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The extraterritorial reach of EU competition law revisited

– The “effects doctrine” before the ECJ –

Peter Behrens

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Editor:
Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Markus Kotzur, LL.M. (Duke) (managing director),
Dr. Konrad Lammers (research director)
Windmühlenweg 27
22607 Hamburg, Germany
http://www.europa-kolleg-hamburg.de

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The extraterritorial reach of EU competition law revisited

– The "effects doctrine" before the ECJ –

Peter Behrens*

Abstract:
The protection of a "system of undistorted competition" within the internal market is one of the core elements of EU law that institutionalizes economic integration. The addressees of the prohibitions regarding restraints of competition such as Articles 101 and 102 TFEU are "undertakings". Hence the question arises whether such undertakings must be located within the EU, whether at least their anticompetitive conduct must be completed within the EU or whether it is sufficient that the effects of restraints of competition are felt on the internal market. These problems have been discussed for many decades, but the ECJ has still not come to a fully satisfactory conclusion. This paper sets out the public international law ramifications, briefly describes the development in the US and analyzes the jurisprudence of the ECJ up to the recent *Intel* judgment of the General Court which is now, upon appeal, before the ECJ.

Keywords:
Competition law – antitrust law – extraterritorial application – international jurisdiction – public international law principles – territoriality principle – personality principle – jurisprudence – single economic entity doctrine – implementation doctrine – effects doctrine – conflicts of jurisdiction – positive comity

* Peter Behrens is Professor em. of Law (University of Hamburg, Faculty of Law), Dr. iur. (University of Hamburg), MCJ (New York University) and Director at the Institute for European Integration of the Europa-Kolleg Hamburg. This paper is based on a contribution to a Liber Americorum in honor of Professor Tadeusz Skoczny, Warszaw.

Contact information:
Peter Behrens
P-Behrens@europa-kolleg-hamburg.de

I. Introduction

The legal bases and the limits of the extraterritorial application of EU competition rules are still not fully settled. Due to the appeal against the General Court's judgment in the *Intel* case,[1] this question is actually again before the Court of Justice (ECJ).[2] Whereas the General Court (GC) has accepted the principle of territoriality as well as the qualified effects-approach as alternative bases for the EU's jurisdiction,[3] the ECJ has so far been careful to avoid any clear pronouncement in favour of this latter approach. Since in his opinion submitted to the ECJ in the *Intel* case the Advocate General (AG) has already recommended that the ECJ should follow the GC's judgment in this respect,[4] it is justified to anticipate that the ECJ will finally also join in. This contribution will provide a short account of the development of EU jurisprudence on extraterritoriality from the early days until now (IV.), not without first explaining the public international law background (II.) as well as the preceding development in the US where the effects doctrine has been adopted by the courts some 70 years ago already (III.).

II. Public International Law Principles of Jurisdiction

It is common ground that three aspects of a State's jurisdiction may be distinguished: jurisdiction to legislate (prescriptive jurisdiction), jurisdiction to adjudicate (curial jurisdiction) and jurisdiction to enforce (enforcement jurisdiction).[5] Prescriptive jurisdiction relates to a State's power to regulate persons, things or conduct. Adjudicative jurisdiction relates to the application of national laws by a State's courts or administrative bodies to specific cases. Enforcement jurisdiction relates to the exercise of compulsion or force in order to ensure compliance with decisions taken by national courts or administrative bodies on the basis of such laws. According to Art. 47 of the Treaty on European Union (TEU), the EU enjoys legal personality and is a legal subject under public international law. Hence, for the purposes of jurisdiction, the EU is also subject to the jurisdictional rules that apply to States.

When it comes to the jurisdiction of States (or of the EU for that matter), the threshold question under public international law is whether it must be positively granted by a permissive rule or whether its exercise is permitted unless it is prohibited by a rule limiting a State's jurisdiction. Even though this question is still not totally uncontroversial, two principles are generally accepted as positively providing jurisdiction: the territoriality principle and the personality principle. The territoriality principle implies a State's unlimited power to exercise jurisdiction within its territory, i.e. also over foreign nationals who are found within that territory. It comes in two distinct varieties: subjective territoriality covers acts originating in a State's territory

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* Professor em. Dr. Peter Behrens, MCL (New York University), Faculty of Law of the University of Hamburg, Member of the Board of Directors of the Europa-Kolleg Hamburg.

[1] CFI Case T-286/09, *Intel v Commission*, EU:T:2014:547.

[2] ECJ Case C-413/14, *Intel v Commission*.

[3] Id. paras. 231 et seq.

[4] Opinion of AG Wahl Case C-413/14, EU:C:2016:788, para. 296.

[5] Cf. id. para 282.

even though they may have been completed abroad; objective territoriality covers acts originating abroad but at least partially completed within the State's territory. The personality principle implies jurisdiction over the nationals of a State even if they are not present within its territory. Hence, the question arises as to whether and to what extent a State may exercise jurisdiction over foreign nationals' conduct taking place within the territory of another State. This question is at the core of a potential extraterritorial application of domestic competition laws.

Here the famous judgment of the Permanent Court of International Justice (PCIJ) handed down in 1927 in the *Lotus* case[6] comes in which appears still to be an undisputed cornerstone of the public international law of jurisdiction. The case was about the institution of criminal proceedings in Turkey against an officer of a French steamer which was involved on the high seas in a collision with a Turkish steamer whereby Turkish sailors and passengers were killed. Before the PCIJ, the French Government argued that the Turkish courts in order to have jurisdiction should point to some "title to jurisdiction recognized by international law in favour of Turkey". Turkey, on the other hand, argued that it had jurisdiction "whenever such jurisdiction does not come into conflict with a principle of international law". The PCIJ ruled as follows:

> "[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."

This statement clearly relates to enforcement jurisdiction. It reflects the negative side of positive territoriality: A State's sovereign power to apply coercion or force against persons or things within its territory is necessarily exclusive of any other State's equivalent power. It is important to notice, however, that the PCIJ went on to say that

> "[i]t does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. […] Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside its territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules."

An undisputed prohibitive rule is exactly the one the PCIJ has initially stated in the *Lotus* judgment, i.e. that States have no enforcement jurisdiction in other states' territory. On the other hand, States may in principle exercise prescriptive as well as adjudicative jurisdiction as far as persons and transactions are concerned that took place outside their territory. According to the *Lotus* judgment, public international law would therefore neither prevent the EU from extending its competition rules to anticompetitive conduct in foreign countries nor from applying such rules to foreign conduct by way of decisions taken by the Commission or by judgments of the GC or the

[6] *The Lotus Case*, France v. Turkey (1927), P.C.I.J. Reports, Series A, No. 10, at 18.

ECJ. The EU cannot, however, enforce such decisions or judgments outside its own territory.

Lotus must be read in conjunction with later judgments of the International Court of Justice (ICJ). The ICJ has in the meantime specified limits to States' "wide measure of discretion" when defining the scope of their extraterritorial jurisdiction. Such limiting principles may be derived from two famous judgments concerning States' right to provide diplomatic protection in favour of their nationals. The *Nottebohm* case[7] involved a German national who had been residing for many years in Guatemala and who's property was said to have been unlawfully affected by the Government of Guatemala during the Second World War. In 1939, *Nottebohm*, without giving up his German nationality, had successfully applied for naturalization by the State of Liechtenstein. Since after the Second World War Guatemala and Germany were still in a state of war, it was Liechtenstein that claimed to be entitled to provide diplomatic protection in favour of *Nottebohm*. Guatemala rejected this claim and Liechtenstein instituted proceedings before the ICJ. The ICJ held:

"[I]nternational law leaves it to each State to lay down the rules governing the grant of its own nationality. This is so failing any general agreement on the rules relating to nationality. […] But, on the other hand, a State cannot claim that the rules it has laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the nationality granted accord with an effective link between the State and the individual."

The *Barcelona Traction* case[8] involved a Canadian company who's investment in Spain had alledgedly been injured by Spanish authorities. The vast majority of the company's shareholders were Belgian nationals. Since Canada had initially intervened on behalf of the company, but then withdrawn, Belgium claimed to be entitled to provide diplomatic protection in respect of the injury suffered by its nationals. Spain rejected this claim and Belgium instituted proceedings before the ICJ. In this case the ICJ required that there should

"exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law."[9]

Even though the ICJ emphasized that in the particular field of diplomatic protection of corporate entities no absolute test of the "genuine connection" (such as, e.g., the place of incorporation, the registered office, the real seat, the central place of management or the centre of control) has found general acceptance, the judges made it crystal clear that in order for a State to be entitled to provide diplomatic protection in favour of a company the showing of a "genuine link" was crucial.

Far beyond the particular field of diplomatic protection, the concept of "effective link" or "genuine link" has since been generalized as a precondition for the exercise of a

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[7] *Nottebohm Case*, Liechtenstein v. Guatemala, I.C.J. Reports 1955, p. 4.
[8] *Barcelona Traction, Light and Power Co. Case*, Belgium v. Spain, I.C.J Reports 1970, p. 3.
[9] Id. para. 70.

State's jurisdiction. Hence, even though States enjoy a "wide measure of discretion" when defining the scope of their extraterritorial jurisdiction, the right to apply national laws to persons, things and conduct outside the national territory or to adjudicate cases involving such persons, things or conduct is justified only if a "genuine link" can be shown. How this is reflected in the ECJ's jurisprudence concerning the extraterritorial reach of EU competition rules will be discussed below after a short account of the development in the US.

III. Extraterritorial Application of US Antitrust Law

The initial approach of American courts to their jurisdiction in the field of antitrust law was strictly based on the territoriality principle. A case in point is the dispute between *American Banana Co.* and *United Fruits Co.* about a conspiracy between the latter corporation and a Central American government to the effect that the first corporation was deprived of the use of a banana plantation in Panama and driven out of the banana market by other exclusionary practices there. The US Supreme Court[10] held that any statute (such as the Sherman Act of 1890) must be construed

"as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial.' […] Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize' etc. will be taken as a matter of course, to mean only everyone subject to that legislation , not all that the legislator subsequently may be able to catch."

And the Court concluded that the prohibitions of the Sherman Act 1890 do not extend to acts done in foreign countries even though done by citizens of the United States and injuriously affecting other citizens of the United States. The question whether the acts complained of might have had a negative effect on competition within the United States was not even raised at all.

This approach was finally abandoned in the famous *Alcoa* case[11] involving an international cartel that was agreed among aluminium producers outside the US and that allocated quotas between the parties which resulted in quantitative restrictions of aluminium imports into the US. Judge Learned Hand, alluding to the American Banana case, said in his judgment:

"[I]t is quite true that we are not to read general words, such as those in [§ 1 of the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws'. We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."

But then he went on to state:

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[10] *American Banana Co. v. United Fruits Co.*, 213 U.S. 347 (1909).

[11] *United States v. Aluminium Company of America*, US Court of Appeals (2nd Circuit), 148 F.2d 416 (1945).

"On the other hand, it is settled law […] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders, which the state reprehends; and these liabilities other states will ordinarily recognize."

And he concluded with regard to the cartel agreements that were relevant in this case:

"Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."

Hence, the basis of the court's approval of its jurisdiction was neither the presence of the persons or corporations involved in the cartel agreements nor the place where these agreements were made, but rather the negative effects on competition within the US. This so-called "effects doctrine" has become a core element of American international antitrust law ever since.[12]

IV. The development of EU jurisprudence

EU jurisprudence concerning the extraterritorial reach of EU competition rules is characterized by an incremental development from the territoriality principle towards the effects doctrine. The fact that this development took more than fifty years is due to some Member States' (especially the UK's) strong adherence to the territoriality principle. As will be seen, this may explain the reluctance of the ECJ to squarely embrace the "effects doctrine". The Court rather upheld the territoriality principle as part of EU law as long as possible. And it remains to be seen in the *Intel* case[13] whether the ECJ will finally "give in". The development may be divided into three phases: the first phase was characterized by the attempt of the ECJ to reconcile the extraterritorial reach of EU competition rules with the territoriality principle by applying the "single economic entity" doctrine to international groups of companies (1.); in the second phase the ECJ developed for the same purpose a distinction between the "formation" of a restrictive practice (such as a cartel) and its "implementation" (2.); it is during the third phase during which at least the GJ has accepted the effects doctrine, but this phase has still not quite come to an end.

1. Phase 1: The "single economic entity" doctrine

The first most important case that confronted the ECJ with the problem of extraterritorial application of EU competition law was the famous *Dyestuffs* case.[14] This case involved a concerted practice of all leading dyestuff producers in Europe, including the British Imperial Chemical Industries (ICI group), the object of which were several simultaneous price increases all over Europe concerning a large range of dyestuffs. At the time the concertation took place, the UK was not yet Member of the EU. Hence, the British parent company of the ICI group was not located within the territory of the EU.

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[12] It was later confirmed also by the US Supreme Court in *Hartford Fire Insurance v. California*, 544 U.S. 155 (1993).
[13] See supra, footnote 2.
[14] ECJ Case C-48/69 (*ICI v. Commission*), EU:C:1972:70.

It did have subsidiary companies within the EU however, which were distributing ICI's products there at prices that reflected the price fixing concertation. The Commission imposed fines on all participants irrespective of whether they were EU or foreign companies, including the British parent company of the ICI group.

ICI challenged the Commission's decision *inter alia* on the ground that the EU lacked jurisdiction. ICI argued (on the basis of the territoriality principle) that ICI's anticompetitive conduct did not take place within the EU and applying EU competition law to conduct outside its territory was a violation of public international law. According to ICI, the territorial jurisdiction which the EU had over ICI's subsidiaries within the EU could not be extended to the British parent company. The Commission based its jurisdiction, firstly, on the fact that ICI had instructed its subsidiaries within the EU to sell at the prices that had been collectively fixed (this was said to amount to ICI's conduct within the EU), and, secondly, on the notion that EU competition rules prohibit all restrictions on competition which produce, within the EU, effects covered by them no matter where the companies responsible for such conduct have their registered office. The first approach would reflect the notion that parent and subsidiary companies form a single enterprise ("single economic entity"), the second approach reflected the "effects doctrine". According to the Commission, this was in line with the *Lotus* judgment of the PICJ, since it did not involve any enforcement activities of the Commission on foreign territory, and it was said to be also in compliance with the "connecting link" requirement established under public international law. The government of the UK had nevertheless sent the ECJ an aide-mémoire expressing its concern that the Commission's decision hat infringed upon the territoriality principle and the UK's sovereignty.

General Advocat (GA) Mayras in his opinion appeared not convinced by the Commission's "single economic entity" approach but rather favoured the "effects doctrine" as a proper basis for the Commission's jurisdiction.[15] He was careful to emphasize, however, that public international law requires certain conditions to be fulfilled in order for the domestic effects of foreign conduct to grant jurisdiction. The effects should be "qualified", i.e. they should be direct, foreseeable and substantial. These conditions clearly reflect the "genuine link" criterion established by the jurisprudence of the PCIJ and ICJ.

The ECJ in its judgment did not follow the AG' proposition, but rather based its reasoning on the territoriality principle.[16] According to the ECJ, anticompetitive effects within the internal market (i.e. within the territory of the EU) are a substantive pre-condition for the application of EU competition rules, but they were not in and of themselves considered a sufficient basis for the Commission's jurisdiction in the case at hand. The ECJ rather considered ICI's conduct to have taken place not only outside, but also inside

[15] Opinion of AG Mayras, ECJ Case C-48/69 (*ICI v. Commission*), EU:C:1972:32, pp. 693 et seq.
[16] ECJ Case C-48/69 (*ICI v. Commission*), EU:C:1972:70, paras. 125 et seq.

the EU due to what has since then been labeled the “single economic entity” doctrine. The judgment reasoned as follows:

“(128) [T]he actions for which the fine at issue has been imposed constitute practices carried on directly within the Common Market.

(130) By making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on that market.

(132) The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.

(133) Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

(135) In view of the unity of the group thus formed, the actions of the subsidiaries may in certain circumstances be attributed to the parent company.”

Since the ECJ was convinced that ICI’s British parent company was able to exercise “decisive influence” over the policy of the subsidiaries as regards selling prices in the Common Market and in fact had used this power upon the occasion of the three price increases in question,[17] the formal separation between these companies could not “outweigh the unity of their conduct on the market for the purposes of applying the rules on competition”. Hence the judgment concluded that it “was in fact the applicant undertaking which brought the concerted practice into being within the Common Market”.[18]

2. Phase 2: The “implementation doctrine”

The next step in the development of the ECJ’s jurisprudence extended the concept of “implementation” of a restriction of competition as mentioned in the *Dyestuffs* case already[19] beyond the scope of cases where the responsible foreign company was somehow present within the EU due to its EU subsidiaries with which it would form an economically uniform entity. The occasion to consider such extension arose in the *Woodpulp* case[20] which involved a concerted practice of foreign pulp producers leading to the fixing of prices for their exports into the EU. In this case the “single economic entity” doctrine could not be applied, because none of the foreign producers had subsidiary companies within the EU. All of them merely sold their products into the EU. It was therefore expected that the ECJ would now be willing to accept the “effects doctrine” in order to justify the Commission’s assertion of jurisdiction.

AG Darmon, after having analyzed the implications of the *Lotus* und *Barcelona Traction* judgments of the PCIJ and the ICJ respectively as well as of the jurisprudence of American courts, suggested that the ECJ should apply the “qualified effects” criterion as

[17] Id. para. 137.
[18] Id. para. 141.
[19] See id. para. 130.
[20] ECJ Joined Cases C-89/85 (*Ahlström Osakeyhtiö et al. V. Commission*), EU:C:1988:447.

developed already by AG Mayras in the *Dyestuffs* case.[21] Hence, he based the Commission's jurisdiction on the anticompetitive effects within the EU, provided they were "direct and immediate, reasonably foreseeable and substantial". However, the UK had been granted leave to intervene and taken the position that the case should be decided exclusively on the basis of the territoriality principle. It seems not to be too farfetched to assume that the ECJ was therefore attempting to avoid the "effects doctrine" and to find another way of justifying the Commission's jurisdiction on the basis of the territoriality principle. The ECJ's way out was the distinction between the "formation" of a cartel or concerted practice and its "implementation". The reasoning of the judgment was as follows:

"(16) It should be observed that an infringement of 85 [now Article 101 TFEU], such as the conduct of an agreement which has had the effect of restricting competition within the [internal] market, consists of conduct made up of two elements, the formation of the agreement, decisions 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 of 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."

(18) Accordingly the [EU's] jurisdiction to apply competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law."

This reasoning is plausible up to the extent that not only the price fixing itself (or the "formation" of the restraint of competition) but also the selling of products on the market at cartelized prices (i.e. the "implementation" of the restraint of competition) is part of the conduct prohibited by EU competition rules. This would then meet the requirements of the objective territoriality principle which covers conduct originating abroad but completed within the territory of the EU.

3. Third Phase: Towards the "effects doctrine"

The first case where at least the GC proved to be open to go beyond the territoriality principle and to also (though not quite unambiguously) take the "effects doctrine" into account was the *Gencor* case.[22] This case involved a merger of a South African and an English company by acquiring joint control over another South African company. All of the companies concerned were exporting platinum and rhodium into the EU. The Commission blocked the merger, because it would have led to the creation of a dominant duopoly position on the world platinum and rhodium market and as a result effective competition would have been significantly impeded within the EU also.

The GC first analyzed the territorial scope of the Merger Control Regulation (MCR) in terms of the "community dimension" of the merger (Art. 1 MCR) and stated:

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[21] Opinion of AG Damon, Joined Cases C-89/85 (*Ahlström Osakeyhtiö et al. V. Commission*), EU:C:1988:258, para. 53 et seq.

[22] GC Case T-102/96 (*Gencor Ltd v. Commission*), EU:T:1999:65.

"(79) Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory.

(82) The legal bases for the Regulation, namely Articles 87 and 235 of the Treaty, and more particularly the provisions to which they are intended to give effect, that is to say Articles 3(g) and 85 and 86 of the Treaty, as well as the first to fifth, ninth and eleventh recitals in the preamble to the Regulation, merely point to the need to ensure that competition is not distorted in the common market, in particular by concentrations which result in the creation or strengthening of a dominant position. They in no way exclude from the Regulation's field of application concentrations which, while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded."

The GC went on to emphasize that the quantitative thresholds mentioned in Art. 1 MCR are based on turnover, i.e. on sales within the EU. Since the foreign companies concerned did in fact sell platinum and rhodium into the EU, the GC concluded that the "implementation" criterion developed in the *Woodpulp* case was also satisfied and provided a territorial link to the internal market.

Nevertheless, the GC continued by examining also the "immediate, substantial and foreseeable effect" of the merger within the EU thereby implying the application of the "effects doctrine". In light of the goal of merger control, it is not surprising that the GC considered the effects on the market structure as crucial. The concentration in question would have altered the competitive structure within the internal market since it would have reduced the number of undertakings in the market from three to two. The judgment therefore, firstly, states that

"(94) […] the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational, given that the concentration would have significantly impeded effective competition in the market by giving rise to a lasting alteration to the structure of the markets concerned."

The GC found the criteria of substantiality and foreseeability of the relevant effects equally satisfied. The ambiguity of the judgment results from the fact that it somehow combines the "implementation" and the "effects" criteria. So it is not totally clear whether the GC stayed within the territoriality principle or went beyond its proper scope.

This ambiguity was finally eliminated by the GC's judgment in the *Intel* case.[23] This case involved an abuse of a dominant position prohibited under Art. 102 TFEU. *Intel*, a US-based corporation, was held to be in a dominant position on the market for x86-processors that were used by its customers as inputs for the production of computers. All of the producers were also located outside the EU. Upon a complaint lodged by *Intel*'s competitor AMD, another US-based corporation, the Commission found that *Intel* had

[23] GC Case T-286/09 (*Intel v. Commission*), EU:T:2014:547.

abused its dominant position by granting its customers rebates as well as payments that were conditioned upon exclusive purchasing of *Intel*'s x86-processors or selling exclusively computers containing such processors. The Commission found that *Intel* had engaged in exclusionary practices by preventing its competitor AMD from staying in the market for processors including the internal market of the EU. *Intel* appealed to the GC arguing *inter alia* that the Commission lacked jurisdiction.

Since the exclusionary rebates and payments were granted by *Intel* outside the EU, the abuse of *Intel*'s dominant position was clearly "formed" outside the EU. Was the abuse at least "implemented" within the EU, however, so that the jurisdiction of the Commission could be established on the basis of the territoriality principle? What exactly does "implementation" in case of an exclusionary practice mean? Arguably, it meant in this case *Intel*'s customers' abandonment of AMD as one of their supplier of processors and this happened clearly outside the territory of the EU. The consequence thereof was, however, that competition on the market for processors or for computers containing such processors was restricted and this was felt on the internal market within the EU as well. To consider these effects as "implementation" of the abuse (i.e. as part of *Intel*'s conduct) would overstretch the concept. Hence, only the effects of *Intels*' abuse could be regarded as a proper basis of the Commission's jurisdiction. When *Intel* appealed to the GC, it was therefore to be expected that the court would have to accept the "effects doctrine". And this is exactly what happened when the GC made the following statements:

"(231) First of all, it should be noted that, in the case-law of the Court of Justice and the General Court, two approaches have been followed in order to establish that the Commission's jurisdiction is justified under the rules of public international law.

(232) The first approach is based on the principle of territoriality. That approach was followed in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193, '*Woodpulp*'. In paragraph 16 of that judgment, the Court held that it was necessary to distinguish two elements of conduct, namely 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 Court therefore held that the decisive factor is the place where it is implemented.

(233) The second approach is based on the qualified effects of the practices in the European Union. That approach was followed in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, '*Gencor*'. In paragraph 90 of that judgment, the Court held that application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), as corrected (OJ 1990 L 257, p. 13), is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the European Union.

(234) By submitting that where trade with third countries is involved, even where implementation of the practices at issue takes place within the European Union, the Commission must also prove the existence of immediate, substantial, direct and foreseeable effects within

the European Union, the applicant's reasoning amounts to an assertion that implementation and qualified effects in the European Union are cumulative conditions.

(235) The Commission stated, at the hearing, that, in the present case, its jurisdiction was justified, first, under the doctrine of implementation of the practices at issue in the EEA, which was followed in *Woodpulp*, paragraph 232 above, and, second, under the effects doctrine, which was followed in *Gencor*, paragraph 233 above.

(236) In that regard, the Court would point out that demonstrating the implementation of the practices at issue in the EEA or demonstrating qualified effects are alternative and not cumulative approaches for the purposes of establishing that the Commission's jurisdiction is justified under the rules of public international law."

This latter statement is crucial, because it indicates already how the GC wants his *Gencor* judgment to be interpreted: The court implicitly says that the effect of an anticompetitive practice is one of two criteria each of which may establish jurisdiction on a stand-alone basis. The ambiguity of the *Gencor* judgment in this respect is thereby eliminated. The GC expressly stated:

"(240) [I]n *Gencor*, paragraph 233 above (paragraphs 89 to 101), the General Court relied solely on the qualified effects in order to establish that the Commission's jurisdiction was justified under the rules of public international law."

It must be added, however, that the GC has also emphasized the relevance of the criteria which, according to the *Gencor* judgment, qualify the effects within the EU that may justify the Commission's jurisdiction. The court insisted again that the effects must be "substantial, immediate and foreseeable".

It now remains to be seen whether the ECJ will, upon *Intel*'s appeal, follow this line of reasoning and for the first time also accept the "qualified effects doctrine" as a separate basis for the Commission's jurisdiction apart from the "implementation" doctrine. In his opinion, AG Wahl has clearly suggested that the ECJ "should explicitly address that issue here and […] adopt an effects-based approach to the application of Articles 101 and 102 TFEU". To the extent that the ECJ's reluctance to embrace the "qualified effects doctrine" may have been due to the UK's insistence on the territoriality principle,[24] this may, in light of the "Brexit", turn out to be no relevant consideration any longer.

V. Conclusion

The extraterritorial reach of EU competition rules has always been a very sensitive problem. The more the EU as well as foreign States such as the US extend the "long arm" of their laws so as to reach conduct on foreign territory, the more likely it becomes that jurisdictional conflicts will arise. It is nevertheless to be welcome that the *Intel* case provides an opportunity for the ECJ to align its jurisprudence with US jurisprudence. Both jurisdictions' "long arms" would finally become equally long. Potential conflicts

[24] Sec. 2(3) of the UK Competition Act, by incorporating the "implementation" concept, is still based on the territoriality principle.

arising from both sides' assertion of jurisdiction in one and the same case may then be resolved by the "positive comity" principle which has been laid down in the "Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws".[25] "Positive comity" applies where one party can demonstrate to the other that anticompetitive activities are occurring within the territory of the latter's territory which are adversely affecting the interests of the first party; the competition authorities of the "requesting party" may request the authorities of the "requested party" to investigate and, if warranted, to remedy anticompetitive activities in accordance with the latter's competition laws; the "requesting party" may then defer or suspend the application of its own laws. The result is that there will be no safe haven any longer that companies may use in order engage in restraints of competition.

[25] OJ [1998] L 173/26.