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The Impact of European Community Antitrust Law on United States Companies

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TABLE OF CONTENTS

I. INTRODUCTION

Two recent developments have made it more important than ever for United States companies to consider the impact of European Community (EC) antitrust law on their policies and practices.

The first development, the judgment of the European Court of Justice (ECJ) in *A. Ahlstrom OY and Others v. EC Commission*[1] (*Wood Pulp*), issued on September 27, 1988, significantly extended the application of EC antitrust rules to companies based outside the EC. Section two of this Article examines the law prior to the *Wood Pulp* judgment. Section three examines that judgment and its implications.

The second development is the EC's program to complete the Single European Market (Single Market) by 1992. EC based companies will

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1. 4 Comm. Mkt. L.R. 901 (1988).

generally benefit from the Single Market, irrespective of the nationality of their shareholders, whereas non-EC companies who do not have EC subsidiaries will not necessarily enjoy the same benefits. Therefore, there has been an increasing tendency for non-EC companies to establish joint ventures, local subsidiaries, or to acquire shareholdings in existing companies based in the EC. Section four of this Article addresses the impact of the EC antitrust rules on this trend.

First, however, a brief summary of EC antitrust law may be useful. EC antitrust law aims to prevent conduct by commercial entities that adversely affects competition within the Single Market and trade between EC Member States.[2] Such conduct falls into two categories:

(1) agreements and concerted practices between two or more enterprises and decisions of associations of enterprises; [3] and
(2) conduct by individual companies holding a dominant position on a relevant market that constitutes an abuse of that dominant position.[4]

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2. The Member States of the EC are Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom, and West Germany.

3. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85, 1988 Gr. Brit. T.S. No. 47 (Cmd. 455) 82, 107 [hereinafter EEC Treaty] (original version at 298 U.N.T.S. 11). Article 85(1) states:

> The following shall be prohibited as incompatible with the common market: 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, and in particular those which:
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development, or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id.

4. Article 86 states:

> 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 in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
> (d) making the conclusion of contracts subject to acceptance by the other parties of

The EC Commission[5] enforces these provisions. It can, among other things, impose fines of up to ten percent of the infringing parties' worldwide sales. In addition, agreements that violate article 85(1) of the EC Treaty may be declared void, in whole or in part, unless they have been exempted under article 85(3) of the EC Treaty.[6] The decisions of the EC Commission may be appealed to the European Court.[7] However, since this is an expensive and time consuming process, and the Court will only reverse the Commission's decisions on certain relatively narrow grounds. Commission decisions are usually regarded as an authoritative source for EC antitrust law.[8]

II. THE LAW PRIOR TO *WOOD PULP*

Although the Commission applied article 86 to non-EC enterprises on several occasions predating *Wood Pulp*, it has tread a more wary path under article 85.

A. Article 85

As noted above, article 85 is not limited in its terms to EC companies. However, although article 85 has long been applied to agreements involving both EC and non-EC enterprises, prior to *Wood Pulp* the rules had not been applied to an agreement or practice involving only non-EC enterprises.

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supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. at 107-08.

5. The EC Commission is officially called the Commission of the European Communities.

6. Article 85(3) states:

> The provisions of [article 85(1)] may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; and any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Id. at 107.

7. The European Court is officially called the Court of Justice of the European Communities.

8. The Court can only vary or annul the Commission's decisions on the following grounds: "[L]ack of competence, infringement of an essential procedural requirement, infringement of the [EEC] Treaty or of any rule of law relating to its application or misuse of powers." *Id.* art. 173, at 136.

The Community and the European Court jointly or alternatively have held that the following agreements violate article 85(1):

An agreement between Eastern European foreign trade organizations and European purchasers that effectively regulated prices for sales to the EC, imposed quotas on imports, and prevented sales to other parties in Western Europe;[9]

An agreement between a non-EC producer and an EC distributor that prevented the distributor from re-exporting the products to other Member States, or prevented the products from being imported from other Member States into the importer's territory;[10]

An agreement between French and Japanese ballbearing manufacturers aimed at regulating imports from Japan into France and increasing prices;[11] and

An agreement between a German company and a Japanese supplier whereby the German company was granted exclusive distribution rights for the EC, thereby preventing the Japanese company from exporting to the Community.[12]

All of these cases concerned imports into the Community. These cases demonstrate that an agreement in which at least one EC enterprise is a party, and which restricts imports into the Community, or competition within the Community, will be found to violate article 85(1).[13] The Commission, however, went further and stated that agreements that had these effects would be violative of article 85(1) even if all of the parties to the agreement were based outside the Community.[14] The Commission, therefore, clearly subscribes to the "effects" doctrine: the Community has jurisdiction to apply EC antitrust rules to parties engaging in agreements or concerted practices that have the effects cited in article 85(1), even if the practices or agreements are implemented outside the Community. This view was not applied in practice, however, until *Wood Pulp*.

Article 85(1) does not generally apply to restrictions on exports from the Community, although it can apply in exceptional cases. For example, an agreement to buy goods on the condition that they will not be resold in countries outside the EC would probably violate article

9. *Aluminum Imports from Eastern Europe*, 28 O.J. EUR. COMM. (No. L 92) 1 (1985).
10. Beguelin Import Co. v. S.A.G.L. Import Export, 1971 E. Comm. Ct. J. Rep. 949.
11. *Franco-Japanese Ballbearings Agreement*, 17 O.J. EUR. COMM. (No. L 343) 19 (1974).
12. *Siemens/Fanuc*, 28 O.J. EUR. COMM. (No. L 376) 29 (1985).
13. *Preserved Mushrooms*, 18 O.J. EUR. COMM. (No. L 29) 26, 28 (1975).
14. *Notice on Imports of Japanese Products*, 15 J.O. COMM. EUR. (No. C 111) 13 (1972).

85(1).[15] An obligation not to export products outside the Community will not normally affect competition in the Community or trade between Member States unless there is a real prospect of the goods re-entering the Community. In the *Junghans* case,[16] for example, the Commission held that the export ban did not have any effect within the Community at the time of the decision because the double customs duty paid for products crossing the Community frontier twice would effectively deter re-import into the Community.[17] However, the Commission stated that this would not necessarily be the result once the Community's free trade agreements with the European Free Trade Association countries were concluded (they now have been).[18]

It is unlikely that restrictions on exporting to the United States will violate article 85(1). Besides possible customs duties, the cost of transport will mean that, in most cases, there exists no real prospect of re-export into the Community.

B. Article 86

The Commission may apply article 86 not only to EC subsidiaries of non-EC companies, but also, in certain circumstances, to the non-EC companies themselves. When an EC subsidiary abuses its dominant position, and the actions involved are not attributable to the parent company, the Commission's decision will be directed to the EC subsidiary. For example, in *General Motors*[19] the Commission imposed fines on General Motors Continental, a European subsidiary of the General Motors group, for abusing its dominant position on the Belgian market.[20]

On the other hand, when the conduct is attributable to the non-EC parent company, the Commission will address its decision to the parent company.[21] When both the parent company and the subsidiary are responsible for the breach, fines will be imposed on each, usually jointly and severally. In *Commercial Solvents*,[22] for example, the Commission

15. Compagnie Royale Asturienne des Mines v. EEC Commission, 1984 E. Comm. Ct. J. Rep. 1679.

16. 20 O.J. EUR. COMM. (No. L 30) 10 (1977).

17. *Id.* at 14.

18. *Id.*

19. General Motors v. EEC Commission, 1975 E. Comm. Ct. J. Rep. 1367; *see also* NV Nederlandsche Banden-Industrie Michelin v. EEC Commission, 1983 E. Comm. Ct. J. Rep. 3461.

20. *General Motors*, 1975 E. Comm. Ct. J. Rep. at 1377.

21. *See, e.g.*, Hoffman-La Roche & Co. v. EEC Commission, 1979 E. Comm. Ct. J. Rep. 461.

22. Commercial Solvents Corp. v. EEC Commission, 1974 E. Comm. Ct. J. Rep. 223.

held that Commercial Solvents Corporation, a United States company and its fifty-one percent owned Italian subsidiary, Istituto Chemioterapico Italiano (Istituto), held a dominant position in the Common Market for the raw material necessary for the manufacture of ethambutol.[23] Istituto's refusal of supplies of that product could be imputed to the parent company because the parent company exercised control over Istituto.[24] A decision imposing fines was addressed jointly and severally to Commercial Solvents and Istituto.[25]

The Commission held a parent company liable, imputing the action of the subsidiary to the parent company because of the parent company's control of its subsidiary. The Commission did not base its decision on the "effects" doctrine.[26]

III. THE *WOOD PULP* CASE

In *Wood Pulp*, the Commission fined forty-three American and Scandinavian businesses, including one trade association and one export association, that were involved in the export of woodpulp to the Community. The Commission held that these businesses infringed article 85(1) by: (1) engaging in concerted practices on prices charged to EC customers; and (2) in the case of the United States export association, recommending to its members the prices to be charged to EC customers and producers.

These were classic violations of EC antitrust law. The only difference in this case was that all the businesses involved were based outside the Community.[27] On appeal to the European Court, the defendants argued *inter alia* that the Commission had no jurisdiction to apply article 85(1).[28] Public international law precluded any application of article 85 to activities conducted outside the Community, even if those activities had economic repercussions within the Community.[29] Moreover, the defendants claimed application of article 85 to the activities of a United States export association would breach the public international law principle of noninterference since it would harm the interest of the United States in promoting exports to the Community.[30] This interest on the

23. *Id.* at 249-50.
24. *Id.* at 253-55.
25. *Id.* at 257.
26. *Id.* at 253-54.
27. A. Ahlstrom OY & Others v. EEC Commission, 4 Comm. Mkt. L.R. 901, 938 (1988).
28. *Id.* at 939-40.
29. *Id.*
30. *Id.* at 940.

part of the United States was codified in the Webb-Pomerene Act of 1918, which exempts export associations from United States antitrust laws.[31]

The Court's decisions on these points are summarized below.

A. Jurisdiction to Apply Article 85

The Court held as follows:

> It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition with the Common Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.
>
> The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had 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.[32]

The Court, therefore, clearly held that in order for an enterprise to be subject to article 85(1), that enterprise need not have any establishment within the Community.[33] Beyond that, however, it is difficult to know what general conclusion to draw from the judgment. On one hand, the judgment could be read as applying the effects doctrine. If this analysis is correct, then article 85(1) could be applied not only to agreements or practices regulating prices in the Community, but also, for example, to an agreement between non-EC producers that one or more of them will not sell to the EC. In that case, at least one of the parties would not be doing business at all in the EC, but the agreement would be governed by article 85(1) because it would undoubtedly affect competition within the Community.

On the other hand, the judgment could be read as applying a nar-

31. *Id.*
32. *Id.* at 941.
33. *Id.*

rower definition of the territorial principle of public international law. Under this view, states have jurisdiction against foreign entities only when the entity engages in some form of activity within their territories. Concluding contracts with EC customers could be regarded as activity for this purpose, but a noncompetition clause of the nature described above would not.

The Commission has clearly adopted the views that the former interpretation is the correct one and that the effects doctrine is part of Community law.[34]

B. The Principle of Noninterference

One of the trade associations involved in the appeal alleged that the Commission had violated the "known interference" principle of public international law, whereby if a person finds himself subject to contradictory requirements imposed by different states, each state is obliged to exercise its jurisdiction with moderation. The trade association argued that such a contradiction existed in this case between the Webb-Pomerene Act and the Commission's application of article 85(1). However, the court held, without inquiring as to the existence of such a rule in public international law, that there were no contradictory requirements in this case; the Webb-Pomerene Act exempted export cartels from United States antitrust law, but did not require such cartels to be entered into in the first place.

IV. THE IMPACT OF 1992

As noted earlier, the Commission's 1992 Program has resulted in an increased tendency for non-EC companies to form joint ventures or subsidiaries in the EC, or to acquire shareholdings in existing companies in the EC.

The formation by a United States company of a subsidiary in the EC should not in itself have any implications under EC antitrust law since it will normally increase, rather than decrease, competition. However, joint ventures or acquisitions in existing companies may well be affected.

A. Joint Ventures

The term "joint venture" is used here to mean the formation of a

34. *See Commission Decision*, 28 O.J. EUR. COMM. (No. L 85) 1, 15 (1984); *Notice on Imports of Japanese Products*, *supra* note 14, at 13.

new company, by two or more commercial enterprises, to carry out a specific economic activity or activities.

When, as is often the case, the companies establishing the joint venture are actual or potential competitors of each other in the EC, the agreement forming the joint venture will usually be governed by article 85(1). Thus, if the agreement is to be exempted, the companies involved must notify the EC.

A considerable body of Commission law provides guidance on the type of joint ventures that may qualify for exemption. An examination of these decisions is outside the scope of this Article. For present purposes it suffices to note that joint ventures, relating solely to sales or distribution, are rarely exempted. Joint ventures involving research and development and or production are more frequently exempted.[35]

The concept of potential competition is important for United States companies. As noted above, article 85(1) will usually apply to a joint venture formed between parties who are actual or potential competitors in the EC.[36]

For a United States company to actively compete with an EC company, the United States company must be operating within the EC market. However, potential competition on the part of a company is interpreted broadly by the Commission. Essentially, if there is no technical or legal obstacle to its participation in the EC market, a company will usually be treated as a potential competitor, even though the company has never participated in the market and has no plans to do so.[37] Therefore, United States companies considering the formation of joint ventures with European partners should consider the applicability of EC antitrust law to the joint venture agreement.

B. Acquisitions

EC antitrust law may also apply when a United States company acquires shares in an existing EC company. The acquisition may fall under article 85 or 86. As noted above, for article 86 to apply, the United States company must already have a dominant position in the EC. It is not necessary for an acquisition to be made through an EC subsidiary in order for article 86 to apply. *Europemballage and Continental Can v.*

35. For a discussion of the relevant cases see L. BELLAMY & G. CHILD, COMMON MARKET LAW OF COMPETITION (3d ed. 1987).

36. *See* EEC COMM'N, SIXTH REPORT ON COMPETITION POLICY, para. 55, at 38 (1977).

37. *See* EEC COMM'N, THIRTEENTH REPORT ON COMPETITION POLICY, para. 55, at 50 (1984).

EEC Commission,[38] is the only decision in which the Commission found an acquisition violative of article 86.[39] In *Continental Can*, the subsidiary did have an office in the EC. It is unclear that the court would have reached the same decision if a different situation existed. However, if *Wood Pulp* has made the effects doctrine a part of Community law, there seems no reason why that doctrine would not apply under article 86 as well as under article 85. Thus, a direct acquisition by a United States company that held a dominant position in the EC, but had no place of business there, could be found to violate article 86 if it adversely affected competition on the EC market.

Until relatively recently, it was thought that only article 86 would apply to acquisitions. One disadvantage of this view was that unless one of the companies involved held a dominant position, the acquisition would escape the antitrust rules.

However, in *Philip Morris*,[40] the European Court virtually closed this gap. In that case, Philip Morris acquired a 30.8 percent interest,[41] representing 24.9 percent of the votes,[42] in a competitor that held "a dominant position in an oligopolistic market."[43] The Commission held that the transaction did not violate article 85(1).[44] The Court upheld the decision.[45] However, the Commission and the Court indicated that a minority holding carrying a greater percentage of votes might be governed by article 85(1).[46]

The implications of the *Philip Morris* judgment are not entirely clear. It appears that both articles 85 and 86 may apply to minority shareholdings that give the acquiring company the power to exercise "material influence" over the affairs of a competitor.[47] It remains unclear whether article 85 can apply to acquisitions of majority sharehold-

38. 1973 E. Comm. Ct. J. Rep. 215.

39. *Id.* paras. 25-27, at 244-45. In this case, Continental Can Company, Inc. of New York held, through its wholly-owned subsidiary Europemballage Corporation (Delaware) a dominant position in the relevant market in the EC, *id.* at 242-43, and the acquisition by that subsidiary of the majority of the shares of a competing company based in the EC was held to constitute an abuse of that dominant position contrary to article 86. *Id.* at 242-45

40. British Am. Tobacco Co. v. EEC Commission, 1987 E. Comm. Ct. J. Rep. 4487, 4 Comm. Mkt. L.R. 24 (1988).

41. *Id.* para. 7, at 4569, 4 Comm. Mkt. L.R. at 53.

42. *Id.*, 4 Comm. Mkt. L.R. at 53.

43. *Id.* para. 7, at 4561, 4 Comm. Mkt. L.R. at 48.

44. *Id.* para. 6, at 4558-59, 4 Comm. Mkt. L.R. at 44-45.

45. *Id.* para. 64, at 4584, 4 Comm. Mkt. L.R. at 65.

46. *See id.* para. 57, at 4582, 4 Comm. Mkt. L.R. at 63.

47. *See id.* para. 49, at 4579, 4 Comm. Mkt. L.R. at 61; *id.* para. 65, at 4584, 4 Comm. Mkt. L.R. at 65.

ings or whether acquisitions of majority holdings will only be subject to article 86 (if relevant).[48]

One defect of applying articles 85 and 86 to acquisitions is that these articles do not require prenotification to the Commission prior to completion. Thus, in the event of an adverse Commission decision after completion, the parties may be required to unwind the transaction and retransfer the shares. They may also be subject to fines.

In part to remedy this defect, the Commission recently adopted a regulation making prior notification of certain acquisitions compulsory.[49] To require notification, the aggregate worldwide sales of the entities concerned must amount to at least 5000 million European Currency Units (ECUs) and the acquisition must result in either the merger of two or more enterprises, or of one or more enterprises acquiring control of one or more other enterprises.

A detailed examination of the regulation is outside the scope of this Article. It is sufficient for present purposes to note that the Regulation will apply to a direct or indirect acquisition by a United States company in an EC company if the shareholding was sufficient to give the United States company or its subsidiary, control and the combined turnover exceeded the threshold mentioned above.

V. CONCLUSION

The aggregate effect of the *Wood Pulp* judgment and prior case law is that any agreement that affects competition in the supply of products and services to the Community, and within the Community, may well be governed by article 85(1).

This result holds true regardless of whether some or all of the companies concerned are based outside the Community and are not established within the Community. It also probably holds true whether the restrictions on competition apply to conditions under which products or services are exported, or to an outright restriction or prohibition of exports.

The latter point (the position adopted by the Commission) remains to be confirmed by the European Court. In the meantime, non-EC com-

48. In the case of majority acquisitions, the Commission's view appears to be that the acquisition *removes* any competition between the parties and there is therefore no competition that is capable of being restricted within the meaning of article 85(1). *See Europemballage Corp.*, 1973 E. Comm. Ct. J. Rep. at 245.

49. *Regulation 4064/89*, 22 O.J. EUR. COMM. (No. L 395) 1 (1989).

panies would be well advised to assume that the Commissions view is correct.