

Investigation and sanctioning of antitrust infringements: The long arm of competition authorities

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1. Prior to the twentieth century, each State had exclusive jurisdiction within its own territory and extraterritorial jurisdiction was claimed only exceptionally. Developments such as increased interconnection between national economies and advances in technology and telecommunications, including the Internet, have made it necessary for States to seek to regulate the activities of multinational corporations. This applies in particular as regards anticompetitive cartels.

2. Competition authorities such as the Department of Justice (“DOJ”) and the European Commission (“EC”), and courts, apply antitrust laws extraterritorially, both during antitrust investigations and when imposing a sanction.

3. The US was the first jurisdiction to apply its antitrust laws extraterritorially and today, DOJ is the most aggressive competition authority in terms of imposing fines and prison sentences on foreign companies and individuals.¹⁵¹ Recently, DOJ was successful for the first time in extraditing a foreign individual on cartel charges.¹⁵²

4. In terms of public enforcement, during antitrust investigations, competition authorities adopt strategies to access documents that are located outside of their jurisdiction. From the perspective of private enforcement, courts (in particular in the US) also apply antitrust laws

extraterritorially, in particular when granting requests for discovery of documents from the files of foreign competition authorities.

5. Extraterritorial application of antitrust law without limitation is particularly problematic at the time of imposition of sanctions since criminal cartel sanctions may be imposed on individuals who participate in cartels, including those who come from countries where participating in a cartel is not a crime. This is a crucial issue given that there is an actual risk of extradition on grounds of anti-competitive conduct.

I. Access to documents

1. Public enforcement

6. In principle, by law, competition authorities cannot directly compel production of a foreign company’s documents located abroad. Competition authorities wishing to obtain access to documents and information located abroad should seek to obtain the formal assistance from local authorities via for example a Mutual Legal Assistance Treaty. The EU and the US, for instance, have signed an agreement on mutual legal assistance in criminal matters to facilitate the collection of information in this context.

7. However, in practice, competition authorities do pursue foreign-located documents in a number of different ways. The EC may send a request for information to the EU subsidiary of a foreign company. In comparison, DOJ has adopted a more aggressive approach. It may for example ask a Grand Jury to issue a subpoena to the US subsidiary of a foreign company for documents the US subsidiary can “access” abroad. Access is defined very broadly:

151 In the US, from 1 January 2015 to today, 12 foreign companies and 9 foreign individuals accepted to plead guilty for having participated in a cartel, and 2 foreign companies and 25 foreign individuals were indicted for having participated in a cartel.

152 Extradition of Mr. Romano Piscioti in April 2014.

the subsidiary “*need only be able to obtain the documents in question to ‘control’ them, and need not ‘control’ the parent that possesses the documents.*”¹⁵³ This may include electronic documents stored on foreign servers. DOJ may also try to access documents located abroad by arguing that the subsidiary is in fact the “agent” or “alter ego” of the parent or even with the imposition of a subpoena on the US law firm of a foreign company for documents produced in civil litigation in the US.¹⁵⁴

8. Beyond access to documents, DOJ also often pressures a foreign company that has agreed to cooperate with DOJ in the context of a cartel investigation to send its employees to the US in order to be interviewed by the DOJ or to testify before a Grand Jury in connection with investigations of other companies. This is a very powerful tool for DOJ to gain access to information and evidence located abroad.

2. Private enforcement

9. Extensive discovery procedures in court proceedings may also enable access to foreign documents. At the close of cartel investigations by competition authorities, private litigants may bring private damages actions against members of a cartel, especially in jurisdictions where private antitrust damages actions (and class actions) are developed, such as in the US.

10. Under discovery procedures—particularly in the US—civil plaintiffs are entitled to make broad document production requests and demand to have access to any relevant documents in a company’s possession.

11. There is a risk that evidence provided to the EC in the EU (and other competition authorities) by leniency applicants would have to be produced in US courts. For instance, in the *Vitamins* case¹⁵⁵, a US court required that written corporate statements provided by leniency applicants to the EC be produced in the damages litigation. To overcome this risk, competition authorities and countries adopt different strategies to counter overbroad requests for discovery.

2.1 The principle of comity

12. Competition authorities may try to intervene in foreign proceedings and invoke the principle of comity. Comity “*reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.*”¹⁵⁶ Even where information is relevant and likely

in the possession of a defendant, a US court may decline to order production of the information if doing so would be adverse to foreign interests.

13. The EC has filed *Amicus curiae* in several cases before US courts to oppose discovery requests of documents in its file. In the *Vitamins* case¹⁵⁷, the EC submitted a letter arguing that “*should all documents and statements provided to the Commission by companies/US defendants as a result of a leniency application, have to be communicated to US plaintiffs in the course of a US civil litigation, the effectiveness of the EU antitrust procedures could indeed be seriously undermined.*” The US court nevertheless allowed discovery, considering that the concerns expressed by the EC were “*insufficient to protect the defendants’ submissions to these authorities from disclosure standing on their own and when weighed against the US interests in open discovery and enforcement of its anti-trust laws.*” By contrast, in the *Rubber Chemicals* case¹⁵⁸, US judges refused to order discovery of business documents provided by a company to the EC after the defendant submitted a letter from the EC opposing discovery. The US court applied the comity doctrine to oppose the production, considering that “*the principles of comity outweigh the need for production of the EC documents.*”

14. The EC learned its lesson and, to limit the risk of discovery, introduced “oral corporate statements.” However, there is still a major risk in jurisdictions where competition authorities have not yet introduced oral leniency applications. When dealing with investigations in these jurisdictions, companies should be prepared to ask the competition authority to agree in a letter that it will intervene in US courts proceedings to oppose discovery of documents that are part of that competition authority’s file.

2.2 Blocking statutes

15. Some countries have adopted national “blocking statutes” to restrict or prohibit the transfer of documents for use in US proceedings outside of the Hague Evidence Convention¹⁵⁹. This Convention allows transmission of letters of request from one State to another (where the evidence is located) without recourse to diplomatic channels.

153 *In re Subpoena Duces Tecum to Ingeteam*, 2011 U.S. Dist. LEXIS 91431 (E.D. Wis. Aug. 16, 2011).

154 *In re Grand Jury Subpoenas served on White & Case LLP, et al.*, 2010 WL 4948545 (9th Cir. Dec. 7, 2010).

155 *In re Vitamins Antitrust Litigation*, MDL No. 1285 (D.D.C.).

156 DOJ Antitrust Enforcement Guidelines for International Operations, April 1995.

157 *In re Vitamins Antitrust Litig.*, 2002 U.S. Dist. LEXIS 26490, No. 99-197, 8 (D.D.C. Jan. 23, 2002); see also *In re Flat Glass Antitrust Litig. (II)*, MDL No. 1942 (W.D. Pa. Feb. 11, 2009), where the court ruled in the plaintiff’s favor holding that comity did not require non-production of documents in the EC’s file, including the Statement of Objections.

158 *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007); see also *In re Methionine Antitrust Litig.*, MDL No. 1311 (N.D. Cal. June 17, 2002), in which the US court denied the motion to compel on the grounds that “*This is not a case of the parties merely speculating over how a foreign government might feel about such an action*” because “*the foreign government itself had clearly stated its position and the reasons why the production of the documents would harm its interests.*”

159 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

16. France's blocking statute, for example, imposes criminal penalties on a person transmitting outside of the Hague Evidence Convention "*documents or information relating to economic, commercial, industrial, financial or technical matters*" for use in foreign proceedings.

17. In reaction to national blocking statutes, US courts have adopted a self-protective "response." In *Aerospatiale*¹⁶⁰, the US Supreme Court ruled that the French blocking statute did not "*deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.*" The Supreme Court provided US courts with a framework to decide whether to order cross-border discovery. They must balance several factors, including (i) the importance of the documents or information requested, (ii) the degree of specificity of the request, (iii) the availability of alternative means of securing the information, and (iv) the extent to which non-compliance with the request would undermine important interests of the US.

18. After *Aerospatiale*, US courts have usually required production of documents despite blocking statutes, which seems to make sense from the point of view of the US because a cartel may have been implemented entirely abroad, but may have important effects in the US. Consequently, a US court could decide that there is no available means of securing the evidence needed to prove the cartel, that the documents are crucial to prove the cartel and that there are important US interests at stake.¹⁶¹

19. A recent EU directive on the protection of trade secrets¹⁶² could further undermine the blocking statute strategy. This directive will align existing national laws within the EU against the misappropriation of trade secrets. The directive describes in particular the conditions of use of these secrets. Of noteworthiness, and this is one of the most sensitive aspects of the directive, the directive provides that the protection of trade secrets should not extend to "*cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing, or illegal activity is revealed.*" Depending on the balance that judges will strike between the different interests, this directive could render ineffective a blocking statute.

20. Competition authorities also apply their laws extraterritorially at the time of the imposition of sanctions.

II. Extraterritorial application of antitrust law at the time of the imposition of a sanction

1. Absence of international consensus on the criminalization of cartel offenses

21. According to the universality principle in public international law, certain crimes are so serious in their effects on international peace and security that all States have an interest in forbidding and punishing them. On this basis, every State may assert extraterritorial jurisdiction over a criminal act regardless of where the activity took place or the nationality of the accused.

22. Assertions of extraterritorial jurisdiction in connection with criminal sanctions for competition law are particularly controversial because States are not consistent in their approach. Although the US has criminalized cartels under the Sherman Act since 1890, collusion has only recently been recognized as a crime by other countries—the UK did not follow suit until the Enterprise Act 2002 came into force in 2003. At the European Union level and in most Asian countries collusion is still not a crime. Even where the offense is criminalized, the elements of the offense may not be the same between different States.

23. Nevertheless, in the US, foreign individuals that have engaged in cartel conduct are pressured into entering into plea agreements with DOJ. Indeed, the threat of arrest or detention while traveling internationally poses practical difficulties for an individual who is working in international business. In addition, foreign executives convicted of felonies can be banned from entering the US for more than a decade on the basis of a 1996 memorandum of understanding ("MOU") with US immigration officials.

24. One may question whether it is fair to extraterritorially impose criminal sanctions on individuals who come from and/or live in countries where participation in a cartel is not a crime.

25. Criminal offenses under competition law fall to an extent outside the traditional realm of criminal law: they are less a response to moral outrage than an attempt to shape economic behavior. As such, assertions of extraterritorial jurisdiction for competition law need

160 *Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987).

161 See for example *In re Air Cargo Shipping Antitrust Litigation*, 06-md-1775, U.S. District Court, Eastern District of New York (Brooklyn).

162 Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

to be carefully justified in order to reflect the different approaches across the international community. It does certainly appear to be the attitude of several sovereign States that involvement in a cartel is simply not a serious enough offense to merit criminalization, let alone the assertion of extraterritorial jurisdiction.

26. It is true that many States are increasingly introducing criminal offenses to supplement corporate fines, but the reason behind this is to act as a deterrent to potential cartel members and not because participating in a cartel is an act of “moral outrage” which justifies going to prison. Thus, participating in a cartel cannot be compared with crimes that are so serious in their effects on international peace and security.

27. Given the lack of international consensus on whether cartel conduct should be criminalized, it is unlikely that cartels would be consistently viewed across the international community as sufficiently serious to merit universal extraterritorial jurisdiction.

2. The principle of “dual criminality”: A guarantee of fairness

28. The principle in most bilateral extradition treaties is that an individual may be extradited from one country to the other for a type of conduct only if such conduct constitutes a crime in both countries (principle of “dual criminality”).

29. The risk of extradition for anticompetitive violations is not merely theoretical since there have been two successful cases of extradition from European countries to the US. In March 2010, Ian Norris, a British citizen, was extradited from the UK to the US. He was convicted in the US for price fixing and obstruction of justice. He was not extradited on the basis of antitrust charges since, at the time of the infringement, price fixing was not a criminal offense in the UK. He was extradited on the basis of obstruction of justice (falsifying documents) which was a crime in both countries. In April 2014, the first successful extradition on the basis of a pure antitrust offense took place. Romano Piscioti, an Italian national, was arrested in Germany in April 2014 while in transit from a business trip for a case of bid rigging, which is a crime in both Germany and the US. Germany does not extradite its own nationals because of a provision in the German constitution but this did not prevent Mr. Piscioti’s extradition, who was an Italian national.

30. In the case of the extradition of Mr. Norris, the House of Lords in the UK held that Mr. Norris could not be extradited for price-fixing because it had not been a criminal offense in the UK at the time of his actions. The court said “*no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.*”¹⁶³

31. Moreover, according to Ivan A. Shearer, the dual criminality rule is founded on the maxim of *nulla poena sine lege* (no punishment without law) and “[t]he double criminality rule serves the most important function of ensuring that a person’s liberty is not restricted as a consequence of offenses not recognized as criminal by the requested State.”¹⁶⁴

32. The dual criminality requirement in extradition treaties therefore serves to promote legal certainty, in that if an act is illegal in the State where the accused is present and from which his extradition is sought, he is more likely to be aware that his conduct was forbidden prior to engaging in it.

33. It stems that the notion of dual criminality in extradition treaties does not rest on the relationship between two sovereigns, but on the notion of fairness. The principle exists to preserve the rights of defense of individuals.

34. Competition authorities and courts could decide to apply the principle of dual criminality at the stage of the imposition of sanctions, not only when ruling on extradition. This would effectively limit the most extreme consequence of the extraterritorial application of antitrust law, i.e., the imprisonment in a foreign country of individuals who participated in conduct that is not criminal in their own country.

Conclusion

35. In the modern globalized world neither business nor crime are restricted by national borders, and it is clear that regulation of those areas must be similarly extraterritorial in order to be effective. If States could not assert extraterritorial jurisdiction over any but their own nationals, some criminal conduct might simply go unpunished. That being said, there needs to be some constraints on extraterritorial jurisdiction in the field of anticompetitive practices because of the major differences in procedures and sanctions in jurisdictions with an antitrust system. ■

163 *R v. Rimington* [2006] 1 AC 459, § 33, cited in *Norris v. Government of United States of America* [2008] UKHL 16; 2008 WL 576934 at § 53.

164 I. A. Shearer, *Extradition in International Law* (1971), note 3, at 137-38.