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## The EU's Evolving Stance on the International Dimension of Competition Policy: A Critical Commentary

*In recent years there has been a rapid increase in both the numbers and the value of cross-border mergers and acquisitions. As more and more competition cases fall within the jurisdiction of two or more competition authorities, the possibility of divergent and unpredictable outcomes increases. This article explores the response of the European Union to international competition concerns that impact on its jurisdiction.*

The internationalisation of business, with the consequent increase of global or mega-mergers and international cartels, has the potential to create tensions that could rapidly spill over into the political arena. This potential is clearly increasing: in 2000, 175 cross-border mergers and acquisitions valued at a total of \$866 billion occurred.<sup>1</sup> This is in marked contrast to 1991 when only seven such deals, worth a total of \$20.4 billion, took place. The acceleration in the number of such deals has been particularly marked since the mid-1990s. As more and more merger and other competition cases fall within the jurisdiction of two or more competition authorities and as the value of such deals increases, the possibility increases of divergent and unpredictable outcomes whereby a decision by one competition authority has an adverse impact on important business interests within the jurisdiction of the other authority or authorities.

This paper explores the response of the European Union (EU), in particular the European Commission, to international competition concerns that impact on its jurisdiction. The response is based on cooperation, both multilaterally and bilaterally, but the EU has also been developing an armoury to enable it to react unilaterally to protect its competition interests. Indeed the EU's July 2001 decision in the proposed GE-Honeywell<sup>2</sup> merger has added momentum and a degree of urgency to new developments at the multilateral level – the International Competition Network (ICN) and the Global Competition Forum (GCF) – which are intended

to maximise convergence of competition philosophies and procedures and which the EU is helping to shape. Yet the EU is still pushing for the World Trade Organisation (WTO) to play a major role in the new international competition architecture and believes it made significant progress on this at the Fourth Ministerial at Doha in November 2001. This raises the question of whether three potentially competing fora are necessary to regulate international competition issues.

Meanwhile, the paper further argues, given that multilateral developments will not come to fruition for some time, that the EU continues to be active in fostering bilaterals. However, this approach is not without its limitations. Finally the paper argues that the EU's ability to act unilaterally received a major boost when the effects doctrine became part of EU law as a consequence of the Court of First Instance (CFI) judgment in the Gencor-Lonrho<sup>3</sup> case, enabling it to protect its competition interests when co-operation is not possible or has failed.

### Multilateralism

Towards the end of 2001, a number of new initiatives at the international level have been launched and the EU seeks to play a central part in them. The EU has long attached importance to multilateralism because of fears that multi-jurisdictional vetting of international mergers will lead to divergent outcomes. However, the urgency to achieve consensus based on conver-

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<sup>1</sup> UNCTAD: World Investment Report 2001: Promoting Linkages, New York and Geneva, page 56.

<sup>2</sup> Case No. Comp. /M.220 - General Electric/Honeywell.

<sup>3</sup> Case T-102/96 Gencor Ltd v. EC Commission [1999].

gence of substantive and procedural merger rules has increased because of the failure of bilateralism to deal adequately with the GE-Honeywell case in 2001 and the prospect that it could happen again. Multilateralism will, in turn, help to create a consistent approach to global governance of these competition matters, albeit operationalised by sovereign co-operating competition authorities, with the eventual aim of creating a common competition culture on the global stage.

### WTO and the Doha Declaration

The EU continues to push for the WTO to play a major role in the new multilateral competition architecture and believes that progress was made to secure this goal at the Fourth Ministerial at Doha. Yet, the EU has also been an active participant in shaping the ICN (initially known as the Global Competition Initiative as proposed by ICPAC – see below) formally launched on 25 October 2001, and in the OECD's Global Competition Forum which met for the first time in October 2001.

The EU's preference for the WTO is based on the broad scope of WTO membership and on the complementary relationship between trade and competition policy.<sup>4</sup> In 1996, partly as a result of a proposal by the EU, the WTO set up a Working Group on Trade and Competition to examine this relationship and to identify areas that may merit further consideration. The Commission subsequently argued that the WTO must go further: prior to the December 1999 WTO Ministerial meeting in Seattle, the Commission proposed negotiations on the development of a binding multilateral framework of competition rules. Its proposals for the Millennium Round<sup>5</sup> included the following points:

- the adoption by WTO members of transparent and non-discriminatory domestic competition structures and rules based on core principles relating to restrictive business practices and abuse of market power;
- common approaches to anti-competitive practices with an international dimension within the domestic competition structure;
- a dispute settlement procedure to ensure that domestic competition laws are in line with the above multilaterally agreed principles;

<sup>4</sup> J.-F. Pons, Deputy Director-General, DGIV, European Commission: International cooperation in competition matters – where are we four years after the Van Miert Report? Speech in Zurich, 9 July 1999, page 7.

- a development dimension to ensure a broad adherence to these principles.

The Seattle meeting failed to reach agreement on the launch of a new round of multilateral trade negotiations, including the treatment of competition issues. Undeterred, the EU continued to promote the WTO's competition role.

Despite the support of some developed countries for the EU's position, a significant hurdle has been major reservations of the US, a key player, and other parties regarding the WTO's competition role. These reservations include the concern that the need to secure the agreement of the members of the WTO to a common framework would result in a lowest common denominator outcome, resulting in weak and ineffective rules contrary to the desired objective. In addition US Assistant Attorney General for Antitrust during the Clinton Presidency, Joel I. Klein, argued that the main trading nations already have competition laws which satisfy any minimum substantive rules that the WTO is likely to adopt.<sup>6</sup>

Meanwhile, in 1997, the US established the International Competition Policy Advisory Committee (ICPAC) to examine these issues and to propose solutions. ICPAC's report, submitted to the Department of Justice in February 2000, rejected the EU's focus on the WTO, claiming that the WTO was not the most appropriate forum for regulating international competition issues. The ICPAC majority view was that the central focus of the WTO is properly on governmental restraints with trade effects, not on private antitrust restraints.<sup>7</sup> However, ICPAC did not rule out multilateral action. Indeed, it argued for the creation of a new forum specific to competition law and policy problems and called this the Global Competition Initiative.<sup>8</sup>

More recently, the Bush administration has taken this forward in the form of the ICN but there are indications that it is also more prepared to entertain a competition role for the WTO. Indeed, the US has signed the Doha Declaration which agrees that competition will formally be included in multilateral negotiations for

<sup>5</sup> Ibid., pages 7-8.

<sup>6</sup> Joel I. Klein: Anticipating the Millennium: International anti-trust enforcement at the end of the twentieth century, address to the 24th Annual Conference on International Law and Policy, Fordham Corporate Law Institute.

<sup>7</sup> International Policy Advisory Committee to the Attorney General and Assistant Attorney General for Anti-trust: Final Report, Washington, February 2000, page 50.

<sup>8</sup> Ibid., Executive Summary, page 31.

the first time. The EU believes that the Doha Declaration represents significant progress in its campaign to enhance the WTO's competition role. Indeed, the EU points out that the Doha Declaration specifically recognises "the case for a multilateral framework to enhance the contribution of competition policy to international trade and development"<sup>9</sup> based at the WTO. The importance of this for multilateral competition enforcement and the role of the WTO in particular was subsequently spelt out by EU Competition Commissioner Mario Monti when he stated that Doha "is a significant development in our efforts towards multilateral competition rules in the WTO since it recognises for the first time that there is a valid case for the WTO to negotiate and conclude a multilateral agreement on trade and competition".<sup>10</sup>

However, it is important to note that the modalities of negotiation will not be decided until the Fifth Ministerial in Mexico in 2003, with the negotiations proper starting shortly thereafter. The Declaration envisages a preparatory stage that will shape the modalities of negotiation. In particular the Declaration states that the WTO working group on trade and competition will focus on the clarification of the very matters that the EU has previously identified as priorities: core principles, including transparency, non-discrimination, procedural fairness, hard core cartels and modalities for voluntary co-operation between anti-trust authorities as well as support for progressive reinforcement of competition institutions in developing countries through capacity building. Success requires that the EU continues to work with developing countries, including India, and that the US maintains a supportive stance. Indeed Alexander Schaub, whilst still Director-General of the European Commission's Competition Directorate, is on record as asserting that there has been a fundamental shift in the US position, dating from 2001 and declaring that, under the Bush administration, the US has adopted a positive approach to multilateral competition rules within the WTO as well as supporting the Doha Declaration.<sup>11</sup>

This shift in the US position can be interpreted as a manifestation of a US refocusing towards multilateralism. Factors that have contributed to this include the US's disappointed expectations regarding the effectiveness of bilateral co-operation as demonstrated by the GE-Honeywell case; the operational limitation of positive comity and ICPAC's recommendation for the establishment of a new multilateral competition forum. A different interpretation is that the US and the EU have reached a position of mutual benefit in which

the US supports the EU's WTO competition proposal in return for EU support of the ICN initiated by the US.

### CN and GCF

The ICN was launched on October 25, 2001 with the involvement of senior competition authority officials from around the world,<sup>12</sup> including the EU. It appears that the ICN is not in direct competition with the Doha Declaration: indeed, the two initiatives could complement each other. The latter is about agreeing multilateral principles whereas the general goal of the ICN is to promote convergence in anti-trust policy via a limited number of projects that will address resolvable issues. These projects will be aimed at forging non-binding general guidelines or best practice recommendations. The ICN will initially work on two important anti-trust issues: the merger control process in a multi-jurisdictional context and the competition advocacy of anti-trust agencies to develop a sound competition culture. With respect to the former, the ICN will tackle issues like the analytical framework for merger review as well as investigative procedures and techniques. With more than 60 countries operating merger control, and more in the offing, this attempt at convergence has become important in reducing the possibility of divergent outcomes as witnessed in the GE-Honeywell case.

Sitting alongside the Doha Declaration and the ICN is another multilateral competition dimension - the OECD's new Global Competition Forum (GCF). As yet, the remit of the GCF is rather opaque, although it does appear to provide a meeting place for high level officials to share experiences of "front burner" competition law and policy issues. Charles A. James, Assistant Attorney Anti-trust under the new Bush administration, sees the two new multilateral fora as potentially mutually reinforcing with the ICN addressing specific practical issues in project form and the Global Forum, through its wider agenda, identifying and feeding these issues into the ICN. The GCF's role may become redundant if the Doha Declaration leads to an enhanced competition role for the WTO. However, if

<sup>9</sup> Doha Declaration, paragraph 23.

<sup>10</sup> European Commission: European Union competition policy: XXXIst Report on Competition Policy, Brussels 2002, page 5.

<sup>11</sup> Alexander Schaub: Co-operation in Competition Policy Enforcement between the EU and the US and new concepts evolving at the World Trade Organisation and the International Competition Network, speech in Brussels, 4 April 2002.

<sup>12</sup> Officials were present from Australia, Canada, the EU, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the UK, the US and Zambia.

Doha fails to deliver, the GCF could become an important part of the multilateral competition architecture.

### Bilateralism

Although the new global initiatives are a promising development at the multilateral level, the EU recognises that it will be some time before they are operating effectively and has sought bilateral agreements with important partners to fill the regulatory gap in the interim. These bilaterals follow two different broad approaches. The first approach originated with the Europe agreements concluded with the countries of Central and Eastern Europe (CEE) prior to their applications for full EU membership and was subsequently extended to the bilateral European-Mediterranean Association Agreements (EMAAs) negotiated within the framework of the 1995 Barcelona Declaration.

The common characteristic of the first approach is the requirement upon the EU's partners to adopt core EU competition instruments, or at least Articles 81, 82 and 87 EC, for enforcement of competition matters with a cross-border dimension involving the EU. Indeed, the express wording of these bilaterals explicitly mirrors the above articles of the Union's treaties. In other words, in cross-border competition matters that affect the EU and this group of partners, it is EU practices that prevail.

The rationale for this approach is twofold. First, in the case of the CEE countries, there is a strong argument for imposing the model of EU competition policy on them, given their intended accession to the EU, an event that will require them to comply with the *acquis communautaire*. This also applies to Cyprus, Malta and Turkey among the Mediterranean countries. Secondly, at the time the bilaterals were negotiated, neither the CEE nor the Mediterranean countries had their own, mature competition policies and authorities. This made the second form of bilateral co-operation (see below) unfeasible. From the EU's point of view it is procedurally neater and more convenient – and indeed inevitable in the case of Central and Eastern Europe – to disseminate its own model of competition. From the perspective of the Mediterranean countries, such agreements, although providing guidance in the development of their own embryonic competition policies, are indicative of the EU's tendency to impose its own solutions, a tendency that has inspired negative comment by these countries in relation to many aspects of the Barcelona Process.

The second type of EU bilateral agreement is not principally about other countries accepting a version of EC competition instruments (and thus EC hegemony)

but concerns co-operation and some degree of soft convergence in relation to cases of mutual interest in the competition field with countries that already have their own established competition laws and authorities. This type of bilateral echoes the OECD Recommendation on Anti-Competitive Practices Affecting Trade, originally drawn up in 1967 and subsequently modified on a number of occasions, the most recent being 1995.<sup>13</sup> The guiding principles of the Recommendation, as well as incorporating traditional and positive comity, are:

- the sharing of information, as far as legitimate interests and confidentiality permit;
- the co-ordination of investigations when two or more members proceed against an anti-competitive practice in international trade;
- assistance in the location and obtaining of information located in the territory of another member.

The 1991 EU-US agreement<sup>14</sup> (not in force until 1995 and developed further in the 1998 positive comity agreement<sup>15</sup>) is the first bilateral of the second type. The 1991 agreement has acted as the template for the EU's agreement with Canada and has influenced the EU's agreement with South Africa. Moreover in July 2000, the EU and Japan reached mutual understanding on the substantial elements of a co-operation agreement modelled on the US and Canada bilaterals.

In order to facilitate co-operation and potential convergence, the US agreement requires each competition authority to notify the other when their enforcement activities may affect important interests of the other. When co-ordinating, each authority acts, insofar as legally possible, consistently with the enforcement objectives of the other authority – this is referred to as “traditional comity”. That is, the agreement declares that within its own laws and to the extent compatible with its important interests, a competition authority will seek at all stages in its enforcement activities to take into account the important interests of the other authority, including whether or not to instigate an investigation or proceeding, its scope and the

<sup>13</sup> Revised Recommendation of the Council concerning co-operation between member countries on anti-competitive practices affecting international trade, 27 and 28 July 1995, C(95) 130/FINAL.

<sup>14</sup> Decision of the Council and the Commission of 10: Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, April, 1995 (95/145/EC, ECSC).

<sup>15</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, OJ L 173, 18 June 1998.

remedies sought. However, potential co-ordination is limited in that information deemed confidential by EU law may not be passed to the US authority without the express agreement of the party concerned (known as the "confidentiality waiver").

A major innovation of the 1991 agreement was the introduction of the concept of positive comity. Article 5 states that when a competition authority believes that anti-competitive activities carried out on the territory of the other competition authority are adversely affecting its interests, it can request the other competition authority to initiate appropriate enforcement activities. This appears to leave the matter of whether to initiate enforcement activities in the hands of the requested party after due co-operation with the requesting party and it remains an option for the requested party not to initiate proceedings. In fact, the requesting party, if it deems necessary, remains free to initiate proceedings with respect to the anti-competitive activities in question. However, the 1991 agreement did not include a test that determined whether or not a case was suitable for positive comity. This was rectified in the 1998 US-EU agreement on positive comity, which adopted the principle of the qualified effects doctrine (explained in more detail below).

Overall, the 1991 US-EU agreement has proved to be a major step forward, reducing, but not wholly eliminating, friction and conflict between the respective competition authorities. Furthermore, in cases of mutual interest, a strong element of co-operation between the US and EU teams has emerged and has led to a greater degree of co-ordination in enforcement activities, albeit within their separate but parallel procedures. In turn, this has had the bonus of increasing their understanding and sensitivity towards each other's methodology and philosophical approaches, incorporating areas such as market and product definition and the issue of remedies.

Strong co-operation has occurred in a number of cases, such as the World Com/MCI merger, enabling the authorities to co-ordinate requests for information and minimising the sending of duplicative and conflicting requests to the companies and third parties. The co-operation and co-ordination was maximised by the agreement of both parties to waive their confidential information rights: this involved joint meetings with the other parties involved and allowed the two authorities to discuss the requested information and the concerns and issues arising from it. In the World Com/MCI case, this ultimately led to a conclusion that satisfied the concerns of both authorities. In general, co-operation also reduces the possibility that the parties involved

in a concentration will be confronted by divergent or incompatible decisions from the respective competition authorities.

Despite the considerable success of co-operation, both the US and the EU recognise that perfect convergence in anti-trust matters is not attainable.<sup>16</sup> In fact divergent outcomes can arise for a number of reasons. For example, when a merger has differential impacts in different jurisdictions, the relevant competition authorities are likely to come to divergent conclusions requiring remedies. This is less likely to be true, even though the EU and US merger control philosophy and methodology is not identical, when the relevant market is global as in the MCI WorldCom/Sprint case.

However, this philosophical difference can lead to a significant divergence of outcome as clearly demonstrated in the recently proposed \$42 billion GE-Honeywell merger. In this case, the US approved the merger subject to certain divestments whereas the EU authorities prohibited the merger in its entirety. This was despite a tremendous amount of co-operation over several months, which was made possible by the parties' waiver of their confidentiality rights. Indeed Assistant Attorney General Charles A. James said "I do not believe that we could have worked together more closely... The glaringly inconsistent decisions, then, were not the product of a failure of co-operation or a lack of effort by either agency to ascertain the other's point of view."<sup>17</sup>

This is a stunning example of how the EU, despite the co-operation with the US, has used its Merger Control Regulation (MCR) to unilaterally prohibit a merger of US-based companies. This demonstrates the importance to the EU of being able to act unilaterally to protect competition within its jurisdiction. The danger here is that, given the proliferation of countries with their own merger regulations, there is an increasing likelihood of decisions with divergent outcomes. This leads to a scenario in which the EU can approve the merger of EU-based multinationals only to see it prohibited by one or more competition authorities whose jurisdiction lies outside Europe. De facto, this is what has happened to the US in the GE-Honeywell case and has led the US to attach greater importance to multilateral initiatives such as the Doha Ministerial as well as the ICN and the GCF in which the US hopes

<sup>16</sup> Charles A. James, Assistant Attorney General (Anti-trust Division): speech to the Global Competition Forum, Paris, 17 October 2001, and Mario Monti: speech to the American Bar Association, Washington DC, 14 November 2001.

<sup>17</sup> Charles A. James, *op. cit.*

to maximise convergence on approaches to merger control and related issues.

Co-operation has also not lived up to expectations in the 1998 EU-US positive comity agreement despite the fact that it was hailed as a major advance at the time. Indeed, in June 2000, Mario Monti, said as much in a speech in Washington, declaring, "I am firmly convinced ... of the value of positive comity as an instrument for enhancing the effectiveness of bilateral co-operation; it is true that the full potential of this new and innovative instrument for co-operation has yet to be realised."<sup>18</sup> To date, only one positive comity referral has taken place involving the EU and the US, and this was on the basis of a US request. Indeed it is extremely unlikely at the moment that a concentration with a very strong US interest but also caught by the EU's MCR will be referred by the EU to the US authorities under the positive comity agreement. This is worrying as the majority of EU to US and US to EU notifications – currently running at about 80 per year – relate to proposed mergers. This situation is a direct consequence of two factors. First, the EU MCR is specifically excluded from the remit of the positive comity agreement<sup>19</sup> and secondly, if a concentration has a Community dimension, the express wording of the MCR compels the Commission to reach a decision on that concentration.<sup>20</sup> The MCR lacks a clause that allows the Commission to defer or suspend these decisions so that referral can take place to the other competition authority involved in the bilateral.

### Unilateralism

Although important, it is not clear at this stage how successful the global fora will be. Equally, the EU recognises that co-operation via bilaterals has two key limitations. First, notwithstanding that some are with key players like the US, there are only so many bilaterals in place. Secondly, even bilateral co-operation cannot guarantee mutually acceptable outcomes. In short the EU has to be able to act unilaterally to protect what it views as its vital competition interests. Indeed, the EU is now able to apply its competition rules extraterritorially based on the effects doctrine.

It was the US that originally championed jurisdiction applied extraterritorially based on the effects doctrine, even for persons outside its allegiance, when conduct abroad has, or is intended to have, effect within its territory. This has subsequently been modified but the subject of extraterritoriality in general, and the use of the effects doctrine in particular, remains controversial in international public law.

### Competing Jurisdictional Tests

The EU Commission has advocated the application of the effects doctrine concept of extraterritoriality to EC competition matters. The first opportunity to resolve this matter occurred in the 1972 Dyestuffs case when ICI appealed against a Commission decision to fine ICI and a number of other dye producers and their subsidiaries for acting in concert to raise prices and thereby infringe Article 81(1). One of several pleas presented by ICI, a company then registered outside the EC, was that the Commission was not empowered to impose fines on it by reason merely of the effects produced in the EC by actions the company is alleged to have taken outside the Community.<sup>21</sup> Advocate General M. Henri Mayras concluded that the effect of an anti-competitive agreement or practice on the domestic market of a state is regarded in most national legal systems as justifying the jurisdiction of the state in applying its law to undertakings irrespective of the nationality or place of residence of the infringers and that the Community must, if exercising such powers, conform to the law of nations. Therefore, he argues, the objective effects alone within the common market of the conduct of undertakings, irrespective of where they are registered, are enough to enable the Commission to have jurisdiction in the matter.<sup>22</sup> In advocating that the principal criterion for the applicability of the law on anti-competitive practices is indeed territorial effect, he argues that the criterion can only be admitted when qualified under public international law: that is, the effects within the territory must be direct, foreseeable and substantial.

Unusually, the European Court of Justice (ECJ) in its Dyestuffs judgment is deafeningly silent on the Advocate General's application of the qualified effects doctrine. Indeed the judgment makes no reference to it. Nevertheless, the unalterable fact that the effects doctrine had been advanced and supported by the Advocate General makes its future adoption by the CFI or ECJ a real possibility. However, the Court accepted the Commission's argument that it has juris-

<sup>18</sup> Mario Monti: Co-operation between competition authorities – a vision for the future, speech to The Japan Foundation Conference, Washington DC, 23 June 2000, page 9.

<sup>19</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, OJ L 173, 18 June 1998, page 3.

<sup>20</sup> Consolidated text of Council Regulation (EEC), No. 4064/89 of 21 December, 1989 on the control of concentrations between undertakings with amendments introduced by Council Regulation (EC) No. 1310/97 of June 1997, Articles 1,2,6 and 8.222

<sup>21</sup> Cases 48/69 ICI and others v. EC Commission [1972], page 594.

<sup>22</sup> Cases 48/69 ICI and others v. EC Commission [1972], page 603.

diction based on the economic entity view. The Court established that where a subsidiary in the common market has a separate legal personality to that of the parent company registered outside the Community, it is still possible for the parent company to dictate the conduct of the subsidiary company and in such an instance it would be right to impute the conduct of the subsidiary to the parent. In the event that the two can be viewed as one economic entity, the entity will come within the scope of Article 81 EC. The limitation of the economic entity approach is that jurisdiction over the parent based abroad only arises if it has a subsidiary in the common market which does not act independently of it. If this is not the case and the parent company outside the Community directly distorts competition in the common market, under this approach the Commission has no jurisdiction. With the effects doctrine however, the Commission can claim jurisdiction where the conduct of the undertaking directly affects the common market.

It was not until September 1988, when a number of non-EC wood pulp producers challenged a Commission decision before the ECJ, that the issue of the effects doctrine came before the Court again.<sup>23</sup> In this case, the Commission argued that the breach of Article 81 EC stemmed from the effects on prices announced and/or charged to customers and on resale of pulp within the Community resulting from the concertation between these producers. One of the core arguments of the applicants in their legal challenge was that the Commission had misconstrued the territorial scope of Article 81. For example, they argued that in the earlier *Dyestuffs* judgment that the Court did not adopt the effects doctrine. However, Advocate General M. Marco Darmon in his *Wood Pulp* opinion supported the adoption of the qualified effects doctrine where the effect has to be direct, immediate, reasonably foreseeable and substantial.<sup>24</sup> This is clearly supportive of the *Mayras* position.

For reasons that are not clear, the Court in its *Wood pulp* judgment sidestepped the issue of the applicability of the effects doctrine within the framework of EC competition policy and introduced a new territorial scope test - the implementation criterion. In other words, the Court stated that the decisive factor is not where the agreement or concertation is formed but rather whether it is implemented in the common market.<sup>25</sup> Thus, as the Court judged, when non-EC producers sell directly to purchasers in the EC on the basis of co-ordinated prices (which, unlike the economic entity test, does not require subsidiaries

or agents within the Community), they are taking part in concertation which has the object and effect of restricting competition under Article 81 of the Treaty. Thus in wood pulp, the implementation criterion was satisfied by the use of co-ordinated prices within the common market by the said pulp producers. This left the question open of what factors other than price can be seen to meet this criterion. The implementation criterion test seems analogous to the effects doctrine for if implemented in the Community it clearly has an effect in the Community. A possible divergence between the implementation criterion and the effects doctrine could occur if a concertation were implemented outside the Community but nevertheless had effects within it. An effects doctrine would give the EC jurisdiction in this case whereas the implementation criterion would not.

The matter of territorial jurisdiction was further complicated by the emergence of another type of test in concentration cases. This form-based test is a cornerstone of the Merger Control Regulation (MCR) which came into force in September 1990. In this test, jurisdiction is determined by satisfying a fixed quantitative global and Community-wide sales/turnover threshold.<sup>26</sup> When satisfied, the concentration is said to have a Community dimension and therefore falls within the scope of the Regulation and is vetted by the Commission on competition grounds. This is a different approach to that of the implementation criterion in determining jurisdictional scope. The latter, for example, has no global element in its test nor does it specify a quantitative threshold that has to be reached in order for the Community-wide implementation criterion to be satisfied. The similarity results from the fact that neither test is concerned with where the undertakings are based or establish their restrictive agreement but with the impact within the Community: in the Article 81 EC wood pulp case, the impact was co-ordinated pricing within the Community whereas within the MCR, it is sales. This similarity in relation to the Community-wide element of the two tests needs qualifying however. In relation to Article 81 complaints, the implementation criterion is specific to the market where the alleged competition distortion has arisen whereas

<sup>23</sup> *Re Wood Pulp cartel: A. Ahlstrom OY and others v. EC Commission* (Cases 89/85, 104/85, 114/85, 116-117/85 & 125-129/85) [1988] 4 CMLR 901.

<sup>24</sup> *Op. cit.*, page 932.

<sup>25</sup> *Op. cit.*, pages 941-2

<sup>26</sup> Consolidated text of Council Regulation (EEC), No. 4064/89 of 21 December, 1989 on the control of concentrations between undertakings with amendments introduced by Council Regulation (EC) No. 1310/97 of June 1997, Article I.



in the case of the MCR, the test is not specific to a particular product market but concerns the aggregate Community-wide sales turnover of at least two undertakings involved in the merger.

### The Gencor-Lonrho Judgment

The next key development in regard to the effects doctrine of extraterritoriality and EC competition law was the 1999 CFI landmark judgment in the Gencor-Lonrho case. The case concerned the proposed concentration between Gencor Ltd and Lonrho Plc in which their interests in Platinum Group Metal (PGM) sector were to be brought together in a jointly controlled company, Impala Platinum Holdings Limited. The issue was made more complex, however, when the Anglo-American Corporation (AAC) of South Africa Limited, the main competitor of Gencor and Lonrho in the PGM sector, acquired a 6% stake in Lonrho with the rights of first refusal over a further 18%. The Commission deemed the concentration incompatible with the common market because it would lead to a dominant duopoly position between AAC and Impala in the world platinum and rhodium markets as a result of which effective competition would have been significantly impeded in the common market.<sup>27</sup>

The effects doctrine came before the Court because Gencor argued that the Commission did not have jurisdiction as the proposed concentration fell outside the scope of the MCR. As well as using the effects doctrine to demonstrate that the case fell outside the scope of the MCR, Gencor also sought to show that the MCR was not applicable based on the implementation criterion test nor was it captured by the wording of the MCR itself.<sup>28</sup> Gencor's action forced the Court to come to a judgment on these three separate jurisdictional tests.

On the basis of Recital 11 of the Preamble to the MCR, Gencor argued that the case fell outside the scope of the Regulation because the concentration's substantial operations – the mining and refinery operations – were based not in the Community but in South Africa. This was rejected by the Court on the grounds that the MCR does not ascribe greater importance to production operations than to sales operations. On the contrary, the action of setting quantitative turnover thresholds implies that sales operations within the common market as a linking factor to concentration have the greater importance.<sup>29</sup> Indeed the Court confirmed that those concentrations which satisfied the aggregate sales thresholds test had a Community dimension and therefore fell within the scope of the MCR – and that this jurisdictional test did not require

the undertakings to be registered or have production facilities in the Community.<sup>30</sup>

Sales are also key to determining whether the merger satisfies the implementation criterion jurisdictional test. The Court judged that, according to Wood pulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, as is the case with Gencor-Lonrho.<sup>31</sup> Thus, according to the implementation criterion, the Commission can claim jurisdiction if the proposed merger has mere sales in the Community, whatever mere sales means – one euro, ten euros or what? But what if the requirement for mere sales is interpreted as less than the turnover thresholds jurisdictional test in the MCR? Does this now provide the Commission with the opportunity for claiming jurisdiction over concentrations that fail to have a Community dimension? This would be politically unacceptable in light of the current decentralisation trend in competition cases.

The Courts have now applied the implementation criterion in both an Article 81EC case (Wood Pulp) and the Gencor-Lonrho concentration. Does this mean therefore that the Commission can now use this test to determine jurisdiction under Articles 81 and 82 EC and in concentration cases? There appears to be a subtle difference however between the application of the implementation criterion test in Article 81 cases and in concentration cases: in the former, the criterion applies to the specific reference market of the complaint whereas in the latter it is sufficient that sales take place in the Community. Under the effects doctrine, such a divergence does not necessarily occur.

Gencor argued that even on the basis of the qualified effects doctrine – initially put forward by Advocate General Mayras in his Dyestuffs opinion and later supported by Advocate General Darmon in his Wood pulp opinion, both of which are detailed above – competence could not be claimed by the Commission under the MCR in this case. Gencor therefore did not assert that the effects doctrine does not apply in concentration cases in determining jurisdiction but merely claimed that this particular concentration did not satisfy the qualified effects criterion regarding immediate, substantial and foreseeable effects. The CFI disagreed

<sup>27</sup> Case T-102/96 Gencor Ltd v. EC Commission [1999], paragraph 20.

<sup>28</sup> Case T-102/96 Gencor Ltd v. EC Commission [1999], paragraphs 48-59.

<sup>29</sup> Case T-102/96 Gencor Ltd v. EC Commission [1999], paragraph 85.

<sup>30</sup> Case T-102/96 Gencor Ltd v. EC Commission [1999], paragraphs 78-79.

<sup>31</sup> Case T-102/96 Gencor Ltd v. EC Commission [1999], paragraph 87.

and found that the concentration satisfied the qualified effects criterion, concluding that the application of the MCR was consistent with public international law. This can be interpreted as the Court sanctioning the use of the effects doctrine by the Commission to determine jurisdiction, not only in this case but also in future concentration cases. However, the ECJ itself has yet to rule on this matter.

The importance of the Gencor judgment cannot be over-estimated because the qualified effects doctrine can now be viewed as part of EC competition law and can arguably be applied by the Commission to determine jurisdictional competence in Article 81 and 82 EC complaints and in concentration cases. However, the same may hold in the case of the implementation criterion. If so, both tests are not required.

The matter is further complicated in concentration cases for, as we have noted, the MCR has its own sales threshold jurisdictional test that has been modified to improve its sensitivity and effectiveness. Indeed, the Gencor judgment confirmed that this threshold jurisdictional test has a limited degree of extraterritoriality as it applies irrespective of where the company is registered and the location of its production facilities, therefore rendering it identical to the other two tests – at least in this respect.

### Conclusion

The EU is well-positioned in relation to the regulation of competition at the international level: it is actively participating in the two new global fora, the ICN and the GCF; in the Doha Declaration, it has progressed its vision of a major competition role for the WTO and is simultaneously continuing to develop bilaterals with key partners. It has also put in place an armoury enabling it to act unilaterally: the Gencor-Lonrho confirms, for example, that the EU can use the effects doctrine to apply its competition law extraterritorially. However, both the EU and the US recognise that there are dangers in unilateral action which could provoke a hostile response, such as blocking statutes, from states who believe that their territorial jurisdiction is being breached. Indeed, as Mario Monti said in his keynote speech at the first meeting of the OECD's GCF,<sup>32</sup> "in many instances, it is on balance more beneficial to cooperate than exercise unilateral extra-territorial jurisdiction. Often coordination of enforcement in more than one jurisdiction is the most appropriate course of action."

Moreover, unilateralism can also be disadvantageous to business as it can result in the vetting of mergers by a number of competition authorities, each

acting separately and according to different philosophies and procedures. This regulatory overkill both increases uncertainty and imposes an unacceptable and unnecessary cost burden on business and can lead to divergent outcomes. Unilateralism also raises the possibility that a competition authority approves a merger of companies based in its territory, only for the merger to be prohibited by another competition authority using a different regulatory framework and criteria. This became a reality in the proposed GE-Honeywell merger.

The above problems have helped to renew interest in finding a multilateral competition solution. It has found expression in a number of ways. The first is the agreement to include a competition framework within the forthcoming WTO negotiations, seeking to provide common competition principles. Secondly the ICN project work has the potential to maximise convergence and move in the direction of a common competition culture and is in harmony with the Doha Declaration. The final expression is the GCF, the role of which is rather opaque, except as a meeting place for high officials to discuss "front burner" issues and shape the project work of the ICN. The precise role of all three multilateral initiatives and how they relate to each other will depend to a certain extent on the outcome of the Doha process. However, even if these initiatives achieve convergence, business will still have to undergo the cost of multiple notification and all that entails. One solution would be the establishment of a global competition authority, a highly improbable development.

Given the newness of these international initiatives and the difficulties of gauging whether they will be successful, the EU continues to foster cooperation on a bilateral basis whilst recognising that this is not a problem-free area. First, the EU has expressed concern in relation to the cost and time of setting up and monitoring such bilaterals. Secondly, the EU recognises that only limited progress has been made regarding the operation of positive comity. For example, the positive comity agreement must be amended to include mergers and the Merger Control Regulation must be altered to include a clause enabling positive comity to happen. Thirdly, cooperation can be deepened only if authorities are able to exchange confidential information without acquiring prior assent from the parties under investigation. Such second generation agreements exist outside the EU and the EU is seeking to move in this direction but it will take time.<sup>32</sup>

<sup>32</sup> Mario Monti: speech at the Global Competition Forum, Paris, 17 October 2001, page 5.