

# EXTRATERRITORIAL APPLICATION OF US-ANTITRUST LAW ON GLOBAL CARTELS FROM COMPARATIVE (EU LAW) PERSPECTIVE

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**Abstract:** *The (extraterritorial) application of US antitrust laws can have, for the concerned European companies, serious consequences. This applies to the prosecution of antitrust violations as criminal offenses, resulting to the imposition of prison sentences against competitors responsible for antitrust infringing (including foreigners), on the other hand the specificities of bringing civil claims for damages before US courts, including procedural aspects. This article provides a summary of the extraterritorial application of US antitrust law, with emphasis to the jurisdiction of US courts. A question whether the European Commission has jurisdiction over conduct that occurs outside the EU and the differing approaches of the US and the EU of how to regulate foreign anticompetitive activity will be examined.*

**Keywords:** *antitrust, cartels, Clayton Act, EU, Sherman Act, TFEU, USA*

## I. INTRODUCTION

The US courts often exercise extraterritorial jurisdiction, in the context of antitrust law, based on the extension of the objective territoriality principle, using the so-called “effect doctrine”.<sup>2</sup> The US Department of Justice (DOJ) prosecutes “foreign conduct that was meant to produce, and did produce some substantial effect in the United States,” while the EU Commission extends extraterritorial jurisdiction to cartel cases where the economic effects in the EU are “direct, immediate, reasonably foreseeable and substantial”.<sup>3</sup> Some scholars<sup>4</sup> criticize the “effect doctrine” arguing that a state has sovereignty only when a constituent element (prohibited by the antitrust law) has taken place on the territory of that state. The extraterritorial application of national legislation has been considered to

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<sup>2</sup> The “effects doctrine” was first introduced in the opinion of Judge Hand in the *Alcoa* case discussed further. There was a confusion as to what standard should be applied to determine an “effect” and also what degree such an effect must have. In *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971) was decided that the “effects” were sufficient if they were direct or substantial.

<sup>3</sup> See *US v. Nippon Paper Indus Co Ltd*, 109 F3d 1 (1st Cir 1997) and compare it with *Joined Cases C-89/85, Ahlstrom v Commission (Wood Pulp)*, 1993 EC R I-1307; 4 CMLR 901 (1988).

<sup>4</sup> The criticism came as it does not consider international comity concerns and potential interference with foreign sovereignty interests, see e.g. KATZENBACH, N. *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*. *Yale Law Journal*. 1956, No. 65, pp. 1148-49. Mann argued that “from the point of view of public international law the *Alcoa* decision cannot be justified. The effect within the meaning of the *Alcoa* ruling does not amount to an essential or constituent part of the restraint of trade, but is an indirect and remote repercussion of a restraint carried out, completed and, in the legally relevant sense, exhausted in the foreign country.” MANN, F. A. *The Doctrine of Jurisdiction in International Law*. In *Collected Courses of the Hague Academy of International Law*. 1964, p. 111.

be an infringement of State sovereignty. Thus, some States have enacted legislation against the extraterritorial application of foreign laws to situations against their sovereignty (e.g. the British Protection of Trading Interests Act, 1980). In the judgement of the US court in the case *Alcoa*<sup>5</sup> from 1945 was, for the first time, established the doctrine according to which a state can “assert jurisdiction over conduct outside its borders where such conduct has the intended effect of causing a substantial adverse impact within the state’s territory.”<sup>6</sup> Judge Hand stated that a “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.”<sup>7</sup> The US Supreme Court confirmed Judge Hand’s opinion in its decision in *Hartford Fire Ins. Co. v. California*,<sup>8</sup> endorsing the substantial effects test (Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States) for determining jurisdiction. The Court of Justice of the EU (CJEU)<sup>9</sup> applied in the *Wood Pulp*<sup>10</sup> case a similar “effects test”.

The US antitrust law contains - as well as the EU cartel law - no express provision about its extraterritorial applicability. According to Section 1<sup>11</sup> of the Sherman Act “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,<sup>12</sup> is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine ...”<sup>13</sup> Going out from the jurisprudence of the US Supreme Court, this provision also applies to foreign restrictions of competition, provided that the foreign practices cause significant effects in the USA (“effects doctrine”).<sup>14</sup> The effects doctrine was first presented in the *Alcoa* case where the US court held that the Sherman Act applies “even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.”<sup>15</sup> The court in the *Alcoa* case found antitrust violations and applied the Sherman Act extraterritorially. This was due to the fact that the foreign conduct showed negative effects in the US (and such effects were intended).

<sup>5</sup> *US v Aluminium Company of America and others*, 44 F. Supp 97; 148 F.2d 416 (1945). The first case addressing the issue of the extraterritorial application of US antitrust law was *American Banana Co. v. United Fruit Co.* 213 US 347 (1909).

<sup>6</sup> ALFORD, R. P. *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches. Scholarly Works, Paper 410.* 1992, p. 4.

<sup>7</sup> See *US v Aluminium Company*, at. 443.

<sup>8</sup> *Hartford Fire Insurance Co. v. California*, 509 U. S. 796 (1993).

<sup>9</sup> BORCHARDT, K. D. *Die Rechtlichen Grundlagen der Europäischen Union.* 4<sup>th</sup> Edition. Heidelberg: C. F. Müller, 2010, p. 192 and follows.

<sup>10</sup> C-89/85, *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, [1988] 5193.

<sup>11</sup> Sherman Act § 1, 15 U.S.C. § 1 as amended by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

<sup>12</sup> “The dissent seems to contend that the Sherman Act’s reference to commerce with foreign nations was intended only to reach conspiracies affecting goods imported into this country.” See, e.g., *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950).

<sup>13</sup> 15 U.S. Code § 1.

<sup>14</sup> *Hartford Fire Insurance Co. v. California*, 509 U. S. 764 (1993).

<sup>15</sup> See *US v Aluminium Company*, at. 443.

If the “direct, substantial and reasonably foreseeable effect” principle outlined in the FTAIA also applies to imports or is limited to export practices, remained unclear in the *Hartford Fire Insurance Co.* case. This extra-territorial application of US antitrust laws caused protests abroad, arguing that foreign interests were affected. The answer to the question of when the effects are classified as significant brought certain difficulties and resulted in diverging decisions of the lower US courts.<sup>16</sup> The dispute concerned contradictory decisions of various federal courts (Circuit Courts). These concerned the interpretation of the Sherman Act and its restriction by the FTAIA, 15 U.S.C. § 6 (a). The applicability of the Sherman Act to foreign matters is therefore excluded, unless there is an exception, which presupposes two things:

1. the action must have a harmful effect on the US market,
2. this effect must be a basis of a claim under the Sherman Act.

The first question seemed to be largely clarified. The text of the law is based on the so-called “effects test”, which is based on the decision of the Supreme Court in *United States v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945) and subsequently confirmed by the Supreme Court in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993). The differences between the various Circuit Courts are focused on the second question: Is it the applicant’s claim in the concrete procedure which is the result of the domestic impact,<sup>17</sup> or satisfies such a claim a potential<sup>18</sup> or potential<sup>19</sup> plaintiffs? The question referred to the Supreme Court has tended to be as whether the plaintiffs can assert claims under the Sherman Act to compensate for damages arising solely from transactions that took place outside the US market. The question focused on the applicability of the Sherman Act to foreign conduct. The Sherman Act is to be considered if such activities have an effect on the US market (effects test). Unlike European law, the US Sherman Act focuses more on foreclosure practices and attempts to market monopolization<sup>20</sup> Described according to Senator John Sherman, Chairman of the US Senate Financial Committee, Sherman’s antitrust law of 1890, has to protect against commercial practices designed to restrict or eliminate competition in the market. Sherman’s law is divided into two sections.<sup>21</sup> According to them, it is forbidden to monopolize trade, all mergers and collusion, which would restrict competition within trade. The Sherman Act was the first measure adopted by the US Congress to ban trusts (or monopolies of any kind). Although many US states have previously enacted similar laws, they were limited to domestic trade. On the other hand, Sherman’s law was based on Congress’s constitutional power to regulate interstate trade.

While the various courts of appeal disputed whether the claim of the foreign plaintiff had to originate from the domestic effects or not, the Supreme Court considers the inde-

<sup>16</sup> *United States v. Nippon Paper Industries Co.* 109 F.3d 1, 2 (1<sup>st</sup> Cir 1997).

<sup>17</sup> 5<sup>th</sup> Circuit in *Den Norske Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5<sup>th</sup> Cir. 2001).

<sup>18</sup> DC Circuit in *Empagran S.A. et al. v. F Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (DC Cir. 2003).

<sup>19</sup> 2d Circuit in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

<sup>20</sup> POSNER, R. Oligopoly and the Antitrust Laws: A Suggested Approach. *Stanford Law Review*. 1968, No. 21, p. 1563 and follows.

<sup>21</sup> SVOBODA, P., MUNKOVÁ, J., KINDL, J. *Soutěžní právo*. 2<sup>nd</sup> Edition. Praha: C.H.Beck, 2012, p. 28.

pendence of the plaintiff's claim as a decisive criterion. It states that the "the exception does not apply to the plaintiff's claim solely on the independent foreign harm."<sup>22</sup> "But, if America's antitrust policies could not win their own way in the international market for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."<sup>23</sup> In order to address this problem, and at the same time to privilege export cartels,<sup>24</sup> the US Congress passed in 1982 the Foreign Trade Antitrust Improvement Act (FTAIA). Based on it, the Sherman Act comes into question only in case of practices that have direct, significant and reasonably foreseeable impact on the domestic trade.<sup>25</sup> The FTAIA significantly limits the Sherman Act's application to conduct that occurs purely outside US borders. Such a conduct may create antitrust liability only if it involves "import commerce" or has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce which gives rise to a claim under the Sherman Act.

## II. (INTERNATIONAL) JURISDICTION OF US COURTS

Cartels emerge worldwide in course of globalization. Those harmed by cartels are faced with the question as to where they can pursue claims for damages. Of particular importance are claims brought before US courts, since the requirements for legal actions (due to antitrust violations) in the US show some advantages for the plaintiff. For instance, § 4 of the Clayton Act provides in case of antitrust violations<sup>26</sup> so-called treble damages (triple damages) and simplifies for the plaintiff the justification of his claim by the so-called pre-trial discovery<sup>27</sup> process. Further advantages are the plaintiff-friendly jury trials, the possibility of class actions and the agreement for payment based on successful outcome for attorneys. In that regard, there are certain incentives for a US-related "forum shopping". The jurisdiction of US courts for antitrust damages claims, on the basis of the Sherman Acts in (antitrust) cases that involve foreign trade is regulated in FTAIA. The US Congress established a law on extraterritorial application (legislative jurisdiction) called the FTAIA. Export cartels without domestic regulations which have domestic effects are covered by the prohibition of cartels due to the effects doctrine. The jurisdiction is given, if

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<sup>22</sup> 2d Circuit in *Kruman v. Christie's Int'l PLC*, at. 233.

<sup>23</sup> *Ibid.*, at. 240.

<sup>24</sup> US acceptance of its own export cartels is nearly as old as its antitrust laws. US adopted the earliest export exemption to its antitrust laws in 1918 through Webb-Pomerene Act. The Export Trading Company Act (ETC) of 1982 does not protect American export cartels from prosecution from other countries. Companies may apply for the ETC exemption if their activities will have no effect on the domestic market.

<sup>25</sup> US Congress enacted the FTAIA to "make explicit only to conduct having a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or domestic exports." None of the US Circuits Courts (Ninth, Seventh, Second) established a clear rule regarding what constitutes a direct effect for the purpose of the FTAIA.

<sup>26</sup> "The Clayton Act of 1914 declares illegal four specified types of restrictive or monopolistic practice. They are: price-discrimination, exclusive dealing and tying contracts, acquisitions of competing companies and interlocking directorates." See FUNTA, R. *Abuse of a dominant position in EU and US Law*. 1<sup>st</sup> Edition. Brno: Tribun EU, 2010, p. 26.

<sup>27</sup> Similar provision can be found in the EU damages directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union).

(1) the behavior has direct, significant and reasonably foreseeable impact on the domestic, import or US export trade and

(2) those effects justify a claim under the Sherman Act.

Based on this provision some US courts took a very far-reaching international jurisdiction by demanding no relationship between the impact on domestic trade and give raise a claim based on the Sherman Act. The possibility to bring a claim in the United States was limited by the judgment of the US Supreme Court in the case *Empagran*,<sup>28</sup> which concerned claims for damages in connection with the vitamin cartel. Plaintiffs in this case were, among others, no US companies that purchased vitamins solely on non-American markets (the plaintiff *Empagran* for example in Ecuador). The US Supreme Court had to decide whether these foreign companies can pursue a lawsuit under 15 U. S. C. § 6a FTAIA in the US. The U.S. Court of Appeals had replied in the affirmative and demanded that there must exist domestic effects that justify a claim from any plaintiff.<sup>29</sup> The Supreme Court overturned this decision and referred it back for a new trial to the Court of Appeals. It supported its decision, inter alia, on the fact that with respect to the sovereignty of other states (so-called comity principle described further) is not materially justified to apply American law to cases where in other countries have come to harm because of a cartel. In US jurisprudence, comity means “that one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>30</sup> Due to the fact that the application of comity by US courts is neither an “absolute obligation” nor a “mere courtesy” as held in the *Société Nationale Industrielle Aerospatiale* case, judicial assessments have sometimes provided inconsistent results. The court left open a question, whether a claim in the US would be possible if there would be a link between the injury suffered in the foreign market and the antitrust infringement in the United States. Such a connection would be possible if the cartel on the US market has influenced prices on non-US markets. In mid 2006 the US Court of Appeals has provided the final judgment in this matter. After that, the prevention

<sup>28</sup> *Empagran S. A. v. Hoffmann-La Roche Ltd.*; 284 F.3d 384, 400 (2003). *Empagran, S.A., Winddridge Pig Farm, Nutricion Animal, S.A., and Concern Stirol, on behalf of unidentified direct purchasers of vitamins from the European Union (Plaintiffs) against the Defendants, F. Hoffman-LaRoche, Ltd., Hoffmann-La Roche, Inc.; BASF A.G., BASF Corporation, Aventis S.A., Rhone-Poulenc Animal Nutrition Inc., Hoechst Marion Rousell S.A., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceuticals Co., Ltd., Eisai Co., Ltd., Eisai U.S.A., Inc., Akzo Nobel Chemicals B.V., Alusuisse Lonza Group Ltd., Lonza A.G., Lonza Inc., Bioproducts, Inc., Degussa-Huls AG, Degussa Huls Corporation, DuCofa, L.P., DCV, Inc., Mitsui & Co., Ltd., Nepera Inc., Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co. Ltd., UCB S.A., Chinook Group Ltd., and Cope Investments Limited.*

<sup>29</sup> *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427, 2001 (exception does not apply where foreign injury is independent of domestic harm) or *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 400 (exception does apply even where foreign injury is independent). The FTAIA says that the Sherman Act applies to foreign “conduct” with a certain kind of harmful domestic effect. The federal antitrust laws do not apply to claims in which the plaintiff’s injury does not arise from the conspiracy’s anticompetitive domestic effect (*Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (2001)). That is, even if a conspiracy results in higher prices in the US, that domestic effect must “give rise to” the plaintiff’s injury (*Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 346 (2003)).

<sup>30</sup> *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 at 544 (1987).

of parallel imports due to high cartel prices within the United States is not a sufficient justification for the exercise of US jurisdiction. Respondents (appellants) argued in the *Empagran* case, that the “anticompetitive conduct’s domestic effects were linked to that foreign harm. They contended that, because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e. higher prices in the United States), the sellers could not have maintained their international pricefixing arrangement and respondents would not have suffered their foreign injury.” The Court of Appeal is referring to the comity principle and/or the principle of non-interference. The US antitrust law is therefore applicable to claims for damages, when these claims create a link with the restrictive effects emerged within the United States (so-called direct causal relationship).

In line with the US Supreme Court decision in the *Empagran* case is a judgment of the District Court for the Northern District of California from 2007 in the *Bridgestone Americas Holding*<sup>31</sup> where the court denied his jurisdiction insofar the claim also relates to damages on territory<sup>32</sup> outside the United States. However, for damages on the US territory the claim was considered as admissible. The question of jurisdiction of American courts also arises when a company in the US in connection with the breach of Art. 101<sup>33</sup> and 102 *Treaty on the Functioning of the European Union* TFEU is obliged to the disclosure of information that is to be used in European Union against a company which is charged with infringement against an antitrust prohibition. Under American law (28 U.S.C. § 1782), a District Court, upon application by an “interested person” may release documents against certain persons, if this information is to be used before a foreign or international “tribunal” (so-called. pre-trial discovery). In the case *Intel/Advanced Micro Devices (AMD)*,<sup>34</sup> the US Supreme Court had to rule on the scope of that provision. AMD lodged a complaint to the European Commission alleging a violation of Art. 102 TFEU<sup>35</sup> by Intel. In order to substantiate its allegations in Europe, AMD submitted a claim in the US to issue files against Intel. The US Supreme Court ruled that in regards to the European Commission we speak about a “tribunal” and the company AMD is seen in the process as an “interested person”.

## II. (A) POSITIVE AND NEGATIVE COMITY

There are various types of cooperation among competition law enforcement agencies: (1) bilateral agreements between; (2) regional agreements; (3) plurilateral agreements; and/or (4) multilateral agreements. There are several bilateral agreements, for example, the agree-

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<sup>31</sup> *Bridgestone Americas Holding Inc et al v. Chemtura Corporation et al*, Federal Civil Lawsuit California Northern District Court, Case No. 3:06-cv-05700.

<sup>32</sup> Chemtura participated in a combination and conspiracy to suppress and eliminate competition by maintaining and increasing the price of certain chemicals.

<sup>33</sup> For the wording of Art. 101 TFEU and further comments see KARAS, V., KRÁLIK, A. *Právo Európskej únie*. 1<sup>st</sup> Edition. Bratislava: C.H.Beck, 2012, p. 401 and follows.

<sup>34</sup> *Intel Corp. v. Advanced Micro Devices, Inc.* 54., U.S. 241.

<sup>35</sup> For the wording of Art. 102 TFEU and further comments see SVOBODA, P. *Úvod do Evropského práva*. 3<sup>rd</sup> Edition. Praha: C.H.Beck, 2010, p. 246.



ments between the US and the EU or Australia and New Zealand.<sup>36</sup> The US and the EU have entered into two agreements in regards to cooperation on competition matters. It is important to mention that the EU/US competition cooperation agreement is not a treaty but an administrative agreement. The agreement contains provisions in regards to notification of enforcement activities, exchange of information, cooperation of the enforcement parties, negative and positive comity, a consultation mechanism and confidentiality of information. The first agreement (1991),<sup>37</sup> focused on a mutual obligation to notify antitrust issues to the extent that these concern the interests of the other authority, and to exchange information on general matters relating to the implementation of competition rules. This agreement encompasses the traditional concept of comity. It also contains a so called positive comity procedure which means that a party to an agreement invokes, upon request, its domestic competition law to remove anticompetitive practices that occur within its jurisdiction and that affect the other party. The positive comity is aimed to promote international cooperation in the enforcement of competition laws. The US and EU signed a second competition cooperation agreement (1998)<sup>38</sup> which does not apply to merger reviews. It clarifies how and when positive comity should be invoked. In 2011 followed the best practices document on cooperation in merger investigations. A negative comity describes that a party to a bilateral agreement refrains from applying its competition law if such application is not in line with governmental policy of the other party. As an example we can mention a situation where a state applies its competition laws to prohibit an international merger where such a merger is promoted by the government of another state. The negative comity approach states that the former state refrains from applying its competition law to that merger due to the governmental policy of the other state.

### III. (INTERNATIONAL) JURISDICTION OF EU COURTS

Article 101 (1) TFEU<sup>39</sup> applies to agreements and practices which may prevent, restrict or distort competition within the EU single<sup>40</sup> market. In this case it does not matter

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<sup>36</sup> The cooperation between Australia and New Zealand is stipulated in the Closer Relations Agreement 1983 and a cooperation agreement from 2007.

<sup>37</sup> Agreement between the government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, Official Journal L 95 (27 Apr 1995).

<sup>38</sup> Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, Official Journal L 173 (18 June 1998).

<sup>39</sup> “The following shall be prohibited as incompatible with the internal 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 internal 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. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.”

<sup>40</sup> The single market includes fundamental freedoms and a system of undistorted competition (Article 101 and follows TFEU), see FUNTA, R. *Binnenmarkt der Europäischen Union: Rechtsgrundlagen*. Brno: Tribun EU, 2015, p. 11 and follows.

whether some or all the companies have their seat inside or outside the EU. It is also not important, whether the agreement was entered into force inside or outside the territory of the EU. European courts have recognized the existence of such jurisdiction through different doctrines that will be briefly summarized in the following. In *Dyestuffs*,<sup>41</sup> the CJEU had the opportunity to decide about international cartels (so-called “economic entity” or “group economic unit” doctrine).<sup>42</sup> Under this doctrine several companies form an “economic entity”, if a control relationship exists between them and the parent company has the possibility to exercise control. The CJEU avoided here the question of extraterritoriality, and instead relied on the doctrine of economic entity. The court held that the European Commission has jurisdiction in such cases if three factors were (cumulatively) present, namely the “*subsidiary must carry out the parent’s instructions, it must have no real autonomy and the parent must exercise decisive influence over the subsidiary in respect of the infringement*”. In the *Viho*<sup>43</sup> case the CJEU decided, that on the basis of the so-called “intra-enterprise doctrine”,<sup>44</sup> Art. 101 (1) TFEU does not apply to intra-corporate agreements between a parent company and its subsidiaries, if they form an economic unit under the condition that the subsidiary has no independence to determine its course of action on the market. The so-called “implementation doctrine” was presented in the *Woodpulp*<sup>45</sup> case, where the CJEU ruled that going out from Art. 101 (1) TFEU jurisdiction exists over non-EU companies situated outside the EU, if they implement an anticompetitive agreement outside the EU through which they want to sell their products (long-term supply contracts (up to five years) guaranteed customers the possibility of purchasing each quarter a minimum quantity and customer was able to purchase more or even less than the quantity reserved with the right to negotiate reductions in the announced price) to purchasers inside the EU. The third, so-called “effects doctrine” was introduced by the General Court of the EU (GC EU) in the *Gencor*<sup>46</sup> case. In this case the GC EU ruled, that the application of the EC Merger<sup>47</sup> Control Regulation “*is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*”.<sup>48</sup> A degree of extraterritoriality is an inevitable part of

<sup>41</sup> C-48/69, Imperial Chemical Industries Ltd. v. Commission (Dyestuffs), [1972] ECR 619.

<sup>42</sup> LOPEZ-BALBOA, V. M., MYERS, J. Jurisdictional Standards under EEC Competition Law: The Evolution of the Economic Entity Test. *Journal of International Law*. 1984, No. 6, p. 383 and follows. Several years after the Dyestuffs case, the CJEU in the Continental Can case (Europemballage and Continental Can v. Commission, [1973] ECR 215, [1973] CMLR 199), expanded the single economic entity theory to include the attribution of the conduct of a non-EU subsidiary which has its branch office within the single market to a non-EU parent company.

<sup>43</sup> C-73/95, Viho v. Commission, [1996] ECR I-5457.

<sup>44</sup> Under this doctrine, several companies can only form an ‘economic entity’ if there is a control relationship between them. In Christiani & Nielsen (Christiani & Nielsen, J.O., 1969, L 165/12), the European Commission concluded that a market-sharing agreement between a Danish company and its wholly-owned Dutch subsidiary was not in line with article 101 (1) TFEU because there was no competitive relationship between the two companies.

<sup>45</sup> Joined Cases 89, 104, 114, 116, 117 & 125-129/85, A. Ahlström Osakeyhtiö and Others v. Commission (Woodpulp-I), [1988] ECR 5193.

<sup>46</sup> T-102/96, Gencor Ltd v Commission, [1999] 4 CMLR 971.

<sup>47</sup> For further comments to EC Merger Control Regulation see FUNTA, R., NEBESKÝ, Š., JURÍŠ, F. *Európske právo*. Brno: Tribun EU, 2012, p. 396 and follows.

<sup>48</sup> JONES, A., SUFRIN, B. *EU Competition Law: Text, Cases, and Materials*. Oxford: Oxford University Press, 2014, p. 1281.



EU merger control. The extraterritorial reach of EU merger control must be in line with public international law. The European Commission and the EU courts tend to assume that if the thresholds for merger notification are fulfilled, the concentration has a sufficient effect in the EU. The application of the EU merger control regulation is in this case justified. The so-called “effects doctrine”, well known in the US antitrust law (developed by the US courts), has been pursued by the European Commission in several cases, although the EU courts were hesitant<sup>49</sup> by its application. When applying the EU competition<sup>50</sup> law, the territorial limits are linked to the EU Treaty according to which competition related articles are applied in relation to anticompetitive conduct if this may affect trade between EU Member states.

## VI. CONCLUDING REMARKS

The cooperation between the EU and the US competition authorities has been not so widespread in antitrust cases than in merger cases. This has been mostly due to the obligation of the competition authorities to protect the confidentiality of information<sup>51</sup> obtained during the investigations. The adoption of leniency programs seems to have facilitated the joint cooperation in cartel cases.

When trying to find out if the European Commission has jurisdiction over conduct that occurs outside the EU, there are three doctrines we speak about above (the economic entity doctrine, the implementation doctrine and the effect doctrine). The first 2 are established doctrines in the EU law. Due to the absence of formal recognition by the CJEU, it is unresolved whether the third has the same status. The hesitance of the CJEU vis a vis the effect doctrine could be seen due to the fact that the EU criticized the doctrine when applied by the US antitrust counterparts. Nevertheless, on both sides of the Atlantic there is a kind of “effects doctrine” concerning the extraterritorial application of the antitrust (competition) law. The extraterritorial application of antitrust (competition) law has never been more current than in the globalised economy of the 21<sup>st</sup> century due to the fact that transatlantic mergers are likely to increase. Starting on December 2016, the EU Damages Directive<sup>52</sup> 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.” It is designed to promote more private cases to supplement the enforcement actions by the European Commission and the national competition authorities.

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<sup>49</sup> See footnote 89 in SATO, Ch. Extraterritorial Application of EU Competition Law. *Journal of political science and sociology*. 2010, No. 11, p. 37.

<sup>50</sup> TICHÝ, L., ARNOLD, R., ZEMÁNEK, J., KRÁL, R., DUMBROVSKÝ, T. *Evropské právo*. 4<sup>th</sup> Edition. Praha: C.H.Beck, 2010, p. 509 and follows.

<sup>51</sup> FUNTA, R. Ochrana súkromia v rámci prenosu osobných údajov medzi EÚ a USA. *Justičná revue*. 2017, No. 8-9, pp. 939–952.

<sup>52</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1.

In recent time some US federal courts<sup>53</sup> created confusion about how the FTAIA should be interpreted. There are still unresolved questions that leave uncertainties, like is the application of the FTAIA a question of substance or jurisdiction, what constitutes import commerce, is it important who asserts the claim (a private plaintiff or the US government), etc. On the other hand, it is clear that foreign conduct that affect only foreign commerce falls beyond the scope of the FTAIA. Such uncertainties create future problems and, at the same time, opportunities for further clarification.

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<sup>53</sup> *Lotes v. Hon Hai Precision Industry*, 753 F.3d 395 (2d Cir. 2014); *United States v. Hsiung*, 758 F.3d 1074 (9th Cir. 2014), amended and superseded by *United States v. Hsiung*, 778 F.3d 738 (9th Cir. 2015); *Motorola Mobility v. AU Optronics*, 775 F.3d 816 (7th Cir. 2015); *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2013).