Oxford Competition Law

1 Competition Law and Policy in the EU, 5 The Territorial Scope of EU Competition Law

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From: Bellamy & Child: European Union Law of Competition (8th Edition)
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Previous Edition (7 ed.)

Content type: Book content
Product: Oxford Competition Law [OCL]
Published in print: 13 December 2018
ISBN: 9780198794752

Subject(s):

Article 101 TFEU — Article 102 TFEU — Single market — Extra-territorial application of competition rules — Third countries — Merger control

5. The Territorial Scope of EU Competition Law

In general.

1.096 On the face of it, the territorial scope of the EU competition rules extends to any collusive or abusive conduct that has the object or effect of restricting competition within the internal market, and appreciably affects trade between Member States, regardless of the nationality or territorial location of the undertakings concerned. Agreements that are concerned only with exports from or imports to the EU may nevertheless have an effect upon trade within the EU and so fall within the territorial scope of the EU competition rules. The following topics are considered here:

(a) The application of Article 101 to agreements affecting trade into the EU from third countries.

(b) The application of Article 101 to agreements affecting trade from the EU to third countries.

(c) The extent to which jurisdiction to apply Articles 101 and 102 and the Merger Regulation can be asserted over conduct that takes place outside the EU.

The scope of the territory of the EU and the effect of the EEA Agreement and other bilateral arrangements between the EU and third countries has already been considered above.[393]

(p. 50) (a) Trade into the EU from third countries

Agreements on imports into the EU.

1.097 It is well-established that an anti-competitive agreement between undertakings within the EU and their competitors in third countries intended to reduce the supply, within the EU, of products originating in third countries is capable of falling within Article 101(1).[394] Further, an agreement relating to imports into the EU from third countries which has as its object or effect an appreciable restriction of competition within the EU is likely to fall within Article 101(1).[395] In *Gas Insulated Switchgear*,[396] the major Japanese and European providers of GIS coordinated the allocation of GIS projects worldwide according to agreed rules under which they agreed not to bid for projects in the others' 'home markets'. Further, the European producers agreed amongst themselves to share EEA markets. The Commission found that both aspects of the cartel were part of a single continuous infringement. The Commission held that it was clear that the intra-EU aspect of the illegal agreement at least potentially affected trade between Member States, so that the condition concerning the impact of the agreement as a whole on trade between Member States was satisfied.[397] Any agreement that potentially reduces competition in the EU by undertakings in third countries may fall under Article 101(1) and it is irrelevant that one or more parties are situated or domiciled outside the EU.[398] Once it is established that the agreement in question restricts competition in relation to the import of goods into the EU, it is not thereafter difficult to find that the agreement is capable of having an appreciable effect on trade between Member States of the EU.[399]

(p. 51) (b) Trade from the EU into third countries

Agreements concerning exports from the EU.

1.098 In general, agreements or individual clauses in agreements relating exclusively to trade outside the EU do not fall within Article 101(1).[400] It does not necessarily follow, however, that an agreement falls outside Article 101(1) merely because it relates to trade outside the EU since the agreement itself may still have a significant effect upon competition and trade within the EU. For example, a cartel of undertakings in the EU concerning only markets outside the EU will be caught by Article 101(1) if it has the object or effect of diverting surpluses from within the EU, or of preventing re-export to home markets.[401] A cargo-sharing agreement between carriers operating on routes from one

Member State to third countries distorts competition with carriers in other Member States and also as between EU exporters.[402] An export ban on sales to third countries included in a distribution agreement for territories in the EU, even if it does not have the object of restricting competition may nonetheless have that effect, and infringe Article 101(1), if in the absence of such a restriction there would be a realistic possibility of re-import of the products into the EU, having regard, for example, to the level of customs duties.[403] Similar considerations apply to a licensing agreement for production in the EU that prohibits export to a third country.[404] Moreover, if an agreement relates to exports to an EEA State, the equivalent competition provisions of the EEA Agreement apply.[405] An agreement or practice that relates to imports or exports with third countries must be capable of having an appreciable influence, direct or indirect, actual or potential, on the pattern of trade between Member States of the EU. In the context of the behaviour of dominant undertakings, the Court of Justice has held that the abuse of a dominant position adversely affecting a competitor (p. 52) within the EU may have repercussions on the competitiveness of, and trade within, the internal market. It is irrelevant that the abusive conduct relates only to activities outside or exports from the EU.[406]

Destination and re-importation clauses.

1.099 In *Javico International v Yves Saint Laurent Parfums*[407] the Court of Justice gave a preliminary ruling on the application of Article 101 to two distribution agreements between Yves St. Laurent Parfums (YSLP), a producer of luxury cosmetics, and Javico, a German company specialised in distributing products to Eastern Europe. The issue arose in proceedings brought by YSLP against Javico alleging that it was in breach of its contractual obligations to sell YSLP products, under one agreement, in Russia and the Ukraine and, under the other, in Slovenia[408] and not to export them to the EU. Noting that the restriction covered not only the EU but all third countries other than the contractual territories, the Court held that the restrictions:

> 'must be construed as not being intended to exclude parallel imports and marketing of the contractual products within the [EU] but as being designed to enable the producer to penetrate a market outside the [EU] by supplying a sufficient quantity of contractual products to that market.'[409]

Although the agreements therefore did not have the object of restricting competition within the EU, it was necessary to consider whether they had such an effect. That would depend on the degree to which the EU market in products of that kind was already competitive and, as regards the potential for re-imports, whether there was a substantial price difference that would not be eroded by the costs involved in re-importation.[410] Although the judgment is somewhat confusing in its lack of distinction between inter-brand and intra-brand competition,[411] the Court's approach is that unless the EU market is oligopolistic (concentrated), prevention of direct, parallel imports by such a third country destination clause should not be regarded as having an anti-competitive effect, and that the test under Article 101(1) is then the same as if the distributor was itself outside the EU, that is to say, whether there is a realistic likelihood of re-imports from the country of destination.

(p. 53) Likelihood of re-imports.

1.100 When territorial restrictions that prevent sale in the EU are included in an agreement for distribution, or a licence to manufacture, outside the EU, the application of Article 101(1) depends on the legislative and economic context of the agreement. The following situations may be distinguished:

(a) Where the distributor or licensee is situated in a third country, if importation is not a realistic commercial prospect, for example because of the nature of the product or because any price differential would be eroded by transport costs or customs duties, the agreement would be unlikely to have an effect on trade between Member States and fall outside Article 101(1). [412]

(b) Where the distributor is another EU undertaking, a third country 'destination clause' operates also to prevent direct sales between Member States. If competition for such products in the EU is limited, a clause that prevents parallel imports may have an appreciable anti-competitive effect and infringe Article 101(1). [413]

Imports into the EU: *de minimis*.

1.101 An agreement that restricts imports into the EU may fall outside Article 101(1) under the *De Minimis* doctrine if it affects trade between Member States to an insignificant extent.[414] In *Javico v Yves Saint Laurent Parfums* the Court of Justice stated:

'… intra-[EU] trade cannot be appreciably affected if the products intended for markets outside the [EU] account for only a very small percentage of the total market for those products in the territory of the [internal market].'[415]

This appears to go somewhat further than the usual *De Minimis* doctrine, especially as the quantity of luxury perfume exported to the Russian/Ukrainian market was evidently not economically insignificant.[416] On the other hand, even if the conduct of an individual party to an agreement does not itself appreciably affect trade within the EU, the small scale of that party's participation in the agreement will not exculpate it if the effect on trade of the agreement as a whole is appreciable.[417]

(p. 54) (c) Jurisdiction over undertakings outside the EU

The issue.

1.102 The question of subject-matter jurisdiction under EU competition law arises not only as regards Article 101 but also in connection with the application of Article 102 and the Merger Regulation. When a non-EU undertaking engages in conduct directly within the EU, such conduct is clearly subject to EU law based on territorial jurisdiction. It is the application of EU competition law to activity carried on outside the EU (and the European Economic Area), especially by non-EU undertakings, that gives rise to a potential problem. How far a State may properly apply its laws to conduct carried out beyond its territory is a controversial issue under public international law.[418] On the one hand, the application by one State, or group of States, of their law to conduct on the territory of another State can be regarded as an infringement of the latter State's sovereignty. If, for example, State A were to impose fines in respect of the application or effects of a cartel in State B, that would encroach on the territorial jurisdiction of State A.[419] On the other hand, the commercial world is increasingly interdependent and trade typically flows freely across national borders, competition law that is based primarily on economic consequences becomes stunted and artificial if it cannot reach any conduct engaged in beyond the legislating State's territorial boundaries.

Articles 101 and 102 TFEU.

1.103 The wording of Articles 101 and 102 TFEU clearly states that those Articles exclusively relate to practices that restrict competition, and affect trade, within the European Union, rather than outside it.[420]

Public international law.

1.104 The EU must comply with public international law in the exercise of its powers.[421] One of the founding pillars of public international law is the principle of territoriality, according to which a state may exercise its authority to prescribe and enforce its law over all persons and things within its territory but according to which a State's authority to exercise jurisdiction extraterritorially is much more limited. As the (p. 55) Court of Justice held in *Wood Pulp I* the EU's 'jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law'.[422]

International comity.

1.105 International comity refers to the idea of every sovereign State respecting the independence and dignity of every other sovereign State.[423] That form of comity finds particular expression through international cooperation agreements whereby the EU and the other contracting State(s) agree to consult and have regard to the important interests of each other when deciding on investigations and remedies.[424]

Non-interference.

1.106 In *Gencor v Commission*, a merger case involving South African companies, the General Court referred to the parties' contention that there was such a principle of 'non-interference', but found on the facts that there was neither a conflict between what was required by the EU and by the South African Government, nor any basis for showing that the concentration would affect South Africa's vital economic or commercial interests. The General Court declined to decide whether such a principle of 'non-interference' exists in public international law.[425]

Single economic entity doctrine.

1.107 One of the ways in which the Commission may exercise international jurisdiction over a non-EU company is if that company owns or controls an EU subsidiary that forms part of the same undertaking, that is to say, the non-EU and EU companies are part of a single economic entity.[426] In *Commercial Solvents v Commission*[427] the Court of Justice dismissed an appeal by a US company and its Italian subsidiary against a decision of the Commission holding them both liable under Article 102 for the latter's refusal to sell a raw material to a competitor.[428]

Implementation test.

1.108 The application of Article 101 to agreements or concerted practices involving undertakings located outside the EU was the principal issue arising in *Wood Pulp I*.[429] The Commission's decision[430] concluded that 41 wood pulp producers, and two of their trade associations, all having their registered offices outside the EU, had engaged in concerted practices relating to the prices charged through subsidiaries or agents to manufacturers of paper within the EU. The decision was challenged on several grounds and the Court of Justice ordered that the jurisdictional issues be determined separately (p. 56) from the substantive issues.[431] The Court of Justice upheld the Commission's interpretation of the territorial scope of Article 101 TFEU, placing emphasis on direct sales into the EU:

> ' … Where wood pulp producers established [outside the EU] sell directly to purchasers established in the [EU] and engage in price competition in order to win

> orders from those customers, that constitutes competition within the [internal market].
>
> It follows that where those producers concert on the prices to be charged to their customers in the [EU] and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the [internal market] within the meaning of Article [101 TFEU].'[432]

The Court of Justice held the EU's jurisdiction to apply its competition rules to agreements or practices *implemented* within the internal market was covered by the territoriality principle as universally recognised in public international law. On the facts of the case, the wood pulp producers had implemented their purported cartel agreement within the internal market.[433] The Court accordingly articulated a principle based on the territorial implementation of an agreement or concerted practice within the internal market, irrespective of where the collusion originated or the parties were based.[434]

Qualified effects test: *Gencor.*

1.109 In *Gencor v Commission*[435] the General Court upheld a Commission decision prohibiting a proposed joint venture between a South African and a British company because this would bring under common control the platinum metals production carried on by their respective subsidiaries, which were located in South Africa. The EU Merger Regulation applies to concentrations according to quantitative thresholds based on worldwide and EEA-wide turnover.[436] One of the grounds on which the parties challenged the decision was that it involved an impermissible assertion of extra-territorial jurisdiction. The General Court upheld the Commission's jurisdiction under the EU Merger Regulation on the basis that it was 'justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the [EU].'[437]

Qualified effects test: *Intel.*

1.110 Further consideration was given to the territorial scope of the EU competition rules by the Grand Chamber of the Court of Justice in *Intel v (p. 57) Commission*.[438] The question was whether the Commission had jurisdiction over agreements made between Intel of the US and Lenovo of China. The Court's answer was 'yes', rejecting the argument that the Commission cannot exercise territorial jurisdiction on the basis of qualified effects. The Court emphasised, first of all, that the application of EU competition law cannot simply depend on the place where the agreement was formed, or else undertakings would have an easy means of evading the law.[439] The Court observed, secondly, that the qualified effects test pursues the same objective as the implementation test, namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market.[440] Thirdly, the Court held that it is necessary to see if it is foreseeable that the conduct in question has an immediate and substantial effect in the Union.[441] In applying that test, the conduct should be looked at as a whole and it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.[442] Noting in particular that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy intended to make sure that no Lenovo notebook using a rival's computer chips would be available on the market, including in the EEA, the Court of Justice held that the three criteria of 'immediate, substantial and foreseeable effect' were satisfied on the facts of the case.

Extra-territorial limits of damages actions.

1.111 The jurisprudence in which the extra-territorial limits of EU competition law were identified concern jurisdiction to find an infringement of EU competition law, as opposed to the principles that govern the jurisdiction of a national court to hear a claim for damages.[443] It appears that EU competition law only confers a right to damages in respect

of losses that arise within the territorial scope of EU law. The English Court of Appeal has held that the claimants in two actions for damages have a real prospect of success in showing at trial that any losses they suffered in the EU can be characterised as resulting from the implementation or qualified effects of a worldwide cartel in circumstances where the cartelised component incorporated into the claimants' computer monitors were first put on the market outside the EU, and entered the EU through intra-group transactions.[444] The defendants have appealed to the UK Supreme Court, arguing that the alleged losses fall outside the territorial scope of Article 101 TFEU and outside the scope of duty under Article 101 TFEU because they arise from restrictions of competition outside the EU.[445]

Application of EU competition rules prior to Accession.

1.112 The issue of the Commission's jurisdiction to apply the Treaty competition rules to the conduct of undertakings in third countries is different from the issue whether the national competition authority has (p. 58) power to apply those rules to conduct in its territory prior to accession. In *Toshiba v Czech Competition Authority*[446] the Court of Justice held that Article 101 and Regulation 1/2003 cannot be applied by the state's national competition authority in respect of the effects of a cartel within the territory before the date of accession to the EU. This is the case even in the context of an investigation of an international cartel constituting a single and continuous infringement capable of producing effects in the territory of the Member State concerned before and after accession. The Czech competition authority was entitled to condemn the cartel only under national competition law in relation to the period prior to the accession of the Czech Republic to the EU on 1 May 2004. However, where the Commission requests information from an undertaking in respect of an investigation into conduct after accession, that request includes information dating from before accession if that is relevant to an issue in the investigation.[447]

Footnotes:

393 Paras 1.067 et seq, above.

394 Case 51/75 *EMI Records v CBS United Kingdom* [1976] ECR 811, EU:C:1976:85, para 28; *Aluminium Imports from Eastern Europe*, OJ 1985 L92/1.

395 Case 22/71 *Béguelin Import v GL Import Export* [1971] ECR 949, EU:C:1971:113; *Franco-Japanese Ballbearings*, OJ 1974 L343/19; *Preserved Mushrooms*, OJ 1975 L29/26; Case 71/74 *Frubo v Commission* [1975] ECR 563, EU:C:1975:61; *Ansac*, OJ 1991 L152/54 (US Webb-Pomerene Act association of soda-ash producers; the Commission rejected the argument that the cartel enabled a strong market entrant from the United States, despite having condemned ICI and Solvay for sharing the EU market).

396 COMP/38899 *Gas Insulated Switchgear*, decn of 24 January 2007 (upheld on appeal, Case T-112/07 *Hitachi v Commission* [2011] ECR II-3871, EU:T:2011:342). See similarly, Case T-517/09 *Alstom v Commission* (*'Power Transformers'*) EU:T:2014:999, paras 38–42 (concerning the effect of a market-sharing agreement between EEA and Japanese producers of power transformer producers); Case T-8/16 *Toshiba Samsung Storage Technology v Commission*, not yet decided (challenging the finding of an effect on inter-State trade in Case AT.39639 *Optical Disc Drives*, decn of 21 October 2015).

397 COMP/38899 *Gas Insulated Switchgear*, decn of 24 January 2007, para 315.

398 eg *Reuter/BASF*, OJ 1976 L254/40 (restrictive covenant affecting transfer of know-how to undertakings outside the EU that could become suppliers in the EU); *Siemens/Fanuc*, OJ 1985 L376/29, (cooperative exclusive dealing agreement between German and Japanese manufacturers); *Quantel International-Continuum/Quantel SA*, OJ 1992 L235/9 (market-sharing on de-merger by French company of its US subsidiary); *Cartonboard*, OJ 1994 L243/1, para 139 (cartel of which many of the members had their head offices outside the

EC); *GEAE/P&W*, OJ 2000 L58/16 (joint venture between two major US manufacturers to develop engine for very large commercial aircraft; such a joint venture would now fall under Art 3(4) of the Merger Reg; see para 8.058).

399 *Frubo v Commission* (n 395, above). Art 101(1) is not infringed if, on the facts, the relevant trade is plainly confined to trade between one Member State and a non-Member State: Case 28/77 *Tepea v Commission* [1978] ECR 1391, EU:C:1978:133, para 48 (no infringement prior to UK accession to the EU); see also Case C-17/10 *Toshiba v Czech Competition Authority* EU:C:2012:72.

400 Case 174/84 *Bulk Oil v Sun International* [1986] ECR 559, EU:C:1986:60, para 44. See generally *Rieckermann*, JO 1968 L276/25; *DECA*, JO 1964 2761; *VVVF*, JO 1969 L168/22. See also *Zinc Producer Group*, OJ 1984 L220/27, para 84 (Commission considered Art 101(1) did not apply to those members of an international cartel outside the EU who scarcely participated in the EU market).

401 Cases 40/73, etc, *Suiker Unie v Commission* (‘*Sugar*’) [1975] ECR 1663, EU:C:1975:174, paras 558 et seq; Cases T-25/95, etc, *Cimenteries v Commission* (‘*Cement*’) [2000] ECR II-491, EU:T:2000:77, paras 3851 et seq (esp at paras 3920–3930); Effect on Trade Guidelines, OJ 2004 C101/81, para 105.

402 *French-West African Shipowners’ Committee*, OJ 1992 LI34/1, para 43: the less favourable terms which participants in the agreement can impose on exporters places shipments from that State at a disadvantage, and thereby also distorts competition between EU ports.

403 *SABA (No. 1)*, OJ 1976 L28/19, para 35; *Junghans*, OJ 1977 L30/10. However, in both cases, once the free trade area came into effect with the EFTA States on 1 July 1977, a restriction on sale to those States would infringe Art 101(1) as the customs duties that made re-importation uneconomic would cease to apply. See also *Tretorn*, OJ 1994 L378/45, paras 65–66: although re-exportation from Switzerland was unlikely, a ban on sales to Swiss dealers was nonetheless held to infringe Art 101(1) since it prevented them from buying in one Member State and reselling in another without physically importing into Switzerland. Note that in *Chanel*, OJ 1994 C334/11, the Commission required deletion from Chanel’s agreements with its selected retailers for watches of the ban on export to all countries which had concluded free trade agreements with the EU. See also *The Distillers Company Limited*, OJ 1978 L50/16, paras 72–73 (appeal on other grounds dismissed, Case 30/78 *Distillers* [1980] ECR 2229, EU:C:1980:186).

404 *Kabelmetal/Luchaire*, OJ 1975 L222/34 (re-importation unlikely because the products were not suitable for sale through intermediaries); *Campari*, OJ 1978 L70/69, para 60 (double excise duties, taxes and trade margins would preclude re-importation). See also *Schlegel/CPIO*, OJ 1983 L351/20 (negative clearance granted to manufacturing licence restricted to the EU but sales permitted worldwide: no grounds to suggest that it would affect competition within the EU).

405 See paras 1.078 et seq, above. Decisions pre-1994 must be read subject to that qualification.

406 See, eg Cases 6&7/73 *Commercial Solvents v Commission* [1974] ECR 223, EU:C:1974:18, paras 33-34; Case 22/79 *Greenwich Film Production v SACEM* [1979] ECR 3275, EU:C:1979:245, paras 11–13.

407 Case C-306/96 [1998] ECR I-1983, EU:C:1998:173. Case 14967, NJ 1993/382 *Philips Information Systems and Solid International*, judgment of Dutch Supreme Court of 23 April 1993 concerned a shipment of outdated personal computers, produced in Canada, and sold by Philips to Solid International. Both Philips and Solid International were based in the Netherlands. The purchasing agreement contained an export clause stipulating that the goods be sold outside the EU in Eastern Europe. However, Solid sold the complete shipment

within the Netherlands claiming the clause contravened Art 101. Philips argued that the export clause could not affect inter-State trade since the computers were produced outside the EU, were to be transported outside the EU, and were destined to be sold outside the EU. The Dutch Supreme Court decided that the Court of Appeal had not properly considered these facts and annulled the Court's judgment.

408 At that time Slovenia was not a Member State.

409 Case C-306/96 *Javico v Yves Saint Laurent Parfums* [1998] ECR I-1983, EU:C:1998:173, para 19.

410 The judgment refers to customs duties, transport costs and the other costs resulting from export to a third country and re-importation into the EU: *Javico*, above, para 24. The reference to other costs ('*les autres couts*') is omitted from the English translation.

411 There is also no discussion of the potential exhaustion of YSLP's trade mark rights, perhaps because that was not part of the questions referred.

412 eg *Raymond-Nagoya*, JO 1972 L143/39 (licence to Japanese company to manufacture in Japan with exclusive territory in the Far East: technical nature of the products made it necessary to be close to the customers); *Grosfillex-Fillistorf*, JO 1964 915 (distributor in Switzerland: no material price difference between Switzerland and the EU, where there was substantial competition for such products). cf *BBC Brown Boveri*, OJ 1988 L301/68 (exclusive know-how licence to Japanese company for manufacture and sale of products in the Far East in the context of a joint research and development agreement: because exports of the product to the EU would have been feasible, notwithstanding the large distances involved, the licence came within Art 101(1)). See also the decisions concerning intra-EU agreements in n 403 and n 404, above.

413 See Cases 29 & 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, EU:C:1984:130: German producer supplied sheet zinc to a Belgian purchaser on condition that he resold the goods in Egypt; the vendor was the only producer in Germany and the CJ held that the clause was 'essentially designed to prevent the re-export of goods to the country of production so as to maintain a system of dual prices and restrict competition on the [internal] market': ibid, para 28.

414 *Tepea* (n 399, above) para 47.

415 *Javico* (n 409, above) para 26.

416 See the Opinion of AG Tesauro in *Javico* (ECR at n 409, above, EU:C:1997:525) paras 14–15, noting that it was undisputed that large volumes of re-importation had in fact occurred and that as it was the policy of large groups to purchase the products throughout the European market, subsequent re-export to another Member State was almost inevitable. However, the CJ declined to make any determination on the facts.

417 *Aluminium Imports from Eastern Europe* (n 394, above) para 13; COMP/38899 *Gas Insulated Switchgear*, decn of 24 January 2007 (upheld on appeal, Case T-112/07 *Hitachi v Commission* [2011] ECR II-3871, EU:T:2011:342 (market sharing cartel with Japanese producers was part of an overall arrangement which also included intra-EU market sharing). See further para 1.097, above.

418 See Jennings and Watts (eds), *Oppenheim's International Law* (9th edn, 2008), Vol I, pp 472–478. This para in the 7th edn of the book was cited with approval by the English Court of Appeal in *iiyama v Samsung* [2018] EWCA Civ 220, para 67.

419 On the imposition of fines by the Commission and foreign competition authorities see, eg Cases T-236/01, etc, *Tokai Carbon v Commission* ('*Graphite Electrodes*') [2004] ECR

II-1181, EU:T:2004:118, para 143; Case T-410/03 *Hoechst v Commission* (‘*Sorbates*’) [2008] ECR II-881, EU:T:2008:211, para 603.

420 See, eg Opinion of AG Wathelet in Case C-231/14P *Innolux v Commission* EU:C:2015:292, para 38.

421 See, eg Cases 21/72, etc, *International Fruit Co v Produktschap voor Groenten en Fruit* [1972] ECR 1219, EU:C:1972:115, para 6; Case C-286/90 *Poulsen and Diva Corp* [1992] ECR I-6019, EU:C:1992:453, para 9. In Case C-308/06 *Intertanko v Sec of State for Transport* [2008] ECR I-4057, EU:C:2008:312, paras 42 et seq (compatibility of EU directive on ship-source pollution with UNCLOS) the CJ stated that where the invalidity of a measure of secondary EU is pleaded before a national court, the CJ reviews the validity of that measure in the light of all the rules of international law, subject to two conditions; first that the EU must be bound by the relevant international treaty and secondly ‘the Court can examine the validity of [Union] legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise’: para 45; Case C-366/10 *The Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, EU:C:2011:864, paras 49 et seq, holding, amongst other things that the Kyoto Protocol was not sufficiently unconditional and precise to be relied on as invalidating an EU measure but that the Open Skies Agreement was.

422 Cases 89/85, etc, *Åhlström Osakeyhtiö v Commission (‘Wood Pulp I’)* [1988] ECR 5193, EU:C:1988:447, para 18.

423 See, eg *The Parlement Belge* (1880) LR 5 PD 197, at 214.

424 For the cooperation agreements entered into by the EU, see paras 1.089 et seq, above.

425 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, EU:T:1999:65, paras 103–105.

426 See, eg Cases 48/69, etc, *Imperial Chemical Industries v Commission* [1972] ECR 619, EU:C:1972:70, paras 131–142.

427 Cases 6&7/73 *Commercial Solvents v Commission* [1974] ECR 223, EU:C:1974:18.

428 *Commercial Solvents*, above, paras 36–41. See also AG Warner at [1974] ECR 223, at 262–265, EU:C:1974:5. The question of when a parent company can be fined for an infringement committed by its subsidiary is discussed at paras 14.087 et seq, below. The question of when a national court has jurisdiction over a foreign corporate entity in a claim for damages arising from infringement is discussed in paras 16.032 et seq, below.

429 *Wood Pulp I* (n 422, above). For a later example of a cartel of undertakings in non-Member States, see *Ansac*, OJ 1991 L152/54. In Case T-395/94 *Atlantic Container v Commission* (‘*TAA Agreement*’) [2002] ECR II-875, EU:T:2002:49, para 72 the GC cited and relied on *Wood Pulp I*.

430 *Wood Pulp*, OJ 1985 L85/1.

431 Much of the infringement decision was subsequently annulled by the CJ in its substantive judgment: Cases C-89/85, etc, *Åhlström Osakeyhtiö v Commission (‘Wood Pulp II’)* [1993] ECR I-1307, EU:C:1993:120. See further para 2.082, below.

432 *Wood Pulp I* (n 422, above) paras 12–13.

433 *Wood Pulp I* (n 422, above) paras 16–18.

434 The CJ declined to follow the Opinion of AG Darmon, *Wood Pulp I* (ECR at n 422, above, EU:C:1988:258) paras 54–58, who urged it to adopt a criterion of ‘direct, substantial and foreseeable effect’, discussing the US and international law on the subject. See also *Adidas-Salomon AG v Lawn Tennis Association* [2006] EWHC 1318 (Ch) where the English High Court held that it had jurisdiction to hear a challenge to the dress code rules set by

sports governing bodies as they were applied to the US and Australian Open tennis matches, citing *Wood Pulp I* and *Gencor* (n 425, above) para 48.

435 M.619 *Gencor/Lonrho*, OJ 1997 L11/30, upheld on appeal Case T-102/96 [1999] ECR II-753, EU:T:1999:65. See, in the context of Art 101, COMP/39181 *Candle Waxes*, decn of 1 October 2008, para 190 (rejecting an argument by MOL, a Hungarian company, that the Commission lacked jurisdiction in respect of MOL's participation in cartel activity before Hungary joined the Union, based on the economic effects and sales in several Member States).

436 See Chap 8, below.

437 *Gencor* (n 425, above) para 90.

438 Case C-413/14P *Intel v Commission* EU:C:2017:632; see also the Opinion of AG Wahl, EU:C:2016:788, paras 280–327. For general discussion of US and international law see the Opinion of AG Darmon in Cases 89/85, etc, *Åhlström Osakeyhtiö v Commission* [1988] ECR 5193, EU:C:1988:258, paras 54–58, advocating a criterion of 'direct, substantial and foreseeable effect'.

439 *Intel*, above, para 44, citing, by analogy, Cases C-89/85, etc, *Åhlström Osakeyhtiö v Commission* [1988] ECR 5193, EU:C:1988:447, para 16.

440 *Intel* (n 438, above) para 45.

441 *Intel* (n 438, above) para 49.

442 *Intel* (n 438, above) paras 50–51.

443 In the US, see eg *F Hoffmann-La Roche v Empagran* 542 US 155 (2004) (rejected a claim for damages arising from the independent foreign effects of worldwide vitamin cartels (ie increased prices paid by the claimants for vitamins in Ecuador) that also caused effects in the US (ie increased prices for vitamins in the US).

444 *iiyama v Samsung* [2018] EWCA Civ 220.

445 At the time of writing, the applications for permission to appeal are pending before the Supreme Court. Note Mann J and Morgan J, the judges at first instance, reached a different conclusion from the Court of Appeal: see, *iiyama v Schott* [2016] EWHC 1207 (Ch) and *iiyama v Samsung* [2016] EWHC 1980 (Ch).

446 Case C-17/10 *Toshiba v Czech Competition Authority* EU:C:2012:72. In *Schneidersöhne Baltija and Libra Vitalis v Competition Council Lithuanian Supreme Administrative Court*, Case No A502-34/2009; 16 October 2009 the Lithuanian Supreme Administrative Court held that an exchange of information cartel the final meeting of which took place 17 days after Lithuania joined the EU had not been shown to effect trade between Member States and the part of the practice which took place before accession could not infringe Art 101.

447 Cases T-458/09, etc, *Slovak Telekom v Commission* EU:T:2012:145.