international competition law. This Convention could be widely recognized as a foundation instrument of international competition law to recognize and enforce decisions made in other States, subject to specific limited exceptions.

VII. Conclusion

The theoretical game dilemma which was presented above stated that the best solution for countries is to make best decisions they can, taking into account the decisions made by other countries. It was also stated that player has anything to gain by changing only his own strategy unilaterally – an example of the *effects doctrine*, the result of which was the enactment of blocking statutes and the increase of hostility by other countries towards such decisions.

[55] 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention

Theory also suggested that in many cases all the players might improve their payoffs if they could somehow agree on strategies. It was argued that cooperation is the only way forward in the context of international competition law. Different interests of countries, economic implications, consolidation between international trade and competition and the sovereign rights of countries brought a complex issue which can only be dealt trough bilateral or multilateral agreements or international networks.

It can be argued that in the future international competition law will play the most important role in world's economy because of the onward movement form national to multinational companies, from national to regional interests and, consequently, from local protection of competition to global protection of competition and consumer welfare.

Bibliography

Textbooks:

1. Algorithmic game theory. Noam Nisan. 2007;
2. International and Comparative Competition Law. Maher M. Dabbah. 2010;
3. Competition law of the European Community. Ivo Van Bael, Van Bael & Bellis. 2005;
4. The European Commission's jurisdiction to scrutinise mergers. Morten P. Broberg. 2003;
5. Asserting jurisdiction: international and European legal perspectives. Patrick Capps, Malcolm David Evans, Stratos V. Konstadinidis. 2003;
6. The International Law on Foreign Investment. M. Sornarajah. 2010;
7. The objectives of competition policy. Claus-Dieter Ehlermann, Laraine L. Laudati. 1998;
8. Economic Law as an Economic Good: Its Rule Function and Its Tool Function in the Competition of Systems. Marc Bungenberg, Karl Meessen, Adelheid Puttler. 2009;
9. International Economics. Robert J. Carbaugh. 2008;
10. International relations: the key concepts. Martin Griffiths, Terry O'Callaghan. 2002;
11. European Yearbook of International Economic Law. Christoph Herrmann. 2010;
12. The International Dimension of EU Competition Law and Policy. Anestis S. Papadopoulos. 2010;

Articles:

13. Extraterritoriality, Institutions, and Convergence in International Competition Policy. William E. Kovacic.. Annual Meeting of the American Society of International Law in Washington, D.C., 2003;

14. Wood Pulp Case, The; Vollmer, Andrew N.; Sandage, John Byron, 23 Int'l L. 721 (1989);
15. Wood Pulp Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings, The; Breibart, Evan. 19 Ga. J. Int'l & Comp. L. 149 (1989);
16. Extraterritoriality, Comity and Cooperation in EC Competition Law. Damien Geradin, Marc Reysen and David Henry. (2008). SSRN: http://ssrn.com/abstract=1175003;
17. EC and U.S. Extraterritoriality: Activism and Cooperation. Joseph P. Griffin. Fordham International Law Journal Volume 17, Issue 2 1993 Article 4;
18. Antitrust Enforcement and Nonenforcement as a Barrier to Imports – with Illustrations from the Japanese Film Dispute. Donald I. Baker and W. Todd Miller. Empirica, Volume 24, issue 1;
19. International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy. Takaaki Kojima. Fellowship Paper, Weatherhead Center for International Affairs, 2001-2002;
20. Extraterritoriality in U.S. Jurisprudence. Mark S. Popofsky. 3 issues in competition law and policy 2417 (ABA Section of Antitrust Law 2008;
21. Antitrust Jurisdiction, Extraterritorial Conduct and Interest-Balancing; Sennett, Michael; Gavil, Andrew I. 19 Int'l L. 1185 (1985);
22. OPEC as a Cartel: Can U.S. Antitrust Laws Be Applied Extraterritorially? Emma Ukpanah. CAR (CEPMLP Annual Review), 2002;
23. OPEC in the Epoch of Globalization: An Event Study of Global Oil Prices. Cyrus Bina, Minh Vo. Global Economy Journal, Volume 7, Issue 1, 2007, Article 2;

24. The Twilight of Comity, Spencer Weber Waller. Columbia Journal of Transnational Law, Vol. 38, p. 563, 2000;
25. Editorial - Globalisation, International Enforcement and Extraterritoriality. Chris Noonan. Competition Law Review, Volume 5 - Issue 2, 2009;
26. Competition Policy and the WTO: Is there a need for a multilateral agreement? Sanoussi Bilal, Marcelo Olarreaga, Working Paper 98/W/02, EIPA, 1998;
27. WTO decides its first competition case, with disappointing results. Philip Marsden, May 2004 issue of Competition Law Insight;

Other:

28. The European Commission's 2008 Report on Competition Policy;
29. European Commission Directorate-General for Trade Raw materials policy 2009 annual report
30. Congressional Record, proceedings and debates of the 107th congress first session, volume 147, part 4, March 30, 2001;
31. http://www.opec.org, last visited: 30.03.2011;
32. “Developing countries resist WTO agreement on 'Competition policy'”. Martin Khor, the Third World Network, 1999; http://www.twnside.org.sg/; last visited: .30.03.2011;
33. "Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities”;