RAIS RESEARCH ASSOCIATION for INTERDISCIPLINARY STUDIES
August 3-4, 2023

DOI:10.5281/zenodo.8310114

The True Nature behind the Implementation of the Extraterritorial Application of Antitrust Laws in Cartelization Control Policy

Selima Ben Maouia Ben Slama

PhD Student, University of Legal, Political and Social Sciences of Tunis, Tunisia
selimabenmaouia@gmail.com

ABSTRACT: The US Supreme Court was instrumental in developing a consistent body of case law on export cartels, which has greatly influenced the antitrust landscape of today. Several states have approved the extraterritorial application of US antitrust laws, although it has run across a lot of opposition. The unstable state of emerging nations is a serious problem since many of them lack the ability to structure their economies and safeguard their citizens. A wave of competition laws have been adopted as a result of the passage of competition laws, luring in international money and investors and fostering economic integration. Extraterritorialism may raise expenses rather than considerably lower them, though. Additionally, it undermines nations' confidence in their own judicial system. Another big issue with antitrust laws is obtaining the necessary evidence. In nations with a common law background, like the US, the discovery process is essential for conclusively proving evidence. To promote international cooperation and uphold a respectful view of other nations' sovereignty, the US has developed a number of conventions and accords. However, because nations are envious of their knowledge, these accords frequently have little teeth. Each nation must secure and safeguard information security in order to maintain the reputation of its businesses.

KEYWORDS: antitrust law, extraterritoriality, cartelization control, developing countries

1. Introduction

The US Supreme Court helped shaping the modern “antitrust-scape” as known today. The evolution of case law was not always that easy. However, Justices managed to build up a coherent interpretation throughout the years even though the Congress did not make it easy for them. The ambiguous formulation and the numerous amendments resulted in a hypertrophy of rules that can be sometimes misleading. But with some firm principles and a standing look at what happens around in the world, the Supreme Court ended up by establishing a consistent case law. As Export Cartels are very toxic wherever they are, it is rather understandable to adhere to the extraterritoriality Doctrine. No matter where they are, if a cartel intends and finishes by affecting US commerce in a way or another, there is no chance for it to escape the American antitrust law reach. In this optic, it is rather an efficient tool for combating such lesion. But, the first part of this work was finished with a glance at other states’ positions toward such “outdoor competence” of US laws. This explains this use of the term “transcending”. It means going beyond borders of the expected. As it primarily seemed, extraterritorial application of US antitrust laws in the war against export consortia has so many benefits that it has been accepted in multiple States. However, it has not been that widely accepted giving countless objections.

2. The precarious situation of developing countries

Not every country in the world has a competition law system. Many still lack the capacity or intent to organize their economies and protect their businesses and consumers. “Many countries have now adopted American-style competition policy, or its close European cousin, at least partly because there are few other models.” For all these, the extraterritorial application of American antitrust law is a reality that they have to deal with. For some, it is a necessary evil and no way out

is in perspective. As for some others, it is heavily costly. Competition policy was not of great importance in developing countries. They had their own priorities to manage at the time Western Countries perfected their own antitrust systems. By the 1990s, a sudden boom among developing countries took place to implement competition laws. This was urged by a set of agreements with western countries and institutions, where competition policy is a condition to the implementation of those trade deals. Agreements aiming at creating free trade zones or even as part of a whole structural program presented the package quite wisely. They advocated attraction of foreign capitals and investors, they stressed on the integration in global economy. And for all this to happen, a simple prerequisite was to be satisfied: Competition Laws. For that, protectionist policies had to be abandoned and put behind. And a wave of competition laws adoption swamped the bottom half of the Globe. New economies were somehow born. They already started dangling their inclusion in the new era of international trade, where foreign direct investments are the future and membership in regional and international trade agreements is a must (talking about OECD and WTO agreements).

3. The problem of duplicative costs of US trading partner

National antitrust regulation genuinely induces certain costs. Some are common to all the antitrust regimes, such as the establishment fees which may just vary from high to low amounts according to each state policy. Other costs are however exclusive, and could not been incurred under a homogeneous international system. In this context, every multinational company has to be in order with the national law of each State it does business in and/or with. Nevertheless, this alignment with the numerous systems has a price.

To that, Extraterritorialism is not of great help. It does not do much in cutting down the costs. In fact, it may increase them. If a certain company aligns to State A's several perquisites to do business, it is not protected from the reach of State B. So, the greater the number of States applying their competition laws extraterritorially, the more burdensome will get the process of alignment.

In addition, it will jeopardize the nationals' faith in their own legal system. Can't they protect them enough from this intrusive extraterritorial reach? Calculus methods are never the same from one country to another. To highlight this difference, a step back from the American system is needed to assimilate the international antitrust scape. In 2007, the Gas Insulated Switchgear (GIS) case was decided by the European Commission. Eleven companies formed a cartel in the gas industry export to the European Union. Ten of them have been convicted of fines. Five among them were Japanese companies. Even if it was demonstrated during the trial that the Japanese companies did not enter in any way the European market, they were nevertheless massively fined. According to the European legislation, a guilty company of cartelization can be fined up to 10% of the total sales of its last year of business immediately before the violation occurred. Such surcharge under Japanese law does not exist because it is measured by multiplying a certain ratio by the sales directly connected to the cartel, and as they had no business in the European market, there would be no surcharge fines under Japanese law. Back to reality, the fines amounted to 750 million euro that could have dramatically lessened if the different national systems matched.

4. The evidence gathering obstacle

The procedure of Discovery is of great importance in Common Law tradition countries, especially in the United States. And in matters of antitrust, in this study the anti-cartel policy specifically, it is rather important to have access to different documents to establish the proofs with certainty. In the case of export cartels, documents of the agreement, if existing, besides the registers of

business, are generally located outside of the US territory. In this case, the fishing trip for evidence can be rather long, facing different nationalities and countries' codes and procedures.

It is true that American discovery procedures are a little unusual. They are permitted so as to be conducted by private parties for pre-trials, whereas in civil law tradition countries and even in other common law countries they have to be directed by the prosecution.

In order to facilitate this procedure, the United States has elaborated multiple conventions and agreements for the sake of international cooperation and to keep the image of a State respectful of others' sovereignty. From back to the 1980s and 1990s, the US along with Canada has strengthened their mutual collaborative relationship in cartel enforcement. Brazil, Chile, Colombia and Mexico also have entered bilateral agreements with the US on the matter. However, only Brazil keeps track of its enforcement efforts. The United States is party to the Inter-American Convention on Mutual Legal Assistance, which has been ratified by 13 additional American states. It has also signed bilateral mutual legal assistance treaties (MLATs). That is true that they are numerous, still all these treaties are however toothless. All the countries are jealous of their information. This over protection is generally spoken in terms of sovereignty protection. Yet, it is not limitative. Information protection is primordial to each country to assure its companies' reputation and preserve it during the trial. Besides, certain business documents such as records and strategies are classified and should not be communicated to competitors.

In the EU, Discovery procedures are often eluded by the law for the protection of personal data. Combining Article 8 of the Charter of Fundamental Rights of the EU and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms results in a rather universal protection of personal data. In 2009, the CNIL recalled for the provisions concerning personal information protection and underlined the possibility and the right of opposition to information disclosure by the concerned persons in respect proportionality of data processing outside of the European Union.

To keep the Americans out of their business, some countries are willing to do anything to prevent the discovery procedure. Preaching the sovereignty principle, they elaborated what called "Blocking Statutes" to prevent data is sharing with the American Courts. The statutes were primarily designed to inhibit extraterritorial jurisdiction. But they are also waved a shield against information gathering. This is the case of Société Internationale v. Roger in 1958. The Supreme Court recognized then that the Swiss company could not be forced to disclose and share the banking records of the company because it would be illegal under the Swiss Laws. Ever since, many States have elaborated a foreign sovereign compulsion defense against American procedures. Many of these States are among the closest trading partners. The list includes the United Kingdom, New Zealand, Canada, Norway, Sweden, Australia, Belgium, Canada, Denmark, Germany, Italy, the Netherlands and Japan. But not only! For example, in France, the purpose of the 1980 Act is to prevent the communication of information which may be of strategic importance for the undertaking victim in the procedure, and especially the interest of the State.

5. The problem of Judgments enforcement

Even where the information and proof collection turns out to be a difficult task, suits are still brought up and judged. Effectiveness of the antitrust system is measured by its capacity to be enforced either at home or abroad. In this study, the American law battery deployed against international cartels is analyzed. In this final paragraph the enforcement issues facing American judgments abroad are approached. Such enforcement is conditioned by the existence of regional or bilateral agreements on the topic. However, generally States will refuse to enforce foreign judgments on their territory. As antitrust matters are very sensitive, many reasons explain states refraining from enforcing the American judgments.

Foreign states will refuse to implement any judgment tinted with American public law, because in doing any other way, they would recognize the American extraterritorial competition and accept its reach to their own territory.

Secondly, by enforcing an American judgment abroad, there is always the fear of implementing contradictory disposition to the national law of the enforcement jurisdiction. For this purpose, all the states generally tend to block such enforcement.

Another opposition is waved in the face of American judgments enforcement in fear of procedural irregularities. Numerous reserves expressed by many states towards the discovery procedures carried out by the United States were expressed, they are opposing such principle and tend to block it by any means. Following this logic, if they issue a blocking statute against sharing any of this information and that the USA succeeds to obtain it, then there is somehow an irregularity in the procedures. Thus, the whole judgment is unfounded and unqualified neither for recognition nor for implementation.

Another serious problem arises under this title. It is about individuals' extradition. Away from bilateral agreements on the matter, there is no other way for the US to enforce their judgments. And the DOJ affirmed many times the difficulties he faces in extraditing foreigners for antitrust claims. The famous case of Romano Pisciotti is the first case on the matter. It was described by the DOJ as "the first ever extradition on antitrust charge". It was about an Italian man who entered a conspiracy to fix the price of marine hose used in the transfer of oil between tanks. The cartel affected the prices all over the world and resulted in huge losses. At first, and for lack of extradition agreement between the USA and Italy, it was impossible for the DOJ to neutralize the individual. It was only three years later thanks to an Interpol red notice that the individual was arrested in Germany and was extradited to Florida, USA to pursue his trial. It is rather difficult to extradite a person solely on antitrust charges. The DOJ failed before Romano Piscotti with an English man, Ian Norris. They managed to extradite him from the UK for obstruction to the justice rather than price fixing, of which he was ultimately found guilty. However, the DOJ still fails to extradite even after Romano Piscotti. For what the case presents of abnormalities and specific events, it could not constitute a solid precedent for antitrust extraditions. For that, the American government needs to negotiate the classic way the extradition terms, if it occurs to happen. Then, securing it would take forever in terms of money and time for the requesting country.

6. Conclusions

The extraterritorial reach of antitrust laws has been more than severely criticized. However, it is important to step back and evaluate the Doctrine in its context. Antitrust laws were primarily and essentially designed to protect the consumers and the commerce against any illegal restraints that would affect them. Consequently, no matter where the harm happens, as long as it affects American consumers and American commerce, it needs to be stopped and repaired. That is rather comforting to know such activities will be taken care of all over the globe.

This outreach of the US antitrust laws is consolidated with the private claim procedure. Knowing that competitiveness can be aggressively high between big companies, small businesses or even individuals can be roughly intimidated and would never seek justice. Even if they decide to do so, they would probably suffocate under the pressure and the heavy fees. To address this concern, the American legislator facilitated the access to courts for the private individuals by approximating the laws and regulations, bringing closer the competent fora and by lightening the fees. Yet, not all countries welcome such Extraterritorialism, and see this welcoming US forum as a threat to their sovereignty and their own judicial system. Most of the States issuing waivers to this extraterritoriality are developing countries. With generally poor natural resources, they try to compensate with rigorous legal systems to protect their nationals. However, under the umbrella of the reform oriented policies, the leading nations

tend to impose their own rules by simply dictating if not duplicating their own legal systems in these developing institutions. For this reason, many countries have issued Statutes of limitations. Not only the developing ones, but also US ever trading partners such as Canada. This type of statutes operates as brakes to the outgoing mettle of the United States in terms of antitrust, consequently, we can anticipate a reduction in the intrusive discovery procedures. Furthermore, the enforcement of American judgments is likely to experience extended timelines, and as for individual extraditions, it is still not for tomorrow!

References

Former Marine Hose Executive Extradited from Germany to Face Charges of Participating in Worldwide Bid-Rigging Conspiracy, Press Release, Friday, April 4, 2014, Department of Justice, Office of Public Affairs, Stable URL: https://www.justice.gov/ .

Objections to Extraterritorialism have been forcibly expressed by developing states: UN Conference on Trade and Development ('UNCTAD'), Communication from the Group of 77 and China regarding the Application of Coercive Economic Measures and Unilateral Sanctions against Developing Countries, UNCTAD Doc TD/411, 6 August 2004.

Official Journal of the European Union, 10.1.2008, C 5/7, Summary for publication of Commission Decision of 24 January 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement, Case COMP/38.899 — Gas Insulated Switchgear, Stable URL: http://www.eur-lex.europa.eu/.

Owen, Bruce M. 2003. "Imported Antitrust." Book review of "Competition Policy for Small Market Economies" by Michal S. Gal, Cambridge: Harvard University Press, 2003, pp 336, p1.

UNCTAD. 2004. Report of the United Nations Conference Trade and Development on Its Eleventh Session, UNCTAD Doc TD/412, 20 August 2004, n°39.