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Responsibility of states and international organizations under the European and the US competition law. OPEC – the exemplary case.

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1. Introduction

Competition law provides a mechanism directed at preventing behaviors which may limit the efficiency of a given market by distorting competition. A country through its competition authorities regulates its market by prohibiting certain anticompetitive activities. But what happens if it is not a private corporation but a state or international organization itself that, for example, sets prices on a global market and distracts global competition?

One may think that reference to international public law, the WTO law in particular, will help solving the aforementioned problem. However, international public law, being a system based on states' compromise, is far less capacious than domestic law. In this article I will analyze the exemplary and representative case of OPEC to discuss the potential liability of an international organization under the European and the US competition systems.

The structure of this article will look as follows. Firstly, I will briefly present OPEC situation under the regime of the World Trade Organization, mainly to show why a question of OPEC liability under domestic antitrust regulations, may be more relevant. Secondly, I will examine OPEC potential liability under the United States Sherman Act. Thirdly, I will pass to the European competition system as regards OPEC anticompetitive operations.

2. The GATT regime

The Organization of the Petroleum Exporting Countries (hereinafter referred to as OPEC) produces slightly more than 1/3 of the world's oil, with 75% of the known reserves. By negotiating among themselves, OPEC sets export quotas for each of its member nations, and is able to exercise a great deal of control over the international price of oil.[1] Potential WTO actions against these export restrictions set by OPEC have been being considered by scholars and government officials for many years[2]. Until now these endeavors turned out to be futile. The most frequently invoked GATT (General Agreement on Tariffs and Trade) Article XI: 1 provides that "No prohibitions or restrictions other than duties, taxes or other charges

[1] *Busting Up The Cartel: The WTO Case Against OPEC,* A report from the office of senator Frank L. Lautenberg, p. 2, lautenberg.senate.gov/documents/foreign/OPEC%20Memo.pdf, 21.07.2010.
[2] *Ibidem*..

(…) shall be instituted or maintained by any contracting party on the exportation or sale for export of any product destined for the territory of any other contracting party". The GATT Article XI: 1 may not however cover OPEC activities. Firstly, OPEC technically decides only how much oil is allowed to extracted (not exported) and the WTO Appellate Body distinguishes between export restrictions and production restrictions while only the first are forbidden by the GATT Article XI:1. Therefore, the OPEC quotas refer rather to production and not to exportation. What is more, the GATT Article XI: 1 is subject to numerous exceptions which may be found in the GATT itself. For example, the GATT Article XX(g) allows to apply measures which relate to "the conservation of natural resources". According to Stephen A. Broome in case of potential WTO law application against OPEC, the natural resources exception may be invoked by OPEC successfully[3].

Bearing in mind the above difficulties in actions against OPEC under the WTO regime, one may ask what internal competition instruments do the two largest economies in the world, the European Union and the United States, posses in order to address the OPEC price fixing policy.

3. The United States

In the US the most important antitrust regulation, the Sherman Act, prohibits price fixing. It seemed to be undisputable that, from material point of view, OPEC crude oil prices policy infringes the Sherman Act § 1. Therefore, as early as in 1978 International Association of Machinists and Aerospace Workers (IAM) filed a lawsuit against OPEC alleging being disturbed by the high price of oil and petroleum-derived products in the United States[4]. The high price of oil was, according to IAM allegations, the result of OPEC activities. The *IAM* case finally went to the Ninth Circuit United States Court of Appeals which issued its final decision in 1981.

Although admitting that, from material point of view, actions undertaken by OPEC may infringe the US antitrust law, the court put main emphasis on two interesting legal doctrines: sovereign immunity doctrine and the Act of State doctrine.

3.1. Sovereign immunity doctrine

[3] Stephen A. Broome, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO, George Washington International Law Review,* 38, pp. 409-436.
[4] *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), westlaw.

Sovereign Immunity doctrine basically says that: "the courts of one state generally have no jurisdiction to entertain suits against another state"[5]. According to the Court of Appeals this doctrine, although may be derived from customary international law, is expressly provided in the Foreign Sovereign Immunities Act (FSIA) of 1976. Of course, sovereign immunity doctrine is not absolute. Pursuant to the FSIA, if activities undertaken by a state are of a "commercial character", they are not immune. It is worth noting that the above-cited FISA exception corresponds with the 2004 UN Convention on Jurisdictional Immunities of States and Their Property. According to Article 10 of the Convention, "If a State engages in a commercial transaction with a foreign natural or judicial person (…) the State cannot invoke immunity (…) in a proceeding arising out of that commercial transaction".

The FISA commercial activity exception encompasses both "activities carried on in the United States by the foreign state" and "activities of the foreign state elsewhere and that act causes a direct effect in the United States". Since setting certain quotas on oil extraction may be classified as a commercial activity outside the US, the OPEC situation falls into the second category only if actions carried out by OPEC have direct effect in the United States. In the case at hand the court, despite not doing it explicitly, seemed to acknowledge that OPEC would not be able to invoke sovereign immunity doctrine. The Court of Appeals did not however decide the case on the basis of sovereign immunity doctrine because it found a more appropriate legal concept, the Act of State doctrine.

3.2. The Act of State doctrine

While sovereign immunity doctrine is purely jurisdictional, the act of state doctrine is a political and constitutional one. This doctrine was firstly formulated in *Underhill v. Hernandez*[6] (1897) by the US Supreme Court and stipulates that "court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state[7]". It is a prudential doctrine "designed to avoid judicial action in sensitive areas[8]". The previously quoted words such as "politically sensitive" or "sensitive areas" clearly indicate where the difference between sovereign immunity and the act of state doctrine lies. Although the act of state doctrine is not formulated neither in the US Constitution nor in any other federal regulation, it stems from the constitutional separation of

[5] *IAM v. OPEC.*
[6] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), westlaw.
[7] *IAM v. OPEC.*
[8] *Ibidem.*

powers principle as it was stated by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*[9] (1964). Pursuant to separation of powers principle, a competence to conduct the American foreign policy should be rested with the executive and the legislative branches. If these branches are not interested in initiating a potential conflict with the powerful global economic organization, the "humble" court of appeals must not step in too. In other words, courts on the basis of the Act of State doctrine, should not enter into the foreign policy area which is reserved for other branches.

Concluding, in *IAM v. OPEC*, the Ninth Circuit Court of Appeals found that the act of state doctrine was applicable to the case and the District Court's decision to dismiss the action was affirmed.

Interestingly, plaintiffs in *IAM v. OPEC* were represented by Antonin Scalia, the prospective US Supreme Court Justice. His future emotional debate with Justice Stephen Breyer about "judicial activism", a constitutional view according to which judges should interfere in politically sensitive areas, in which Scalia criticized socially engaged judges, corresponds with a way of thinking developed by the Court of Appeals in *IAM v. OEPC*[10].

Recently, according to Spencer Webber Waller, the Supreme Court changed its understanding of the Act of State doctrine[11]. This change would arguably influence the outcome of *IAM v. OPEC*. What is more, there have been some initiatives to legislatively reverse the effects of *IAM v. OPEC*. A special amendment has been prepared to the Sherman Act which was aimed at making OPEC liable under the US antitrust law. The name of the proposed bill, "No Oil Producing and Exporting Cartels Act" (NOPEC) leaves no doubts of what is the primary purpose of this regulation. The bill has passed House of Representatives on 22nd May 2007 but Senate did not vote on it until today. However even if NOPEC enters into force this bill should not be treated as a reverse of the Act of State doctrine. On the contrary, the enactment of NOPEC would only support the Act of State main thesis which says that the legislature and the executive are the two powers deciding on American foreign economic relations.

4. The European Union

[9] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964), westlaw.
[10] For more about the debate between Scalia and Breyer, see e.g.: Stephen Breyer, *Active Liberty. Interpreting Our Democratic Constitution*, Vintage Books, 2006., Anthonin Scalia, *A matter of Interpretation. Federal Courts and the Law*, Princenton University Press 1997.
[11] Spencer Waller, *Suing OPEC*, University of Pittsburgh Law Review 105, 106 (2002).

After pointing out the most crucial issues related to the US antitrust law let us now examine the possibility of international organizations being held liable under the European competition law. Let OPEC be an exemplary case one more time.

Contrary to the United States regime, no competition proceedings against OPEC has been initiated yet in the European Union. Therefore, the analysis of OPEC potential liability must necessarily be more theoretical.

Section 1 of Article 101 of the Treaty on the Functioning of the European Union prohibits inter alia the agreements "which have as their object or effect the prevention, restriction or distortion of competition within the internal market". Subsection 1(a) of this article specifies that the aforementioned prohibition pertains to agreements which "directly or indirectly fix purchase or selling prices".

In order to simplify the following part of this article which concerns the European Union competition law, I decided to divided the application of Article 101 TFEU into three categories: the material application, the personal application and the extraterritorial application.

3.1. The material and personal application

The material application relates to substantive preconditions of infringing competition. As it was said, it is undoubtful that OPEC fixes prizes of oil on the global market. According to J.P Terchechte[12], the OPEC prices and extraction policy infringes material preconditions of Article 101 TFUE. What is more, OPEC meets the definition of a cartel which is "a coordination of the economic behavior of independent partners, based on their consent which results in the regulation of a particular market".

The more problematic issue is the personal application of the European competition law to OPEC. The personal application addresses a question: is a public international organization captured by the notion of "undertaking" as provided by Article 101 TFEU? In order to answer this question a reference to the European Court of Justice case law has to be made. In *Bodson v. Pompes Funèbres des Régions Libérées*[13], a case from 1988, the European Court of Justice was considering a case of a French company which was given an exclusive

[12] Jorg Philipp Terhechte, *Applying European Competition Law to International Organizations: The case of OPEC*, in: Christoph Hermann, Jorg PhilippTerhechte, *European Yearbook of International Economic Law*, Springer-Verlag Berlin Heidelberg 2010, pp. 179-195, books.google.com, 21.07.2010.
[13] Court of Justice Case 30/87, *Bodson v. Pompes Funèbres des Régions Libérées [1988], file:///E:/comptetition%20itd/competition/bodson.htm*, 21.07.2010.

concession by the town of Charleville-Mézières to provide the "external services" for funerals. Of course, the company's monopoly was granted by the state, therefore the agreement between the state and the private company had to be examined by the European Court of Justice. Eventually, the Court found that: "Article 85 of the Treaty (present Article 101) applies, according to its actual wording, to agreements "between undertakings", and not to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service". However, three years after issuing the decision in *Bodson*, the European Court of Justice in *Hoefner and Elser v. Macrotron*[14] decided that the definition of undertaking applies to "every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed". In the case at hand, controversies arose because a public employment agency has been granted a monopoly over private recruitment consultancy companies. The court found that employment procurement is an economic activity, therefore it is subject to the present Article 101.

Of course, given the conclusions reached in *Hoefner and Elser* it is then disputable why funeral services in *Bodson* were not considered to be an economic activity. The borderline seems to be vague. An important factor however, may be this important extract from the Court's decision in *Hoefner and Elser*: "The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities."

It then seems to turn out that if a economic activity, although temporarily carried out by a public entity, might be a part of private sector, such activity may be subject to competition rules regardless of the public or private character of an entity. Reiterating the OPEC example, it seems that if the oil extraction and distribution businesses may be perceived as activities that are frequently performed by the private sector, the OPEC public character should be disregarded while applying Article 101. It seems that OPEC economic activities may be classified as operations which vulnerable to private investors since, in a lot of European countries, corporations which extract and distribute natural resources such as oil, are owned by private capital.

[14] Court of Justice Case C-41/90, *Hoefner and Elser v. Macrotron*, [1991], file:///E:/comptetition%20itd/competition/elsner.htm, 21.07.2010.

Another indication might be inferred from the European Commission decision in *BP Amoco/Acro*[15] in which the Commission described the oil market as a fully competition driven market.

As we can see, the above-presented approach of the European Court of Justice resembles the American sovereign immunity doctrine and wide exceptions to this doctrine which generally do not protect a state if its actions are commercial. This conclusion may be supported by the fact that some scholars even argue that the United Nations Convention on Jurisdictional Immunities of States and Their Property constitutes a customary international law which applies to the competition law system of the European Union[16]. On the other hand, there is no legal concept in the European competition law that in any aspect reminds the purely political Act of State doctrine.

4.2. The extraterritorial application

The extraterritorial application of the European competition law pertains to operations of companies incorporated outside the EU. Examining the issue of extraterritoriality is however not only relevant to foreign companies but to "foreign" international organizations, such as OPEC, as well. Therefore, not only it must be proven that OPEC public character is irrelevant while finding an infringement of the EU competition rules but also OPEC "foreign" character must be analyzed in the context of Article 101. In simple words, while the personal application of the EU competition law contemplates the OPEC public nature, the extraterritorial application discusses its international face.

According to Cynthia Day Wallace, the European Commission's understanding of extraterritoriality differs from the position adopted by the European Court of Justice[17]. The European Commission's view is that whenever an agreement has its effects on the territory of the common market, such agreement is subject to the European competition provisions (so- called "effects doctrine"). The "effects test" is rather liberal and, since fixing the price of oil has its effects on the price of oil and its products on every European petrol station, OPEC would presumably meet this test.

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[15] Commission Decision, case IV/M. 1532 – BP Amoco/Acro, OJ 2001, L 18/1, ec.europa.eu, 21.07.2010.
[16] J.P.Terchehte, *op.cit.,* p.195.,
[17] Cynthia Day Wallace, *The Multinational Enterprise and Legal Control, Host State Sovereignty in the Era of Economic Globalization*, Kluwer Law International, Hague 2002, p.757-762, books.google.com, 21.07.2010.

The European Court of Justice on the other hand adheres to the so-called implementation doctrine, expressed in the *Wood Pulp* case[18]. Following the Court's argumentation, "the decisive factor is where the agreement, decision or concerted practice is implemented rather than where it is formed". When an agreement is implemented in the common market it is then irrelevant if this implementation needs to result in owning any subsidiaries within the EU jurisdiction. Of course there is no fully comprehensive definition of "implementation". In the *Wood Pulp* case however, supplies into the common market themselves turned out to constitute sufficient factor.

Although it seems that European competition law applies to OPEC extraterritorially as well, the above-mentioned discrepancies between the European Court of Justice and the European Commission (between the so-called effects doctrine and the implementation doctrine) may raise some doubts.

Lastly, while discussing the extraterritoriality issue it worth to invoke the FISA exception from the American sovereign immunity rule. According to the FISA, state commercial activities are not immune if they "cause a direct effect in the United States".

5. Conclusions

Since endeavors to address the OPEC policy through the World Trade Organization failed, the antitrust law systems of Europe and the United Stated posses only "legal weapons" to economically influence OPEC actions. Nevertheless the competition policy, when it comes to powerful global economic players, remains prone to political way of thinking. Politics seem to be a main problem in holding OPEC liable of infringing competition law. The political aspect of competition law as regards OPEC became visible in the American *IAM v. OPEC* case. It is also worth underlying that the No Oil Producing and Exporting Cartels Act was blocked because of the political pressure. Lastly, the initiative to commence competition proceedings within the European Union is vested in the European Commission, a body which also could not avoid political calculations.

[18] *Ahlström Osakeyhtiö e.a. v. Commission* (Case IV/29.725)["Wood Pulp"], Joined cases C-89/85, C-104/85, C-114/85, C-116 and 117/85, C-125-129/85, file:///E:/comptetition%20itd/competition/wood%20pulp.htm, 21.07.2010.