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Extraterritorial Application of EU Competition Law

-Is It Possible for Japanese Companies to Steer Clear of EU Competition Law?-

Chie Sato

Abstract

On 26th March 2009, Neelie Kroes, European Commissioner for Competition Policy, stressed in her speech that her task is to reject the argument that going soft on competition enforcement is the right approach to helping bring an end to the recession. It is clear that the Commission will continue to apply its competition law to undertakings and impose fines for violations irrespective of the situation. This stance could potentially place a greater burden on private-sector companies, which have been struggling to deal with the recent economic crisis. In the era of globalization, it is becoming more and more difficult to isolate the effects of conduct committed by international companies, such that restrictions on competition affecting the EU internal market may very well originate outside the Community. As a result, limits on the application of EU competition law is subject to serious dispute in terms of the extraterritorial application of competition law.

In this paper, I shall explain the problems and the impact of the extraterritorial application of EU competition law; mainly the extraterritorial application of Article 101 of the Treaty on the Functioning of the European Union with reference of decisions of the Commission and judgments handed down by European courts. As a background to discuss the problems of extraterritorial application of EU competition law, I refer to the theory of jurisdiction from the perspective of public international law including the effects doctrine which is the most controversial theory regarding to the extraterritorial applications of the competition law in general. As an example which shocked Japanese companies affected by the Commission's decision I will mention the recent decision in a case relating to a gas insulated switchgear cartel. Finally, I will discuss measures that can be implemented in order to resolve problems regarding the extraterritorial application of EU competition law.

I. Introduction

A short time ago, Neelie Kroes, European Commissioner for Competition Policy, stressed in her speech that her task is to reject the argument that going soft on competition enforcement

is the right approach to helping bring an end to the recession.[1] It is clear from this speech that the European Commission (hereinafter the "Commission") will maintain its hard-line position with respect to anti-competitive conduct. In other words, the Commission will continue to apply its competition law to undertakings and impose fines for violations irrespective of the situation. This stance could potentially place a greater burden on private-sector companies, which have been struggling to deal with the recent economic crisis. In the era of globalization, it is becoming more and more difficult to isolate the effects of conduct committed by international companies, such that restrictions on competition affecting the EU internal market may very well originate outside the Community. As a result, limits on the application of EU competition law[2] is subject to serious dispute in terms of the extraterritorial application of competition law.

In this paper, I shall explain the problems and the impact of the extraterritorial application of EU competition law, namely in regard to Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU. Articles 81 and 82 of the EC Treaty, Articles 85 and 86 of the EEC Treaty). If we focus on the problem of the extraterritoriality of EU competition law, many of the cases dealing with the problem of extraterritoriality have been cases relating to Article 101 of the TFEU. I will then discuss mainly the extraterritorial application of Article 101 if the TFEU in this paper and will refer to decisions of the Commission and judgments handed down by European courts. First, I shall describe different theories regarding the application of jurisdiction from the perspective of public international law. Second, I will explain the positions of the Commission and European courts regarding the application of EU competition law to undertakings based outside the EC. In this part, I will mention the recent Commission's decision in a case relating to a gas insulated switchgear cartel, which shocked Japanese companies affected by this decision. Third, and finally, I will discuss measures that can be implemented in order to resolve problems regarding the extraterritorial application of EU competition law.

II. Jurisdiction under Public International Law versus Adherence to Competition Policies

Jurisdiction concerns the power of the state to affect people, property, and circumstances and reflects the basic principles of state sovereignty, equality of states, and non-interference in domestic affairs.[3]

1. Three Types of Jurisdiction

Jurisdiction may be constituted by way of legislative action, executive action, or judicial action.[4] Usually, a national parliament passes binding statutes or laws, the courts make binding decisions, and administrative organs have the power to enforce the rules and laws.

Thus, jurisdiction is divided according to three different functions.

The first type of jurisdiction consists of prescriptive (or legislative[5]) jurisdiction, which refers to the supremacy of the constitutionally recognized organs of the state to make binding laws applicable to activities, whether by legislation, by executive act or order, by administrative rule or regulations, or by determination by a court.[6] The second type of jurisdiction consists of enforcement jurisdiction, which refers to the capacity of the state to enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.[7] According to the general principle of international law, states are independent and possess territorial sovereignty; this means that, generally speaking, state officials may not carry out their functions within the territory of a foreign state without the express consent of that foreign state.[8] Accordingly, they may not enforce the laws of their state upon a foreign territory. Thus, enforcement jurisdiction is limited to within the territory of the state. The third type of jurisdiction consists of adjudicative jurisdiction, which concerns the state's jurisdiction to adjudicate and to subject persons or things to the processes of its courts or administrative tribunals, whether in civil or in criminal proceedings, regardless of whether or not the state is a party to such proceedings.[9] Adjudicative jurisdiction refers to the jurisdiction of the courts. However, if the reach of a particular law, for instance competition law, is not clear, the courts may themselves determine the reach of the law. In so doing, the courts exercise prescriptive jurisdiction.[10]

In discussing the problems of the extraterritorial application of competition law, the most controversial type of jurisdiction is prescriptive jurisdiction. In this paper, I use the term "jurisdiction" to refer to "prescriptive jurisdiction" unless otherwise specified.

2. Grounds for the Exercise of Jurisdiction

There are some grounds for the exercise of jurisdiction. The most universally recognized principles are the territorial principle and the nationality principle. The territorial principle means that a state may exercise its executive and judicial jurisdiction over offences committed within its territory.[11] The nationality of the person who committed an offence is immaterial. This principle is recognized as being reasonable in light of the territorial sovereignty of the state. According to the nationality principle, a state may exercise its jurisdiction by reference to the nationality of persons who commit crimes or other offences.[12] It is based on the recognition that every state possesses sovereignty and jurisdictional powers and that every state consists of individuals. The nationality principle recognizes the link between the state and its nationals within any territory.[13] A state can claim jurisdiction over crimes committed by their nationals even if the offence may have occurred within the territory of another state.[14] In the event that a foreigner committed a crime outside the territory of the state where the crime may have a harmful impact on the state, the state may exercise its jurisdiction over the act committed by the foreigner outside

its territory under the protective principle.[15] This principle is justifiable on the basis of the protection of a state's vital interests in protecting important state functions, such as the security and integrity of the state, as the foreigner might not be committing an offence under the law of the country where he is residing.[16] Under such a doctrine, a state may exercise its jurisdiction over political or economic offences and immigration.[17] Finally, there is the universality principle under which state jurisdiction is exercised over crimes and according to which every state has the jurisdiction to try particular offences. The basis for this doctrine lies in the understanding that the crimes involved are regarded as particularly offensive to the international community. Under international law, this principle is highly limited to such acts as piracy and similar international crimes.[18]

These four doctrines are basic concepts under international law, which acknowledges state jurisdiction. However, because of the expansion of human activity in such terms as the movement of persons and the conducting of business activities by private-sector companies across borders, situations occasionally arise in which these basic doctrines of state jurisdiction may not be appropriate for dealing with the problems of the modern internationalized world. States have found it increasingly necessary to expand their jurisdiction over matters outside its territory and irrespective of the nationality of persons concerned. To deal with such circumstances, new doctrines have been established; or, more accurately, existing doctrines have been adapted. One such is the so-called objective territorial principle.[19] Under this principle, a state may exercise its jurisdiction over a crime for which only certain elements were carried out in its own territory, for example where a person fires a weapon in its neighboring state across a frontier killing somebody within its territory. The state in which an injury actually took place may exercise jurisdiction to try the offender.[20] Jurisdiction according to the objective territorial principle is recognized for the state in which the substantial part of the act is committed.[21] Beyond the objective territorial principle, there are cases in which the state assumes jurisdiction over activities outside its territory committed by foreigners on the grounds that the given acts are producing "effects" within its territory. This is so even if the complete act complained of takes place in other states.[22] Such a principle for the exercise of state jurisdiction resulting in an expansion of the territorial principle is called the effects doctrine.[23] The effects doctrine is often controversial in the field of antitrust law and particularly when the United States seek to apply their antitrust regulations to foreign companies.[24] The objective territorial principle was developed in the field of criminal law and under the criminal law concepts it is clear what is penal acts. Contrary to such criminal law concepts the conducts of private sector companies which seems to be anticompetitive is not clear-cut, they could be differently regulated under each national laws and regulations. Accordingly, it may be questionable whether it is appropriate to take the criminal law concept to the antitrust law. It was regarded economically rational to take into account the effects of the activities of the private sector companies.[25] In fact the assertion of the state jurisdiction for example in the form of imposing fines in the antitrust law field which is not exactly criminal may be justifiable

under the effects doctrine.[26]

To summarize, a state is justified in exercising its jurisdiction over activities committed by aliens outside its territory according to various principles and doctrines. Based on various principles and doctrines, there could be situations in which two states might assert their jurisdiction over the same matter (concurrent jurisdiction).[27] From the perspective of private persons and companies over which states exercise jurisdiction, concurrent jurisdiction might give rise to legal uncertainty, as it could happen that a given activity is lawful according to the laws of State A and unlawful according to the laws of State B. A person over whom a state may exercise jurisdiction would feel unfairly treated if it is not clear under whose jurisdiction he or she stands and if there is also uncertainty as to what kinds of acts are, or are not, unlawful.

For states or with respect to other objectives of public international law, the application of jurisdiction under the effects doctrine often causes conflicts among interested states. There may be a question as to which state in a given case has jurisdiction over certain conduct since jurisdiction based on the effects doctrine is not dependent on such clear standards as the territory in which conduct is committed or the nationality of the perpetrator. The effects doctrine is based on the ambiguous concept of "effects" which is not clearly fixed in terms of definition or in terms of its ascertainment.[28] A different effects test will often be applied by each state which asserts its jurisdiction based on this doctrine.

III. Problems of the Extraterritorial Application of Competition Law

One of the fields in which the exercise of extraterritorial jurisdiction has become controversial is competition law. Nowadays, private companies extend their activities beyond the territory of one particular state and many are active worldwide. They have subsidiaries in different states and they sell their products through them. In recent years, there have been some big mergers among internationally active companies. All of these activities contribute to an increase in corporate profits. In line with such an expansion of economic activity on the part of private-sector companies, it is sometimes difficult for states to maintain competitive markets if the state applies its competition law only to companies that are based within its territory.[29] In response, states are increasingly applying their competition laws to companies based outside their territories and to activities occurring outside their territories. However, there is no common global competition policy and each state has its own competition law and policy. This means that one state may regulate very strictly what is not compatible with its competition law while other states may have relatively loose competition policies, such that one activity undertaken by a private company might be considered a breach of competition law in one state but accepted under competition law in other states.[30] For example, an activity undertaken by Company X, which is incorporated in State A, is permitted in State A but prohibited in State B, which imposes a fine on Company X. The application by State B of its strict competition law to

Company X may be injurious to State A's competition policy. This is the most serious problem associated with the extraterritorial application of competition law. Therefore, the exercise of prescriptive jurisdiction is the main theme of discussions concerning the extraterritorial application of competition laws, as I have already mentioned earlier.[31]

In the next part, the extraterritorial application of EU competition law is examined with reference to the Commission's decisions and judgments of the courts.

IV. Framework of EU Competition Law

1. Jurisdiction of the Commission

Based on Article 105 of the TFEU (Article 85(1) of the EC Treaty), the Commission has the duty to ensure the application of principles laid down in Articles 101 of the TFEU (Article 81 of the EC Treaty) and 102 of the TFEU (Article 82 of the EC Treaty) and to investigate cases of suspected infringement. According to Article 105 of the TFEU (Article 85(1) of the EC Treaty), if the Commission finds infringement it may take appropriate measures to bring it to an end.

2. EU Competition Law

EU competition law is constituted by Articles 101 and 102 of the TFEU as well as various guidelines and regulations governing mergers and other relevant matters. If we focus on the problem of the extraterritoriality of EU competition law, many of the cases in which extraterritorial application have been seriously considered and argued relate to Article 101 of the TFEU.

EU competition law sets forth no clear definition regarding the breadth of its application, either in terms of territorial scope or of the nationality of companies.[32] Article 101 of the TFEU states only: "…which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...." As we can understand from the language of Article 101, there are some requirements in applying this article. First, there must exist an agreement between undertakings, a decision by associations of undertakings or concerted practices.[33] Second, these acts should affect trade between Member States. Third, they have as their object or effect the (appreciable) prevention, restriction or distortion of competition within the common market.[34] If an activity fulfills these three requirements, the Commission may exercise its jurisdiction over an anti-competitive activity and impose fines on perpetrating companies.[35]

As there is no definition with respect to the nationality of undertakings or associations of undertaking to which EU competition law is applied, this law may potentially be applied to foreign companies not based within the EC.[36] The most controversial point regarding the

application of EU competition law is the third requirement, namely the anti-competitive "effect". How should the effect be determined? Is it possible to apply Article 101 to a company with no offices and no business operations within the EC and no intention of securing EC business?

Article 101 lays down the prohibition and annulment of agreements and cooperative activities that have an anti-competitive object or effect. In Article 101(1), there are some examples of activities that are considered anti-competitive and these activities are, by virtue of Article 101(2), automatically void. Cartels and agreements that fix resale prices are strictly prohibited and many recent cases ruled as anti-competitive by the Commission involve cartels and resale price agreements. Other activities, such as those resulting in a division of the market or resources and those restricting investment or production activities or the development of technology, are also subject to EU competition law.[37]

Article 102 prohibits abuse of a dominant position. In other words, companies which enjoy a dominant position may not set an unfair price or impose unfair trading conditions. Such unfair business practice is illegal.

The differences between Articles 101 and 102 arise in their application. Article 101 is applied to cases in which competition is extremely restricted. Article 102 is applied to cases in which a company abuses its "dominant" position. The object of Article 102 is unilateral activities whereas prohibited activities under Article 101 require some collaboration between or amongst at least two market participants. Lastly, there is a possibility of general exemption under Article 101 in accordance with Article 101(3) but such an exemption is not expressly stipulated in Article 102.

These provisions are applied if an activity appreciably affects trade between Member States. The concept of "appreciable" effect is lather unpredictable and the European Court of Justice has not quantified "appreciability",[38] it has often analyzed this concept in two principal ways, namely the flow or pattern of trade and the alteration of the "competitive structure".[39] To identify an activity which meets the test of "appreciable" effect, the Commission analyzed the case law in its guidelines on effect on trade.[40] Besides some notices issued by the Commission to quantify the "appreciability" by reference to for example market shares and turnover[41] could be helpful to determine what is the "appreciable" effect to the trade between Member States.[42]

In order to apply Articles 81 and 82 of the EC Treaty (Articles 101 and 102 of the TFEU), there was new regulation, namely Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.[43] This Regulation replaced the first Regulation in 1962.[44] The Regulation No 1/2003 lays down the cooperation between the Commission and the competition authorities of the Member States (Article 11), Uniform application of Community competition law (Article 16), Commission's powers of inspection (Article 20) and the calculation of fines (Article 23).

V. Evolving Basis for the Extraterritorial Application of EU Competition Law

In this part, certain cases in which EU competition law – especially Article 101 of the TFEU – was applied to companies situated outside the EC are analyzed. The grounds for the extraterritorial application of EU competition law as supported by the Commission and the European courts are looked at here.

1. Dawn of Extraterritorial Application: *Grosfillex-Fillistorf*[45]

The *Grosfillex-Fillistorf* case may be the first decision of the Commission that was related to jurisdiction over a foreign company based outside the EEC (today's EC). It concerned a sales agreement between Grosfillex, based in France, and Fillistorf, based in Switzerland. These two companies concluded a sales agreement whereby Fillistorf was obliged not to sell products similar to those it received from Grosfillex and Grosfillex was obliged to sell their products to Fillistorf in Switzerland and to no other companies. Both companies requested negative clearance for their agreement from the Commission according to Article 2 of Regulation No. 17.[46] The Commission noted that the agreement was concluded between one company within the EC and another based outside the EC and that the agreement regulated activities outside the EC. As a result, the Commission decided that this agreement was not intended to prevent, restrict, or distort competition within the EC. There was also another part of the agreement – the agreement prohibited Fillistorf from selling products received from Grosfillex within the EC – that might have come under Article 85 (today's Article 101 of the TFEU). The Commission looked into whether this part of the agreement prevented, restricted, or distorted competition in the EEC (today's EU), concluded that it was not contrary to EC competition law and granted negative clearance to the agreement.[47]

In any case, the important point of this case in terms of the extraterritorial application of EU competition law is that, although the company subject to the decision was incorporated outside the EC, the Commission looked at neither the nationality nor the location of the company in recognizing jurisdiction over a foreign matter and automatically applied EC competition law to a foreign company. The attitude of the Commission suggests that it believes that it is right and not extraordinary to exercise jurisdiction over a foreign company irrespective of where such a company might be based.

2. Early Attitude of the European Court of Justice Concerning Extraterritorial Matters: *Béguelin*

In this case, one of the parties was a company incorporated in France, the other a Japanese company. They concluded an exclusive sales agreement. In this case, one of the parties was

an EC company and the Commission did not impose a fine on the Japanese company. Thus, the application of EC competition law to the Japanese company was not discussed in terms of whether it should be based on the effects doctrine or not. However, an excerpt from the judgment might give one the impression that the Court might have recognized the extraterritorial application of EC competition law based on the effects doctrine: "The fact that one of the undertakings participating in the agreement is situated in a non-member country is no obstacle to the application of that provision, so long as the agreement produces its effects in the territory of the Common Market."[48]

3. *Dyestuffs*[49]

In the *Dyestuffs* case, the question as to whether the extraterritorial application of EC law is acceptable based on the effects doctrine was raised for the first time. In this case, three general and uniform increases in the price of dyestuffs had taken place within the common market.

3.1 Decision of the Commission

In this case, the Commission concluded that the price increases had occurred as a result of a concerted practice among ten producers (it had discovered significant evidence of actual direct and indirect contact among the parties).[50] The Commission found that Imperial Chemical Industries (hereinafter referred to as "ICI"), a company incorporated and having its headquarters in the United Kingdom (which was not a Member State at that time), had engaged in concerted practices contrary to Article 85(1) (Today's Article 101 of the TFEU) by virtue of the instructions it had given to its Belgian subsidiary. The Commission imposed a fine on ICI. It stated:

> Under Article 85(1) of the Treaty instituting the EEC, all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which may affect trade between member-States and the object or effect of which is to prevent, restrict or distort competition within the Common Market shall be prohibited as incompatible with the Common Market. The competition rules of the Treaty are, consequently, applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1). There is no need to examine whether the undertakings which are the cause of these restrictions of competition have their seat within or outside the Community.[51]

From this part of the decision, it is clear that the Commission relied on the effects doctrine without any further elaboration.

ICI claimed that the Commission had no power to apply the competition rules to undertakings established outside the Community and appealed against the Commission's decision before the European Court of Justice (hereinafter "ECJ").[52]

3.2 Opinion of the Advocate General

Advocate General Mayras recommended that the Commission's decision should be upheld on the basis of the effects doctrine. In his opinion, he said that the conditions necessary for taking extraterritorial jurisdiction were that the agreement or concerted practice must create a direct and immediate restriction of competition, that the effect of the conduct must be reasonably foreseeable, and that the effect produced on the territory must be substantial.[53]

3.3 Judgment of the ECJ

The ECJ upheld the Commission's decision. The behavior constituted a concerted practice prohibited by Article 85(1) of the EEC Treaty (Today's Article 101 of the TFEU). But the ECJ did not refer to the opinion of the Advocate General who cleaved to the effects doctrine. Instead, the ECJ upheld the Commission's decision on the basis of what has become known as the single economic entity doctrine. According to this doctrine, parents and subsidiaries are considered to be one undertaking for the purpose of the application of the competition rules. In this case, the Court relied on this doctrine to impute the conduct of the subsidiary to the parent and to hold that the Commission did have jurisdiction over the UK company. The Court held that the subsidiary did not have "real autonomy" but acted on its parent's instruction,[54] such that the infringing conduct in the EC could be treated as having been committed by the subsidiary as an agent of the parent.[55]

The Court was therefore silent about the application or denial of the effects doctrine, which Advocate General Mayras recommended. The Court preferred to rely on other less controversial grounds for its ruling.

4. Turning Point: *Wood Pulp*

This case is a leading case on cartels in the context of the extraterritorial application of EU competition law. The Commission investigated alleged price-fixing in the wood pulp industry.

4.1 Decision of the Commission

The Commission found forty-one producers and two trade associations had engaged in concerted practices in contravention of Article 85(1) (Today's Article 101(1) of the TFEU). All forty-three producers and trade associations had their registered offices based outside the Community. Most of them had subsidiaries or other forms of establishments within the Community. The Commission said in its decision that Article 85 of the EEC Treaty applied to restrictive practices which may affect trade between Member States even if the undertakings and associations which are parties to the restrictive practices are established or have their headquarters outside the Community and even if the restrictive practices in question also exert effects on markets outside the EC.[56] From this part of the decision, it is

clear that the Commission treated the effect on the Community as the most important element in applying Article 85. To clarify what is the "effect", the Commission explained that during the period of infringement, the companies were exporting their products directly to their customers or selling their products to their buyers within the EC. In line with these facts, the Commission concluded that the effect of the agreements and practices on prices announced and/or charged to customers within the EC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.[57]

4.2 Opinion of Advocate General Darmon

In drafting his opinion, Advocate General Darmon recognized the distinction between prescriptive and enforcement jurisdiction and determined that the mere imposition of a pecuniary sanction is a matter of prescriptive jurisdiction, enforcement jurisdiction being involved only when steps are taken for its recovery since it is only then that the state takes coercive measures in the territory of a foreign sovereign.[58] He concluded that the effects doctrine is not contrary to international law and that the Community was entitled to take, and should take, jurisdiction in this case on the basis of the effects doctrine.[59]

4.3 Judgment of the ECJ

Once again, the Court steered clear of the effects doctrine. Instead, the Court adopted the implementation doctrine.

The Court divided the infringing conduct into two elements: the formation of the agreement, decision, or concerted practice and the implementation thereof. The Court insisted that the decisive factor is the place where the conduct is "implemented" because 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.[60] The crucial point lies in the meaning of "implementation". In regards to this point, the Court stated that the producers in this case implemented their pricing agreement within the Common Market. In any case, the Court insisted that it is immaterial whether or not they had recourse to subsidiaries or others within the Community in order to make their contracts with purchasers within the Community.[61] According to the judgment, "implementation" is constituted whenever a direct sale is made to a purchaser in the Community, such that jurisdiction is claimed on the grounds that sales were made to buyers based in the Community.

5. Extraterritorial Application of EU Competition Law to Japanese Companies: *Gas Insulated Switchgear*

In this case, the Commission imposed fines on five Japanese companies together with other European companies due to the impairment caused to competitiveness in the EC.

5.1 Description of Infringement

The major Japanese and European providers of gas insulated switchgears (hereinafter "GIS") coordinated the allocation of GIS projects worldwide.[62]

The first element of infringement is constituted by the division of the market among the cartel members. Japan on one side and the European domestic markets of the European members of the cartel on the other side were respectively allocated as a block to the Japanese group or to the European group. Those territories were known as the "home market" or "home countries".[63] As a result of this "home-producer" principle, home-producers entitled to projects coming up in the "home countries" consisted of, for instance, ALSTOM and Schneider in France and Siemens, ABB, and AEG in Germany. Only the Japanese suppliers were entitled to sell in Japan.[64]

The second element of infringement was constituted when the market was divided according to the worldwide market share of each cartel member. The cartel members were divided into two groups: the European group and the Japanese group.[65] In the Agreement, each group was granted a collective quota of worldwide sales covered by the agreement,[66] which had been updated several times since April 1988.[67] Members of the cartel established penalties applicable to a whole group in case of non-compliance with certain rules[68] in order to ensure proper implementation of the agreement.

Third, each group had to nominate a corporate secretariat to function as the hub of communications within the cartel. Each secretariat filled a crucial role by way of organizing meetings and distributing information from and for members.[69]

Based on these facts and the detailed evidence before it, the Commission concluded that there was a GIS cartel agreement among the Japanese and European companies.

5.2 Jurisdiction of the Commission

As the cartel was found to have an appreciable effect on trade between Member States as outlined above, the Commission recognized its jurisdiction in this case as a competent authority in terms of the application of Article 81 of the EC Treaty (Today's Article 101 of the TFEU).[70] The Commission declared that there were no indications pertaining to this cartel that suggested that the conditions of Article 81(3) of the EC Treaty (Today's Article 101(3) of the TFEU) could be fulfilled.[71] The Commission thus considered the nature of the infringement in this case precisely in terms of different elements[72] and thereby determined that it had jurisdiction over the case.

The Commission concluded that the cartel agreement had an effect on trade between Member States. First, it stated that, for an agreement, decision or concerted practice to be capable of affecting trade between Member States, *it must be possible to foresee with a sufficient degree of influence on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States* and that the Commission is *not required to demonstrate the actual existence of such*

an effect on trade, a potential effect being sufficient (italics added by the author).[73] The Japanese companies insisted that their participation in the GIS cartel could not be regarded as having had any effect on trade between Member States since they would not have conducted themselves differently in the absence of the cartel agreement.[74] In response to this argument, the Commission indicated that since the GIS cartel constituted a single and continuous infringement affecting trade between Member States, the impact of the Japanese applicants' involvement in the infringement could not be evaluated in isolation from the impact of the involvement of the European producers. Thus, it is clear that the intra-Community aspect of the illegal agreement at least potentially affected trade between Member States.[75] The Commission acknowledged that the Japanese companies did not even consider making a necessary investment to become actual firm competitors since they were aware of the existence of the cartel group in Europe, which was an integral part of the GIS cartel to which the Japanese companies were parties.[76] Accordingly, the Commission concluded that the agreement and/or concerted practices among the GIS producers were capable of having an appreciable effect on trade between Member States.[77]

Consequently, the Commission imposed fines totaling around seven hundred and fifty million euros on nineteen companies inclusive six Japanese. According to Article 2 of the decision, the companies were required to pay these fines within three months of the date of the notification of the decision, with interest costs to be automatically charged after the expiration of this period. The Commission sought to enforce its decision through this provision. [78]

5.3 Grounds for Exercising Jurisdiction over the Japanese Companies - Effects Doctrine or Single Economic Entity Doctrine

In relation to the previous practices of the Commission and the ECJ, it is interesting to analyze the GIS decision of the Commission in terms of the grounds on which the Commission exercised its jurisdiction over the Japanese companies that were incorporated in Japan and that had been engaged in almost no commercial activities within the EC. In the decision, we can find two elements as potential grounds for the extraterritorial application of Article 81 of the EC Treaty; one is the main reason, the other perhaps ancillary.

5.3.1 Main Reason: Effects Doctrine

The Japanese companies that were regarded as cartel participants did not actually bid in the European market as noted in the decision[79] and they were not active in the European GIS market. In regard to such an operating stance taken by the Japanese companies, the Commission decided that:

> For 16 years, the Japanese companies apparently did not even consider making the necessary investment to become actual firm competitors within the EEC by any of the modalities they had chosen to contest the markets in other parts of the world also because

> they were aware of the cartelization of projects in Europe. (…) They were aware of this cartelization in Europe because it was an integral part of the GIS cartel to which they were parties.[80]

The Commission found that the reason for the Japanese companies' negative attitude in the European market lay in their participation in the cartel agreement. Moreover, the Commission noted clearly that the effect of the cartel was sufficiently established if it was possible to foresee that the cartel may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[81] From this sentence, it appears that the requirements for the assessment of the existence of an effect within the Common Market are rather loose. One can surmise that such a loose standard for assessing an effect could be based on the present state of affairs, under which there may be some common understanding among states about what kinds of activities are not compatible with competition law. However, this case, in which EU competition law was applied to companies who were not active in the market, suggests that a careful examination must be carried out to determine whether a company really participated in a cartel as well as a precise investigation of the effect of such an activity. Where such a careful examination is carried out, the application of EU competition law will provide companies with legal certainty.

5.3.2 Single Economic Entity Doctrine

In this case, the Japanese companies denied any responsibility as derived from the joint ventures in question, namely Japan AE Power Systems Corporation (hereinafter referred to as "JAEPS") and TM T&D. JAEPS was incorporated in July 2001. Hitachi Ltd. and Fuji Electric Systems Co Ltd. are 50% and 30% owners, respectively, of joint venture JAEPS. Fuji argued that it had no decisive control over the joint venture and that it was not responsible for the activities of JAEPS.[82] However, the Commission recognized the responsibility of the parent companies for the activities carried out by their joint venture. To reach this finding, the Commission relied on the decisive influence wielded by the parent companies over the market behavior engaged in by JAEPS, for instance, supervisory and management role played by Hitachi and Fuji with respect to the activities carried out by JAEPS[83]. Accordingly, the Commission concluded that JAEPS, Hitachi Ltd., Fuji Electric Holding Co., Ltd., and Fuji Electric Systems Co., Ltd. should be held jointly and severally liable for the involvement of JAEPS in the cartel.[84]

The Commission also looked at the responsibility of Toshiba as a parent company of TM T&D Corporation, fifty percent of whose shares were held by Mitsubishi Electric Corporation (Melco) and fifty percent of whose shares were held by Toshiba. The GIS activities of these companies were transferred to TM T&D. The Commission was entitled to hold Toshiba (and Melco) jointly liable for TM T&D's conduct because it fell to them to answer for that infringement, as legal persons having exercised a decisive influence on TM

T&D.[85] Based on this argument, the Commission concluded that Toshiba should be held jointly and severally liable with Melco for the infringement committed by TM T&D.[86]

5.3.3 Grounds for the Exercise of the Commission's Jurisdiction

The cartel agreement was concluded in Vienna in 1988. Austria was not a Member State of the EC at that time so the exercise of the Commission's jurisdiction based on the territorial principle could not be justified. The Commission did not mention any element relating to the implementation theory in its GIS decision. As outlined above, the Commission alluded to the responsibility of the parent companies in line with such theoretical concerns as the single economic entity doctrine. However, as this part of the decision does not exactly pertain to the question of the jurisdiction of the Commission, we cannot conclude that the Commission relied on the single economic entity doctrine. In its decision, the Commission very precisely analyzed the effect of the cartel in the section in which it assesses its jurisdiction in this case. Thus, we can be certain that the Commission relied simply on the effects doctrine to justify its jurisdiction over the Japanese companies. In other words, the Commission's jurisdiction over the GIS cartel was established on the basis of the fact that GIS prices remained at high levels within the EC market subsequent to the conclusion of the cartel agreement. From an assessment of the state of the market, it was found that an anti-competitive influence had been exerted in the EC in such a way as to have affected trade between Member States.[87]

6. Interim Result

Based on the above overview of the approach and position of the EC since the 1960s and in more recent years, there are some indications of the theoretical grounds relied upon for the extraterritorial application of EU competition law.

6.1 Single Economic Entity Doctrine

The ECJ adopted this theory for situations in which a foreign company outside the territory of the EC has a subsidiary or agency operating within the EC. Under this theory, the anti-competitive activities of the subsidiary belong to its parent company even when the parent company is incorporated outside the Community. On this basis, fines can be imposed on the parent company. The weakness of this theory lies in the failure to acknowledge the legal fact that a subsidiary and its parent company each possesses a different legal personality.[88]

6.2 Effects Doctrine

The Commission relied constantly on the effects doctrine even as the Courts hesitated to adopt (or recognize) it.[89] This doctrine is the most effective method for applying antitrust laws in order to maintain the competitiveness of the market system and to control

anti-competitive activities of national and foreign companies since states may exercise their jurisdiction over all activities exerting an anti-competitive influence over their market regardless of the place where such activities occurred or the nationality of the actors involved. Thus, under the effects doctrine, the extraterritorial application of EU competition law is recognized only because of the effect on the EC market. However, the definition and gravity of the "anti-competitive effect" is still vague.[90] This may cause private-sector companies to deal with uncertainties whenever they expand their economic activities across state borders since it is not exactly clear as to where the "effect" threshold, beyond which competition might be found to have been restricted, lies.

6.3 Implementation Theory

The ECJ relied on this theory in the *Wood Pulp* case. According to this theory, it is possible to exercise jurisdiction over anti-competitive activities taken by foreign companies outside the territory in question even if they have no subsidiaries or agents operating within the territory. If a company is not active in the market, however, it may mean that it did not sell any products within the territory, as with the Japanese companies in the GIS case, in which case the relevant authority (the Commission) would be deprived of any grounds for exercising jurisdiction over the foreign company and its activities outside the Community.[91]

VI. Guidelines Pertaining to "Effect"

Even as the Commission had consistently relied on the effects doctrine in order to apply EU competition law, a clear quantitative definition of effect was lacking. In this sense, the question as to how to determine if an activity of a company has an effect on competition within the Community market has always been controversial. In 2004, the Commission published its guidelines on the effect concept (hereinafter referred to as the "Guidelines").[92] In the Guidelines, the Commission set out the principles developed by Community courts in relation to the interpretation of the effect on trade concept found in Articles 81 and 82 of the EC Treaty (Today's Articles 101 and 102 of the TFEU).[93] Although it is mentioned in Paragraph 5 that the Guidelines are without prejudice as to the interpretation of Articles 81 and 82 (Today's Articles 101 and 102 of the TFEU) by the courts, they do help to clarify the effect concept in the context of applying EU competition law.

First, it is important to note that these Guidelines describe very precisely what is constituted by effect. In Paragraphs 36 to 43, the character of the effect that is captured within the meaning of Articles 81 and 82 (Today's Articles 101 and 102 of the TFEU) is explained. According to these paragraphs, the impact on trade that may affect trade between Member States can be "*direct or indirect, actual or potential*".[94] This explanation of effect was adopted by the Commission when deciding the *GIS* case.[95] This description sets out relatively loose standards for establishing an effect. In the following paragraphs, however, the Guidelines set out more detailed descriptions of what is meant by such terms as "direct

effect" and "indirect effect" to help bring greater clarity to the process of establishing an effect.[96]

Second, it is important to note that the Guidelines make it clear that the application of EU competition law may encompass activities and undertakings beyond the borders of the Community; in other words, extraterritorial application is permitted. The Guidelines clearly mention that Articles 81 and 82 (Today's Articles 101 and 102 of the TFEU) apply to agreements and practices that are capable of affecting trade between Member States even if one or more of the parties are located outside the Community and they apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement produces effects inside the Community.[97] In addition, these articles may also apply to agreements and practices that cover third countries, provided that they are capable of affecting trade between Member States.[98] From this part, it is clear that the jurisdiction of the Commission in terms of the application of EU competition law is justified simply on the basis of the "effect" upon trade within the Community. Moreover, the Guidelines state that Articles 81 and 82 (Today's Articles 101 and 102 of the TFEU) may apply to agreements and practices that cover third countries, provided that they are capable of affecting trade between Member States.[99]

To summarize, the attitude of the Commission as reflected in the Guidelines is such that the Commission emphasizes the application of EU competition law according to the effects doctrine and tries to formulate particular standards to determine the existence of an "effect" by referencing the Guidelines. The Guidelines are a non-regulatory document that is intended to be used to explain in more detail the policy of the Commission[100]. However, the Guidelines also offer insight into the Commission's policy with regard to the application of EU competition law.

VII. Problems for the Extraterritorial Application of EU Competition Law from the Viewpoint of International Law

If extraterritorial jurisdiction is limited to legislative and adjudicative jurisdiction, real conflicts with other states would be less likely to occur. This means that as long as a state makes laws or regulations which cover the activities of foreign companies occurring outside its territory, judicial organs will issue orders to foreign companies conducting unlawful activities outside their territory. A serious intervention in another country's jurisdiction may occur if the state tries to exercise its enforcement jurisdiction over a foreign company based in a foreign territory. Under a general principle of international law, a state is not permitted to exercise enforcement jurisdiction over the territory of another sovereign state.[101] However, in the field of EU competition law, the application of competition law by the Commission to foreign companies that are active in foreign territories generally entails a requirement that foreign companies obey relevant decisions of the Commission. If a foreign company were to completely ignore a decision of the Commission by, for example, failing

to pay a fine, they would face difficulties when conducting business in the EU in the future. Therefore, in reality, companies are forced to adhere to the extraterritorial jurisdiction of the Commission. The situation in which most companies find themselves as described herein produces an effect similar to the exercise of enforcement jurisdiction even though the organ in charge does not in fact exercise its jurisdiction in this regard.

Of course, avoiding jurisdictional conflicts is an excellent reason for concluding bilateral agreements between states in such a way that each country's competition policy can be properly respected. For example, the EC concluded such a cooperative agreement with Japan. According to Article 3(1) of the "Agreement Between the Government of Japan and the European Community Concerning Cooperation on Anti-Competitive Activities"[102], the competition authority of each party shall render assistance to the competition authority of the other party in its enforcement activities to the extent consistent with the laws and regulations of the party rendering the assistance and the important interests of that party, and within its reasonably available resources.[103] Such a rule will be helpful for securing the enforcement of one state's decision in a foreign state where such enforcement is otherwise not recognized under international law. However, Japan did not receive any information pertaining to the Commission's investigation into the *GIS* case despite the existence of this agreement between the EU and Japan. It regulates the exchange of information concerning anti-competitive activities that the informing competition authority believes may also have an adverse effect on competition within the territory of the other party[104]. The Japanese authority first came to know of this anti-competitive conduct when the Commission released its decision. As a result, it was difficult for the Japanese authority to rely on Japanese antitrust regulations to investigate the GIS cartel, which might have been exerting its influence on the Japanese market. By the time the Japanese authority was brought up to speed, there was too little time to conduct its own investigation.

Recently, Japan also took on the position of exercising its jurisdiction over foreign companies based on the effects doctrine. The most recent case in this regard is commonly referred to as the *Marine Hose* case. The Japan Fair Trade Commission (hereinafter referred to as "JFTC") had investigated entrepreneurs manufacturing and selling marine hoses in accordance with the provision of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as "AMA") and issued a cease and desist order pursuant to the provision of Paragraph 2 of Article 7 of the AMA. In this case, the companies subject to the order were four European companies and one Japanese company. This *Marine Hose* case also involved an international cartel agreement among Japanese, Italian, French, and UK companies that together comprised a group akin to the GIS cartel. Under the AMA, however, a fine can only be imposed on a company with turnover in Japan. Therefore, Bridgestone Corporation, the only Japanese company belonging to the cartel, was subject to a fine, while no such fine was imposed on any of the remaining four European companies. Here we can see the difference between the two cases. In the *GIS* case, the Japanese companies who engaged in no business activities in the European market were

fined just like the other cartel members based in Europe. This may be one of the reasons why the *GIS* case was received with an attitude of incredulity in Japan. For example, after the Commission's decision, Hitachi commented on the fine imposed on it by the Commission by stating that they had never sold any GIS equipment in Europe and that they believed that they were not in violation of European anti-trust law with regard to tenders for GIS products.[105] The addressees of the Commission's decision in the *GIS* case brought the case before the European Court of First Instance,[106] whereupon it will become the focus of public attention in terms of how the Court will decide to exercise its jurisdiction over the Japanese companies in question. These Japanese companies argued that they did not participate in the cartel and that they refrained from engaging in any business activities in Europe in accordance with their own business interests rather than due to the existence of the GIS cartel.

To avoid the incompatibility between states in respect of application of their competition laws, forums such as the International Competition Network, which represents major national antitrust authorities could play an important role.[107] Besides the concept of "comity" or rule of reasons, both are taken into consideration in the United States regarding to the application of its antitrust law to the foreign companies could be one of the possible method to lose the problems of extraterritorial application of the competition law. However, we should keep in mind, that the European countries are not very familiar with "comity" as a legal obligation.[108]

VIII. Concluding Remarks

The Commission applies EU competition law very strictly in order to maintain a state of fair competition in the Community. Japanese companies were sometimes addresses of the Commission's decisions in the past and fines were imposed on them. However, there were only few cases which were related to the extraterritorial application of the EU competition law in the strict meanings. Mostly, the foreign companies which were addresses of the Commission's decision were engaged in the business in the EU, for instance, they distributed their products in the EU or sold them directly to their European business partners or through their subsidiaries in the EU. In such cases we can find rational reasons why the Commission applies its jurisdiction to the foreign companies outside the EU.[109] For example in the car glass case[110], Japanese undertaking -Asahi Glass Company Limited as a major Japanese glass manufacturing- was also one of addressees of the Commission's decision. Contrary to the GIS case, Asahi Glass Company Limited had sold its products within the EU and they had direct connection with the European market.[111] As another example, the Commission imposed fine on Nintendo because of the infringement of Article 81 of the EC Treaty (Today's Article 101 of the TFEU).[112] Nintendo did not argue whether the Commission had jurisdiction to the company, because the agreements and concerted practices concerned were targeted to the European market and Nintendo had sold their

products within the EU. Besides, in the process of the European Court of First Instance, Nintendo argued mainly the measures of calculation of fine[113] and not the jurisdiction of the Commission. It is also in this case clear that the problem is not the extraterritorial application of the EU competition law because Nintendo sold their products in the European market and it had its subsidiary there. The deference between these cases and the GIS case is that the Japanese parties of the GIS cartel had taken few commercial activities within the EU as they insisted[114]. This is why the Commission's decision of the GIS cartel was received sensational in Japan and it remains if the Commission may take jurisdiction based on the effects doctrine over foreign companies who had not participated in the European market because of its own business interests.[115]

As we can see from the *GIS* case, Japanese companies should not ignore this strict attitude of the Commission even in cases in which a Japanese company engages in business only in Asia or in Japan. In a complex world where the movement of peoples and the activities of private-sector companies cross borders as a matter of routine, traditional principles applicable to the exercise of jurisdiction – such as the territorial principle or nationality principle – are not appropriate for safeguarding the state's interest. To deal with the current new era of globalization, the effects doctrine is being increasingly accepted not only in the United States, but also in the EU. This trend appears to be the reasonable result of developments in the law. In line with such developments in the law, Japanese companies should carefully bear in mind that their activities may run afoul of EU competition law even if they are only active outside the Community.

Notes

[1] Neelie Kroes, European Models for Economic Recovery Address at Atlantic Council, Washington D.C., 26th March 2009, Press Release on 26th March 2009.
[2] The Lisbon Treaty enters into force in December 2009. From December 2009 on, Article 81 of the EC Treaty is renumbered to Article 101 of the TFEU and Article 82 is Article 102 of the TFEU.
[3] Ian Brownlie, *Principles of Public International Law, 6th ed.* (Oxford: Oxford University Press, 2003) p. 297; Malcolm N. Shaw, *International Law, 5th ed.* (Cambridge, Cambridge University Press, 2003) p. 527; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford, Oxford University Press, 2008) p. 6.
[4] M. N. Shaw, *International Law, 5th ed.*, p. 527.
[5] M. N. Shaw, *International Law, 5th ed.*, p. 576; Michael Akehurst, *"Jurisdiction in International Law"*, *British Yearbook of International Law*, Vol. 46, 1972-73, p. 179.
[6] §401(a) Restatement (Third) of US Foreign Relation Law.
[7] §401(c) Restatement (Third) of US Foreign Relation Law.
[8] *Lotus* Case, *PCIL, Series A*, No.10, 1927, p.18; Matthias Herdegen, *Völkerrecht, 8. Aufl.* (München, Beck, 2009) p. 170.
[9] §401(b) Restatement (Third) of US Foreign Relation Law; see also, M. N. Shaw, *International Law, 5th ed.*, p. 578; Michael Akehurst, *"Jurisdiction in International Law"*, p. 152.
[10] Cedric Ryngaert, *Jurisdiction in International Law*, p. 10.

[11] Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 299; Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 185; Michael Akehurst, *"Jurisdiction in International Law"*, p. 192.
[12] Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 301; Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 185; Michael Akehurst, *"Jurisdiction in International Law"*, p. 206.
[13] M. N. Shaw, *International Law, 5th ed.*, p. 584; Michael Akehurst, *"Jurisdiction in International Law"*, pp. 156-7.
[14] M. N. Shaw, *International Law, 5th ed.*, p. 588.
[15] Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 302; M. N. Shaw, *International Law, 5th ed.*, p. 591; Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 188; Michael Akehurst, *"Jurisdiction in International Law"*, pp.157-9.
[16] M. N. Shaw, *International Law, 5th ed.*, pp. 591-2.
[17] Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 302.
[18] M. N. Shaw, *International Law, 5th ed.*, pp. 592-3; Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 303; Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 188; Michael Akehurst, *Jurisdiction in International Law*, pp.160-6.
[19] M. N. Shaw, *International Law, 5th ed.*, p. 580; Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 299; Cedric Ryngaert, *Jurisdiction in International Law*, p. 76.
[20] M. N. Shaw, *International Law, 5th ed.*, p. 580; Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 299.
[21] M. N. Shaw, *International Law, 5th ed.*, p. 581; Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 299.
[22] M. N. Shaw, *International Law, 5th ed.*, p. 612.
[23] M. N. Shaw, *International Law, 5th ed.*, p. 612; Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 307; Cedric Ryngaert, *Jurisdiction in International Law*, p. 185; Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 183.
[24] M. N. Shaw, *International Law, 5th ed.*, p. 612; Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 186.
[25] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford, Oxford University Press, 2008), p. 76.
[26] Ibid., p.77.
[27] Harold G. Maier, *"Jurisdictional Rule in Customary International Law"*, pp. 68-69, in: K.M. Meesen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (London, Kluwer Law International 1996).
[28] Matthias Herdegen, *Völkerrecht, 8. Aufl.*, p. 187.
[29] A. Jones and B. Sufrin, *EU competition law, 3rd ed.* (Oxford, Oxford University Press, 2008) p. 1357; J. Faull & A. Nikpay, *The EC Law of Competition* (Oxford, Oxford University Press, 1999) p. 102.
[30] A. Jones and B. Sufrin, *EU competition law, 3rd ed.*, p.1357; Michael J. Trebilcock and Edward M. Iacobucci, *"National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy"*, in: R.A. Epstein & M. S. Greve, *Competition Laws in Conflict* (Washingtom, D.C., AEI Press, 2004) pp. 156-7; Cedric Ryngaert, *Jurisdiction in International Law*, pp. 220-21.
[31] See 1(1) in this paper.
[32] Immenga/Mestmäcker, *Wettbewerbsrecht, Band 1, EG/Teil 1, Kommentar zum Europäoschen Kartellrecht, 4. Aufl.* (München, Beck, 2007) p. 69.
[33] *Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht)* Band 1, (München, Beck, 2007) p. 513, 524; L. Ritter/W. D. Braun, *European Competition Law: a practitioner's guide, 3rd ed.* (The Hague, Kluwer Law International, 2004), p. 80.
[34] *Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht)* Band 1,

p. 535.
[35] Valentine Korah, *An Introductory Guide to EU competition law and Practice, 9th ed.* (Oxford, Hart Publishing, 2007) p. 45.
[36] L. Ritter/W. D. Braun, *European Competition Law,* p. 62.
[37] Valentine Korah, *An Introductory Guide to EU competition law and Practice, 9th ed.*, p. 58.
[38] L. Ritter/W. D. Braun, *European Competition Law,* p. 49.
[39] J. Faull & A. Nikpay, *The EC Law of Competition*, p.96.
[40] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), OJ C 101/81.
[41] For example, Commission Notice on agreements of minor importance that do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001, pp.13-15.
[42] L. Ritter/W. D. Braun, *European Competition Law,* p. 50; *Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht)* Band 1, p.532, p.602.
[43] OJ 2003 L1/1, 4.1.2003.
[44] Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, pp.204-11.
[45] Decision of EC Commission 64/233. March 11, 1964. No. IV/A-00061, OJ 58, 09.04.1964, pp. 915-16.
[46] Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, pp. 204-11; replaced in 2004 by Regulation 1/2003 OJ 2003 L1/1.
[47] However, it is not clear if the Commission would take the same position regarding such an agreement today. See *Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht)* Band 1, p. 219, para. 857.
[48] Case 22/71, [1971] ECR 949, para. 11.
[49] Case 48/69, Imperial Chemical Industries [1972] ECR, p. 619; Case 52/69, Geigy AG [1972] ECR, p. 787; Case 53/69, Sandoz AG [1972] ECR, p. 845.
[50] OJ 1969, L 195/11.
[51] Ibid, at paragraph 28.
[52] Case 48/69, Imperial Chemical Industries [1972] ECR 619.
[53] Ibid., p. 696.
[54] Ibid., para. 130-138.
[55] Ibid., para. 141.
[56] Commission Decision of 19 December 1984, IV/29.725, OJ L 85, 26.03.1985, para. 79.
[57] Ibid., para. 79.
[58] In this part, the opinion of Advocate General Darmon is the same as the opinion of the Advocate General Mayras in the *Dyestuffs*. See also Case 48/69, Imperial Chemical Industries [1972] ECR 619, p.695.
[59] Cases 89, 104, 114, 116, 117, and 125-9/85, *A. Ahlström Oy v. Commission* [1988] ECR 5193, para. 47-58.
[60] Ibid., para. 16.
[61] Ibid., para. 17.
[62] Commission Decision of 24 January 2007, Case COMP/F/38.899, para. 113 (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009).
[63] Ibid., para. 114.
[64] Ibid., para. 134.
[65] Ibid., para. 142.
[66] Ibid., para. 143.
[67] Ibid., para. 140.

[68] Ibid., para. 141.
[69] Ibid., para. 147.
[70] Ibid., para. 220.
[71] Ibid., para. 221.
[72] Commission considered different points in order to recognize its jurisdiction: existence of the agreement, the single and continuous infringement, real restriction of the competition, and the duration of the infringement. See Commission Decision Case COMP/F/38.899, para. 7.4.
[73] Commission Decision Case COMP/F/38.899, para. 310 (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009).
[74] Ibid., para. 314.
[75] Ibid., para. 315.
[76] Ibid., para. 318.
[77] Ibid., para. 319.
[78] Article 2 of the Commission Decision Case COMP/F/38.899 (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009).
[79] Commission Decision Case COMP/F/38.899, para. 316-318 (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009).
[80] Ibid., para. 318.
[81] Ibid., para. 310.
[82] Ibid., para. 387.
[83] Ibid., para. 391.
[84] Ibid., para. 403.
[85] Ibid., para. 432.
[86] Ibid., para. 435.
[87] Ibid., para. 319.
[88] Joseph P. Griffin, *"Adjudicatory Jurisdiction over Multilateral Enterprise: Lifting the Veil in the EU and the USA"*, in: G.S. Goodwin-Gill and S. Talmon, *The Reality of International Law Essays in Honour of Ian Brownlie* (Oxford, Oxford University Press, 1999), p.226.
[89] In the *Genor* Case, which arose under the Merger Regulation, the Court of First Instance explicitly used the language of the effects doctrine. It held that:
[A]pplication of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community. (…) It is therefore necessary to verify whether the three criteria of immediate, substantial and foreseeable effect are satisfied in this case. See, Case T-102/96 *Genor Ltd v Commission*, para. 90-92. However it is not yet possible to say that the effects doctrine is adopted by the European Courts. See also J. Faull & A. Nikpay, *The EC Law of Competition*, 1999, p. 101. Besides, according to Article 1 of the Merger Regulation, the Regulation is applied to all concentrations with a "Community dimension" and what is "Community dimension" is determines in Article 1(2) to 1(5) of the Regulation by reference to the quantitative criteria such as worldwide or Community level turnover. In case of the international merger, the criteria for the application of the Merger Regulation are clear cut by the quantitative criteria of the Merger Regulation, so that the scope of the Commission's jurisdiction is definitely clear. So if the Commission applied the Merger Regulations to the cases like *Genor* or *Boeing/Macdonell*- all of the parties were non-European companies- the first step to apply the Merger Regulation is clearly determined and not controversial, because the test to apply it is laid down by reference to the quantitative criteria like turnover. The problem of the application of the Merger Regulation seems to be rather political. I would like to discuss more precisely the extraterritorial application of the Merger Regulation in other opportunity.
[90] A. Jones and B. Sufrin, *EU competition law, 3rd ed.*, 2008, p.1358; L. Ritter/W. D. Braun,

European Competition Law, p.47; Werner Meng, *Extraterritoriale Jurisdiction im öffentlichen Wirtschaftsrecht* (Berlin, Springer, 1994) p.480.

[91] Joseph P. Griffin, *Reactions to US Assertions of Extraterritorial Jurisdiction* [1998] ECLR 64, 69.

[92] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), OJ C 101/81.

[93] Ibid., para. 3.

[94] Ibid., para. 36.

[95] Commission Decision Case COMP/F/38.899, para. 310 (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009).

[96] Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty (2004/C 101/07), OJ C 101/81, para. 37-43.

[97] Ibid., para. 100.

[98] Ibid., para. 100.

[99] Ibid., para. 101.

[100] See http://ec.europe.eu/competition (on 20 Nov. 2009).

[101] Ian Brownlie, *Principles of Public International Law, 6th ed.*, p. 306; M. N. Shaw, *International Law, 5th ed.*, p. 573.

[102] OJ L 183, 22.7.2003, pp. 12-17.

[103] Article 3(1) of the Agreement.

[104] Agreement between the Government of Japan and the European Community Concerning Cooperation on Anticompetitive Activities, Article 3(2)(a).

[105] Press Release on January 25, 2007.

[106] Case T-112/07 *Hitachi* v *Commission*, Case T-113/07 *Toshiba* v *Commission*, Case T-132/07 *Fuji Electric* v *Commission* and Case T-133/07 *Mitsubishi* v *Commission*.

[107] Michael J. Trebilcock and Edward M. Iacobucci, *"National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy"*, p. 172.

[108] Cedric Ryngaert, *Jurisdiction in International Law*, p. 172.

[109] There was also the Case which included famous Japanese company -Sony, Commission Decision of 20 Nov. 2007, Case COMP/38.432- Professional Videotape (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009). In this case the Commission recognized that all Japanese companies concerned took part in the cartel meetings and their subsidiaries in the EU followed the policy laid down by the parent companies. See para.163, para.182 and para.192 of the Decision.

[110] Commission Decision Case COMP/39.125, OJ C 173/13, 25.7.2009.

[111] Asahi Glass Company Limited paid the fine and it did not bring the case before the European Court of First Instance. See Press Release of the company in Japanese on 6 Feb. 2009 (http://www.agc.co.jp/news/2009/index.html, on 20 Nov. 2009).

[112] Commission Decision of 30 Oct. 2002, COMP/35.587, COMP/35.706 and COMP/36.321, OJ L 255/33, 8.10.2003.

[113] Judgment of the Court of First Instance (Eighth Chamber), 30 April 2009. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0013:EN:H (on 20 Nov. 2009).

[114] Commission Decision Case COMP/F/38.899, para.316 (http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009).

[115] On 7 Oct. 2009 the Commission published new decision relating to power transformers cartel between European and Japanese companies (Case COMP/39.129-Power Transformers, Commission Decision of 7/10/2009, http://ec.europa.eu/competition/antitrust/cases/, on 20 Nov. 2009). If the Japanese companies concerned had taken few business activities before and did not

participate in the European market from their own business interest, this new case may be the same situation like the GIS case. I will analyze this new case in the near future.