CASENOTE

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The *Wood Pulp* Case

Forty-one non-EC producers of bleached sulfate wood pulp, together with two non-EC trade associations, one U.S. and the other Finnish, brought actions in the European Court of Justice to annul a decision of the EC Commission. The commission had imposed substantial fines on the applicants for violating EC competition law.[1] Most of the applicants challenged the power of the Community to apply its competition law extraterritorially to reach them, and, considering the importance of the issue, the Court first heard and decided submissions limited to the jurisdictional question.

The Commission had determined that the producers and the trade associations had engaged in concerted practices to fix the price of wood pulp in violation of article 85(1) of the EEC Treaty. Article 85(1) prohibits agreements and concerted practices "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."

In its decision, the Commission had addressed the jurisdictional question and had explicitly adopted an effects test as the basis for applying article 85 to the wood pulp producers and trade associations. It said that the EC had jurisdiction because the "effect of the agreements and practices on prices announced and/or charged to customers . . . within the EEC was . . . not only substantial but

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1. *See Wood Pulp*, 27 O. J. EUR. COMM. (No. L 85/1) (1984), [1982–85 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 10,654 (1985).

intended, and was the primary and direct result of the agreements and practices."[2]

In their submissions to the Court, the industry applicants argued principally that the Commission did not have extraterritorial authority over the conduct of foreign persons that engaged in no wood pulp production in the EC, did not maintain offices or subsidiaries within the EC, and entered into no concerted agreements with the EC.[3] By focusing on the lack of any direct territorial connection between themselves and the Community, the industry sought to invoke the stricter versions of the territoriality principle of jurisdiction.[4]

The Court rejected these arguments, concluding first that nothing in article 85 itself precludes its application to persons situated outside the Community. The Court reasoned that the concerted practices of the applicants satisfied the wording of article 85(1): The practices had the object and effect of restricting competition in the Common Market because they coordinated the prices charged to customers in the Community.[5]

The Court next concluded that the Commission's decision was compatible with the territoriality principle as universally recognized in public international law. The Court reasoned that: "an infringement of article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the Common Market, consists of conduct made up of two elements: the formation of an agreement, decision or concerted practice and the implementation thereof."[6] The Court could not accept that the Community had jurisdiction only if the challenged conduct originated within the EC: "If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement . . . was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions."[7] The Court

2. *Id.* at 11,547–54. The *Wood Pulp* case dealt solely with jurisdiction under article 85, but the Commission is also likely to apply the Court's reasoning when it proceeds under article 86 against an abuse of a dominant position.

3. The applicants also advanced additional arguments, not central to the Court's decision. The Canadian undertakings argued that the Commission's actions interfered with Canadian sovereignty and thereby breached the principle of international comity. *See* A. Ahlström Osakeyhtiö v. Commission, [1987–1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,491, at 18,606–07 [hereinafter *Wood Pulp*]. The Court rejected this contention on the tautological ground that it called into question the Community's jurisdiction to apply its competition rules to the conduct at issue in the case. *Id.* at 18,612.

The Finnish undertakings argued that the EC-Finland Free Trade Agreement superseded article 85 and provided the only basis for challenging the actions of the Finnish industry. *Id.* at 18,608. The Court rejected the Finnish claims on the grounds that the Free Trade Agreements did not prevent the application of article 85. *Id.* at 18,613.

4. *See, e.g.*, Higgins, *The Legal Bases of Jurisdiction*, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 3, 5–7 (C. Olmstead ed. 1984).

5. *See Wood Pulp*, ¶ 14,491, at 18,611–12.

6. *Id.* at 18,612

7. *Id.*

concluded that the "decisive factor" relating to the Community's jurisdiction over restrictive conduct is "the place where it is implemented."[8]

The Court did not define or analyze at length the critical term "implemented," but three passages in the full report of the proceeding help illuminate the Court's thinking. The first passage explains the Court's conception of competition within the Common Market. Competition occurs when suppliers sell directly to purchasers established in the Community and engage in price competition to win orders from those customers. Competition in the Common Market is restricted when suppliers enter into an agreement or concerted practice concerning the price to be charged to their customers in the Community.[9]

The second passage is in the section in which the Court voided the Commission's decision against the U.S. trade association. The Court said that the trade association itself neither engaged "in manufacture, selling, or distribution," nor "played a separate role in the implementation" of the pricing agreements concluded by its members.[10] Evidently, to be held liable, a person must have some direct involvement in a transaction with an EC consumer.

The third passage describes an argument of the Commission. The Commission claimed that the essential issue in the case was "the jurisdiction of the Community over undertakings that implement a practice directly, intentionally, and appreciably affecting competition within the Community and trade between Member States, either by trading directly into the Community or by using agents or sales offices within the Community."[11]

These passages suggest that a restrictive agreement is "implemented" in the Community when it concerns the price, quantity, or quality of a product or service sold to a buyer in the EC by a seller having a connection with the agreement. As a result, the EC's jurisdiction does not reach as far as it would under the *Alcoa* standard[12] or even as far as a standard requiring a "direct, substantial, and reasonably foreseeable effect."[13] Extraterritorial jurisdiction does not arise simply when a restrictive agreement affects the price, quantity, or quality of goods or services sold to an EC buyer; the non-EC person that is making, or attempting to make, a sale to a buyer within the EC must have some direct involvement with the restrictive agreement.

The Court also dealt briefly with the assertion that public international law contains a principle of noninterference. The U.S. trade association had contended that the Commission could not challenge its conduct because to do so would violate that principle. This was because the Webb-Pomerene Act of the

8. *Id.*
9. *Id.*
10. *Id.* at 18,613.
11. *Id.* at 18,605.
12. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).
13. *See* 15 U.S.C. § 6a (1982).

United States encourages the formation of export associations.[14] The Court declined to decide whether international law contains a principle of noninterference, saying that, even if it existed, it would not apply in this case. United States law did not compel the formation of the trade association, and the U.S. authorities had not raised any objections to the *Wood Pulp* case when consulted by the Commission.[15]

Wood Pulp is a statement of first importance on the scope of EC competition law. The Court adopted neither the expansive effects test of *Alcoa* nor the effects test used by the Commission, but it did make clear that effects are relevant to the jurisdictional analysis. The standard adopted by *Wood Pulp,* requiring an intent or direct effect of restricting EC competition following from conduct implemented within the EC, attempts to strike a balance between the extremes of jurisdiction based purely on territoriality and that based purely on effects.

14. *Wood Pulp,* ¶ 14,491, at 18,607.
15. *Id.* at 18,613.