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INTERNATIONAL ANTITRUST: OBSTACLES ON THE ROAD TO CONVERGENCE

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International cooperation and harmonization of competition law principles have been a continuing policy objective of the major antitrust jurisdictions, most notably the United States, the European Union, Canada, the United Kingdom, and Germany. Increasingly, an array of other jurisdictions with active competition enforcement agencies have begun to actively participate in both bilateral and multilateral efforts aimed at reducing conflicts in worldwide competition enforcement. Not surprisingly, however, major issues of divergence continue to emerge, exposing significant procedural and substantive differences among the various antitrust regimes. These areas of divergent policy will become serious obstacles to the prospects for complete harmonization, and may result in disproportionately tilting antitrust enforcement toward one jurisdiction or another.

One area of significant divergence was highlighted in two recent U.S. court decisions which adopted a dramatically more expansive approach to the reach of U.S. antitrust jurisdiction. These decisions, if upheld and if followed by other U.S. courts, will almost certainly attract increasing numbers of foreign claimants to pursue private antitrust damage claims in U.S. courts, notwithstanding the fact that their injuries resulted from the effects of foreign conduct on foreign markets.

Efforts in the late 1980s by the U.S. enforcement agencies to push the limits of the extraterritorial reach of U.S. antitrust law for the purposes of opening non-U.S. markets, notably Japan, to U.S. businesses met international resistance and at times strained international relations. These current efforts, pushed by private plaintiffs seeking the favourable environment of U.S. courts to pursue their damage claims, have resulted in exposing companies both to an expensive and time-consuming litigation process and to damage claims far beyond what they, until very recently, could reasonably have anticipated. As such, the potential for straining international relations is once again quite high.

While the consequences of this expansive view of U.S. jurisdictional are most immediate in the context of international cartels, the implications go well beyond cartel enforcement. This "tilt" towards litigating foreign damage claims in U.S. courts has arisen precisely because of the wide disparity in the treatment of such claims between the U.S. and virtually every other jurisdiction worldwide. Indeed, it is unlikely that "convergence" or "harmonization" will ever coalesce around a common position on the issues most relevant to private damage actions.

A second issue is the continuing debate over the economic underpinnings and appropriate circumstances for the application of the theory of "portfolio power" or "conglomerate effects" in merger control. While the awaited Court of First Instance decision as to the now-abandoned GE/Honeywell transaction will provide guidance as to the Commission's approach to conglomerate effects analysis, it is unlikely to articulate a position around which international merger policy will readily coalesce. International relations have already been bruised over this issue. U.S. companies have claimed that they were treated unfairly by the European Commission. The Commission, in turn, has objected to the heavy-handed criticism it has received.

I. Tilting Towards Litigating Foreign Private Actions in U.S. Courts

A. "Plaintiff Friendly" U.S. Procedures Provide a Powerful Incentive for Foreign Plaintiffs to Litigate Antitrust Claims in U.S. Courts

Private actions for damage have long been an important part of the U.S. antitrust enforcement regime. Private plaintiffs have been approvingly described as "private attorneys general" and, as a matter of antitrust policy, are encouraged to use damage actions as one means to scrutinize anticompetitive conduct. Specifically, Section 4 of the Clayton Act provides for a private right of action, either for damages or injunctive relief, for any person injured as a result of a violation of the federal antitrust laws. Enticingly, Section 4 also automatically trebles any damage award and provides that the attorneys' fees of successful antitrust plaintiffs, unlike the attorney fees in nearly all other U.S. litigations, are to be paid by the losing defendants. Further, all participants in a cartel are jointly and severally for all overcharges of the cartel conspiracy, irrespective of which cartel member actually overcharged the claimant, and proof of antitrust damages is relatively easy once liability has been established. For these reasons, among others, the U.S. remains the favoured forum for antitrust plaintiffs. Indeed, private enforcement of competition laws has long been a unique feature of U.S. law; only recently have other jurisdictions even begun to provide under their laws for similar private rights, and no jurisdiction has yet to construct a regime based on the U.S. model.

Apart from antitrust-specific features, U.S. procedure generally is very favourable to private plaintiffs. U.S. law provides for the aggregation of multiple claims into class action actions. Potentially, thousands of claims can be brought in one action (in the recently settled *Visa/Mastercard* litigation the plaintiff class consisted of over four million retailers), simultaneously reducing the costs to each plaintiff while magnifying for exposure for each defendant.

Further, U.S. law provides powerful incentives for plaintiffs' counsel by permitting generous contingency fee arrangements, by which plaintiffs' counsel are compensated by taking a percentage of any eventual recovery. In class actions, fees are subject to court approval, but generous fee awards are routine. Contingency fees between 25- 40% of any recovery are common.

B. Expanding U.S. Antitrust Jurisdiction Increases the Likelihood that Foreign Plaintiffs Will Now Choose to Seek Redress in U.S. Courts

New avenues may now be available to foreign plaintiffs seeking to recover antitrust damages in U.S. courts. The jurisdiction of U.S. courts to hear such claims is controlled by the U.S. Foreign Trade Antitrust Improvements Act. Specifically, the FTAIA provides that a foreign plaintiff can proceed in a U.S. court if it can establish (a) the conduct complained of has a direct, substantial, and reasonably foreseeable effect on U.S. commerce and (b) such effect on U.S. commerce gives rise to the plaintiff's claim.

There has been little debate concerning the first prong of the FTAIA. There is, however, a significant split in the federal appellate courts regarding the proper interpretation of the second prong. For example, assume there is an international cartel involving a U.S. firm and a Greek firm. If a Greek customer of the Greek firm bought one of its products for use only in Greece, the jurisdictional issue is whether, and under what circumstances, the Greek customer can sue in a U.S. court for treble the overcharges imposed by its Greek supplier. In short, the debate is whether the FTAIA requires a plaintiff to demonstrate that the harmful effects to U.S. commerce caused by the defendants' conduct gave rise to *the plaintiff's* cause of action (the Greek customer in this situation therefore could not pursue a claim in a U.S. court) or whether it is sufficient to show that the cartel had some effect in the U.S. and that by being part of that cartel the defendant in that sense gave rise to a cause of action by *someone* in the U.S., even if not by the plaintiff itself (in which case the Greek customer could sue in a U.S. court).

The Court of Appeals for the Fifth Circuit was the first to address this issue, and held that the plaintiff must establish that its specific claim arose due to the harmful effects on U.S. commerce caused by the defendant's conduct. *See Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001) (holding that the plaintiff, a Norwegian oil corporation active solely in the North Sea, needed to show that its conspiracy claim against providers of heavy-lift barge services arose out of rising oil prices in the U.S.).

This view of the FTAIA was rejected by the Second Circuit, which held that the plaintiff's injury itself need not arise from the harmful effects to U.S. commerce, so long as some part of the international conspiracy causes some harm to U.S. commerce. *See Kruman v. Christie's Int'l*, 284 F.3d 384 (2d Cir. 2002) (holding that a class of foreign buyers and sellers at foreign auction houses could maintain their U.S. action, despite the fact that their injuries arose from effects on foreign commerce, because the overall conspiracy had an effect on U.S. commerce). In the most recent examination of this issue, the Court of Appeals for the District of Columbia Circuit concurred with much of the reasoning behind the Second Circuit's opinion in *Kruman*, holding that the FTAIA permits suits by foreign plaintiffs who are injured solely by the effect on foreign commerce caused by the defendants' conduct, so long as the conspiracy also had an effect on U.S. commerce that by itself would give rise to a claim under the Sherman Act by an injured party. *See Empagran S.A. v. F. Hoffman-LaRoche*, 315 F.3d 338 (D.C. Cir. 2003) (class

of foreign purchasers of vitamins could also maintain U.S. action against vitamin cartel because the cartel's activities in the U.S. also gave rise to a claim under the antitrust laws).

Taken together, *Kruman* and *Empagran* have dramatically expanded the subject matter jurisdiction of the U.S. courts to hear claims brought by foreign plaintiffs alleging antitrust injuries suffered in foreign markets, so long as the challenged conduct both violated U.S. antitrust law and caused some antitrust injuries in U.S. markets.

As such, this will expose U.S. and non-U.S. corporate defendants to far greater liability than they have faced in the past, and ultimately may lead foreign firms to urge for the adoption of protectionist measures. Those who welcome this expanded jurisdiction argue that price fixers should face the full consequences of their illegal actions, even if the consequences are severe. Those who are offended by this extraterritorial reach counter that the local competitive effects of conduct that may violate U.S. law should, for a variety of reasons, including comity, be dealt with under local substantive and procedural law.

C. Foreign Plaintiffs are Further Encouraged to Seek Redress in U.S. Courts Due to the Limited Private Rights of Action Available Outside the U.S.

1. Procedural Rights Outside of the U.S. Are Limited

Perhaps not surprisingly, no jurisdiction outside the U.S. has fostered a litigation environment that is nearly as conducive to private antitrust actions. Although many non-U.S. antitrust laws provide for private rights of action of some sort, none provides for the breadth of procedural rights afforded to potential litigants under U.S. law.

Most prominently, Articles 81 and 82 of the EC Treaty may be enforced by private litigants in the national courts of the various Member States, and the European Court of Justice requires that each Member State now provide for judicial procedures sufficient to accommodate private litigants seeking to enforce EC competition law. These new European private rights conflict with the policy decisions of certain Member States whose antitrust regimes do not provide for private damage actions, and, in some of these Member States, private litigants still lack the procedural means to enforce their rights. Even where private rights of action do exist within Europe, the practical impact of these rights varies greatly. Very few private damage claims have been commenced in the national courts and recoveries are rare. Indeed, even in Germany, where private rights of action are well-established under competition law, actual instances of successful private actions for damages even against cartel members are virtually non-existent.

In addition to the increased financial awards available to plaintiffs under U.S. law, perhaps the most important reason for the development of robust private litigation under the antitrust laws in the U.S. is the availability of the class action procedure. At present, the class action is virtually unique to U.S. civil procedure. For example, while group action claims may be brought under UK law, the absence of the attendant contingency fee arrangements

provided for under U.S. law[1] greatly limits the ability of UK lawyers to prosecute complex antitrust cases on behalf of thousands of claimants. Moreover, since losing UK litigants are liable for the legal costs of the prevailing party, some measure of financial risk is present for group action claimants in the UK, despite the ability to purchase insurance to help offset these future costs.

Elsewhere in Europe, representative actions, in which associations may bring civil suits on behalf of consumers, are becoming more common. For example, in France, consumer associations may bring claims to protect the interests of French consumers. Similar representative claims may be brought under Belgian, German, and Spanish law. Elsewhere, class actions may be prosecuted under, among others, Australian, Brazilian, Canadian, and Israeli law.

It remains to be seen, however, if the availability of at least some procedures for aggregating claims will be sufficient to offset the incentives discussed above for foreign plaintiffs to seek redress in U.S. courts.

2. Expanding Antitrust Jurisdiction in English Courts May Provide an Alternative Forum to the U.S.

Interestingly, just as *Empagran* and *Kruman* have expanded the jurisdiction of U.S. courts, the *Provimi* case in the UK has greatly expanded the jurisdiction of English courts to hear claims brought by non-English claimants against non-English defendants regarding products purchased at inflated cartel prices across Europe. *See Provimi Ltd. v. Roche Products Ltd.*, 2003 WL 21236491 (Queen's Bench Division). In *Provimi*, two English companies and a German company sued some of the various corporate entities within Roche and Aventis for overcharges collected as a result of cartel activity. The Court ruled that since at least some of the claimants and defendants were domiciled in England, the Court had jurisdiction over the entire matter. Thus, the Court allowed a claim brought by a German claimant against a German defendant regarding transactions which took place outside of England to proceed to trial.

The *Provimi* case may well result in a greater number of European-based cartel cases being filed in English courts, as a result of the greater breadth of discovery afforded under English procedure and the potential for exemplary damages under English law, raising on a smaller scale many of the same concerns that are posed by the expansion of U.S. jurisdiction.

[1] While UK law does provide for Conditional Fee Arrangements, such fees are capped at a recovery of the solicitor's costs, plus a "success fee" of up to 100% of costs. As such, the multi-million dollar fees recovered by class action lawyers in the U.S. are not possible under UK law.

D. The Increased Jurisdictional Reach of U.S. Courts Creates New Concerns for Managing International Cartel Cases

Following the success of the U.S. Department of Justice's corporate leniency program, many other jurisdictions have adopted similar programs to encourage cooperation from existing cartel members. In simplest terms, in exchange for voluntarily bringing previously undisclosed antitrust violations to the attention of enforcement agencies, individuals or firms can avoid criminal prosecution and government fines. Under the recently amended EC leniency program,[2] only the first cartel participant to cooperate with the Commission is eligible to receive complete immunity from fines, provided that it did not coerce other companies to join the cartel, immediately ends its involvement with the cartel, and cooperates completely with the Commission. Subsequent whistleblowers may receive a reduction in fines assessed against the cartel members, but only if the evidence submitted by such companies provides "significant added value" to the investigation.[3] These revisions bring European practice into line with current U.S. practice.

Elsewhere, the development of corporate leniency programs has continued. Currently, there are at least thirteen jurisdictions that have enacted such programs, including the United States, the European Union, Australia, Canada, Brazil, the United Kingdom, Germany, France, Ireland, The Czech Republic, the Netherlands, New Zealand, and Korea. Critically, however, these programs provide companies with immunity solely from regulatory fines, not from private litigation. Thus, if the cartel members are subject to jurisdiction in the U.S., where successful plaintiffs are entitled to treble damages and defendants are subject to joint and several liability, immunity from regulatory fines, while valuable, may address only a small portion of a company's overall financial exposure.

Susceptibility to private lawsuits in the U.S. therefore affects the decision on whether and how to apply for leniency outside of the U.S. U.S. civil plaintiffs will undoubtedly attempt to obtain, through the extensive pre-trial discovery procedures available in U.S. courts, copies of the proffers of proof or "corporate confessions" made by companies in furtherance of their leniency applications. Indeed, in a recent U.S. case, plaintiffs successfully compelled corporate defendants to turn over copies of elaborate statements made to several foreign regulators regarding the *Vitamins* cartel. Those statements then became the outline of plaintiffs' liability and damage claims. Despite protests from non-U.S. regulators that compelled disclosure of these statements in U.S. courts will effectively chill their ability to secure

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[2] *See* Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002/C 45/03.

[3] The first company to provide additional evidence meeting this standard will benefit from a reduction ranging between 30% and 50%. The second such company can receive a reduction ranging from 20% to 30%. Subsequent whistleblowers providing evidence that meets this standard can receive a reduction of fines up to 20%.

cooperation to reduce cartel behavior in their local markets, U.S. courts have routinely denied these comity-type arguments.

Defending against compelled disclosure of these statements in U.S. courts is not easily done. While defendants may argue against disclosure by showing that statements given to regulators were both compelled and made with the expectation by all involved that the information disclosed would be kept confidential, the voluntary nature of virtually every corporate leniency program makes proving the first prong of this test extremely difficult. Moreover, in jurisdictions such as the EU, where the Commission may eventually make public the substance of these statements in its Statement of Objections, if not in a subsequent decision, defendants also face an uphill battle to prove the latter prong of this test.

In an effort to limit disclosure in subsequent U.S. court proceedings, the European Commission has taken certain practical steps to avoid or forestall U.S. disclosure of statements made pursuant to its leniency policy. Parties are given the option of making their statements orally to the Commission. The only written notes taken of these statements, which are made by Commission representatives, are read over and confirmed for accuracy by the leniency applicant. These notes are then placed in the Commission's file and the applicant never receives a copy. As such, the U.S. defendant will have nothing to disclose pursuant to a discovery request in any subsequent U.S. litigation. Moreover, even when third parties are consulted by the Commission in later stages of the investigation, these notes are available only at the Commission's offices, and third parties are prohibited from making any copies. Thus, the notes effectively remain out of the control of any private party subject to the jurisdiction of U.S. courts.

These efforts, unfortunately, are not completely effective. For example, U.S. plaintiffs may be able to compel the deposition of the person who gave the statement to the Commission, thereby potentially obtaining substantially the same information as contained in the Commission's files. More importantly, once a Statement of Objections is issued, much of the information contained in the company's statement may be made publicly available. Thus, the Commission's efforts may merely delay discovery of the substance of a company's statement.

Thus, firms affected by international cartels or other cross-border arrangements face expanding risks and difficult judgments. Pursuit of leniency must be thoughtful. Vulnerability to private claims for damages is expanding. And exposure to U.S. substantive law, U.S. remedies, and U.S. procedures is markedly increasing. The need for harmonization is obvious. The obstacles to harmonization are equally obvious.

II. The Debate Over Portfolio Effects Theory

The European Commission's decision in 2001 to block the *GE/Honeywell* transaction based upon the "portfolio effects" theory has been the most debated merger decision of Mario Monti's tenure as Competition Commissioner. It was the first transaction that had been cleared by the U.S. but blocked by the EC. Since that time, the Court of First Instance

has reversed three other Commission merger decisions.[4] With the Court's ruling in *GE/Honeywell* due imminently, the expectation is that the Court, whether or not it reverses the decision, will clarify the controversial doctrine of portfolio effects.

For the Commission's part, it refuses to categorize *GE/Honeywell* as a portfolio effects merger at all; rather, the Commission relies on an elusive distinction between "genuine portfolio effects" and "conglomerate effects." Regardless of the label, at the heart of the Commission's case was the fundamental concern that GE's financial strength, as well as its activities in aircraft purchasing, financing, and leasing, would further enhance Honeywell's already considerable market strength in the manufacture of corporate jet engines, avionics and non-avionics products. Thus, the Commission found that the risk of the merged entity leveraging its market power across its entire products range was too great, and would inevitably result in reduced customer choice, higher prices and a general loss in consumer welfare.

Similar theories were recently reviewed, with somewhat divergent results, in the *Tetra Laval* and *SEB/Moulinex* cases. In the former, the Court annulled the Commission's decision, finding that while the Commission's conglomerate effects theory properly falls within Article 2(3) of the EC Merger Regulation, the Commission in that particular transaction failed to prove its case against the Tetra Laval/Sidel merger. A few months later, the Court chastised the Commission for failing to properly analyse the conglomerate effects of the SEB/Moulinex merger before clearing the transaction. Annulling in part the Commission's clearance decision, the Court found that the Commission failed to properly assess the potential anticompetitive effects of the transaction in certain peripheral markets, based on the combination of the significant positions of SEB and Moulinex in their respectively distinct, but closely related, markets.

If the Court elects to clarify the law concerning conglomerate effects in *GE/Honeywell*, it will do so in light of the high evidentiary standard it placed on proving conglomerate effects in *Tetra Laval*. In *Tetra Laval*, the Court was presented with the opportunity to rule that conglomerate effects analysis was outside the purview of Article 2(3) of the EC Merger Regulation. The Court declined to do so, expressly ruling that in the event the Commission is able to prove that the means and capacities brought together by a conglomerate-type merger would immediately create conditions allowing the merged entity to leverage its existing market power in one market to create or strengthen a dominant position in another market, the Commission is duty-bound to block the transaction. *Tetra Laval* at ¶ 151, 153.

Despite its affirmation of conglomerate effects theory, the Court imposed a high burden of proof on the Commission in such cases. Significant in the Court's justification for this high standard of proof is that, unlike mergers which present either horizontal or vertical

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[4] Tetra Laval v. Comm'n, Cases T-5/02 and T-80/02 (CFI); Airtours v. Comm'n, Case T-342/99, [2002] 5 C.M.L.R. 7 (CFI); Schneider Electric v. Comm'n, Cases T-310/01 and T-77/02 (CFI).

overlaps, conglomerate mergers are generally considered to be neutral, or even beneficial, for competition in the markets concerned. *Tetra Laval* at ¶ 155. Moreover, as the Court found that the Commission's conglomerate effects theory is largely based on foreseeable monopoly leveraging, the Commission's analysis in such cases involves an express finding that the merged entity will engage in illegal conduct. *Id.* As such, the Commission's analysis in a conglomerate merger case differs materially from that in an ordinary merger analysis; in the ordinary merger case, the Commission may deduce the creation or strengthening of a dominant position from the combination itself and not on some possible future illegal conduct.

In order to set forth a *prima facie* conglomerate effects case under *Tetra Laval*, the Commission will need to prove by "convincing evidence" that (1) the parties produce products that are either complements or used by the same group of customers, (2) the merged entity will have an incentive to engage in illegal monopoly leveraging, (3) that the merged entity would be able to engage in such leveraging, and (4) that such leveraging would be effective due to the resultant foreclosure effect on the merged entity's competitors. *Id.* at ¶¶ 169, 200, 216, 174. Moreover, the Commission will need to demonstrate that the merged entity's incentive to engage in illegal monopoly leveraging would not be reduced, or even eliminated, due to commitments offered by the parties during the merger investigation, the likelihood of such conduct being detected and remedied by the competent authorities at the time it occurs, the potential financial penalties for breaching the law, and, indeed, the very fact that such conduct is illegal in the first instance. *Id.* at ¶¶ 159, 161.

Given the Court's endorsement of conglomerate effects theory in *Tetra Laval*, it is unlikely that the Court will overturn the Commission's theory which lay at the dispute between Brussels and Washington, D.C. Instead, the Court is likely only to question whether the Commission has met its significant burden of proof.

III. CONCLUSION

These two current examples reveal why harmonization remains an important international objective. They also expose just how fundamental some of the differences are that persist even between more fully-developed antitrust regimes.