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Citations:		*Gencor Ltd v Commission of the European Communities, Judgment, Case T-102/96; [1999] ECR II-00753, 25 March 1999*		
Case name:	Party 1	Gencor Ltd		
	Party 2	Commission of the European Communities		
	Party 3			
	Party 3 role:			
Additional case name:	Name type:			
	Party 1			
	Party 2			
	Party 3			
	Party 3 role:			
Other case name:	Name			
	Name type			
Date:		25 March 1999		
Jurisdiction/Court/Chamber:		Court of First Instance, Fifth Chamber, Extended Composition		

Judge(s):

Name	Nationality	Role	Opinion
J Azizi	Austria	President	
B Vesterdorf	Denmark		
R García-Valdecasas	Spain		
RM Moura Ramos	Portugal		
M Jaeger	Luxembourg		

Procedural stage:	Application for annulment of Commission Decision
Previous stages:	*Commission Decision of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.619 - Gencor/Lonrho), OJ 1997 L 11, p. 30*
Subsequent stages:	

Related developments:	
Key subjects:	• Statehood, jurisdiction of states, organs of states • Territory • International economic law
Keywords (Max 10):	• Jurisdiction of states, adjudicative • Jurisdiction of states, extra-territorial • Jurisdiction of states, territoriality principle • Competition
Core issues (Max 5):	1. Whether, in light of the international law principle of territoriality, (*Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ 1989 L 395, p 1, corrigenda at OJ 1990 L 257, p 13*) ('EC Merger Regulation') confers jurisdiction on the Commission to examine the compatibility of the concentration with the common market, where the concentration at issue related to economic activities conducted within the territory of a non-member country.
Facts (Max 750 words):	F1 In 1995, South African platinum mining companies Gencor and Lonrho announced a proposed merger. The South African competition authorities did not object to the merger, arguably because consumption of platinum was predominantly abroad – *e.g.*, in Europe – and the South African economy would accordingly have gained more than South African consumers would lose. F2 The European Commission, however, determined in 1996 that the concentration would be incompatible with the *EC Merger Regulation* as it adversely affecting competitive conditions in the common market (see *Commission Decision of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.619 - Gencor/Lonrho), OJ 1997 L 11, p. 30*). According to the Commission, the merger would create a position of collective dominance between Gencor and Lonrho, and Anglo American Corporation (another competitor in the platinum market). F3 Gencor brought an action for annulment of the Commission's decision, alleging that the *EC Merger Regulation* only concerned concentrations which take effect within the Common Market and, accordingly, not the concentration at issue, which related to economic activities conducted within South Africa,

	outside the Common Market.
Held (Max 1000 words):	H1 *Article 1 of the EC Merger Regulation* did not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory. **[para 79]** H2 According to *_Ahlström Osakeyhtiö and others v Commission of the European Communities_, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85; [1988] ECR 05193* (‘*Wood pulp’)*, the criterion as to the implementation of an agreement was satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It was not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. **[para 87]** H3 The Commission did not err in its assessment of the territorial scope of the *EC Merger Regulation* by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations were outside the Community. **[para 88]** H4 Application of the *EC Merger Regulation* was justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community. **[para 90]** H5 Application of the *EC Merger Regulation* to the proposed concentration was consistent with public international law, as the three criteria of immediate, substantial and foreseeable effect were satisfied in this case. **[paras 92-101]** H6 It was necessary to examine whether the Community violated a principle of non-interference or the principle of proportionality in exercising effects-based jurisdiction. **[para 102]** H7 The applicant's argument that, by virtue of a principle of non-interference, the Commission should have refrained from prohibiting the concentration in order to avoid a conflict of jurisdiction with the South African authorities must be rejected, without it being necessary to consider whether such a rule exists

	in international law. Suffice it to note that there was no conflict between the course of action required by the South African Government and that required by the Community given that, in their letter of 22 August 1995, the South African competition authorities simply concluded that the concentration agreement did not give rise to any competition policy concerns, without requiring that such an agreement be entered into. **[para 103]** H8 In its letter of 19 April 1996 the South African Government, far from calling into question the Community's jurisdiction to rule on the concentration at issue, first simply expressed a general preference, having regard to the strategic importance of mineral exploitation in South Africa, for intervention in specific cases of collusion when they arose and did not specifically comment on the industrial or other merits of the concentration proposed by Gencor and Lonrho. It then merely expressed the view that the proposed concentration might not impede competition, having regard to the economic power of Amplats, the existence of other sources of supply of PGMs and the opportunities for other producers to enter the South African market through the grant of new mining concessions. **[para 104]** H9 The applicant nor, indeed, the South African Government in its letter of 19 April 1996 have shown, beyond making mere statements of principle, in what way the proposed concentration would affect the vital economic and/or commercial interests of the Republic of South Africa. **[para 105]** H10 As regards the argument that the Community cannot claim to have jurisdiction in respect of a concentration on the basis of future and hypothetical behaviour, namely parallel conduct on the part of the undertakings operating in the relevant market where that conduct might or might not fall within the competence of the Community under the Treaty, it must be stated, as pointed out above in connection with the question whether the concentration has an immediate effect, that, while the elimination of the risk of future abuses may be a legitimate concern of any competent competition authority, the main objective in exercising control over concentrations at Community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market. Community jurisdiction is therefore founded, first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position, and not on the need to control directly possible abuses of a dominant position. **[para 106]**

	H11 The contested decision was not inconsistent with either the *EC Merger Regulation* or the rules of public international law relied on by the applicant. **[para 108]**
Analysis (Max 1000 words):	A1 Together with **Wood Pulp**, the judgment is the leading EU case with respect to the 'extraterritorial' application of EU competition law. The judgment is ground-breaking in that an EU court for the first time endorsed the 'effects doctrine' in competition matters. This doctrine, pursuant to which jurisdiction can be based on the domestic territorial effects of foreign conduct, was coined by the US Court of Appeals for the Second Circuit in **United States v Aluminium Corp of America*, 148 F 2d 416 (2nd Cir 1945)* ('*Alcoa*') as early as 1945. In **Wood Pulp*, the European Court of Justice did *not* endorse the effects doctrine in cartel matters, preferring instead an 'implementation' doctrine that would arguably be more in keeping with the jurisdictional principle of territoriality. Selling goods directly in the Community was considered to be territorial implementation. The exact difference between the implementation and the effects doctrine remained somewhat elusive, however. A2 In *Gencor,* the CFI at first sight seconded the **Wood Pulp* approach, finding that the Commission had jurisdiction because the defendants sold goods in the Community, as sales amounted to implementation. It is conspicuous, however, that the CFI, unlike the ECJ in **Wood Pulp*, seemed to embrace the American effects doctrine, citing in para 90 that jurisdiction obtains as soon as substantial, direct and reasonably foreseeable effects on domestic commerce could be established. The CFI may however not have meant to supplant the **Wood Pulp* implementation doctrine. The latter may still be apply to cartels, whereas the effects doctrine applies to international mergers. Mergers differ from cartels as almost inevitably they have repercussions within the Union as part of the worldwide market in which the merging companies trade. The Commission, however, routinely refers to *effects* in the Union to establish its jurisdiction over foreign-based cartels affecting or targeting the common market. A3 The effects doctrine could be criticized as a tool of jurisdictional overreaching: the mere effects of a foreign restrictive business practice suffice for the establishment of jurisdiction, thus potentially giving rise to normative competency conflicts between multiple states. At the same time, the effects doctrine, as it has been developed in US antitrust law, may also serve as a tool of jurisdictional *restraint* insofar as effects-based jurisdiction only obtains where substantial, direct and reasonably foreseeable effects can be identified. The CFI indeed employs this version of the effects doctrine to limit the reach of the *EC

	Merger Regulation*, pursuant to which *any* foreign concentration that meets the substantive turnover thresholds of *Article 1 of the EC Merger Regulation* might fall within its remit. By requiring that the concentration also has substantial, direct and reasonably foreseeable effects for jurisdiction to be established, the CFI ensures that the Commission remains within the bounds of international law. A4 The CFI made rather light of the South African Government's clearance of the merger (H4-H7), implying that only in case South Africa had *mandated* the merger a true jurisdictional conflict would arise between the application of EC and South African competition law. This is a particularly narrow reading of the international law principle of non-intervention: according to the Court this principle would only be violated in case of foreign sovereign compulsion. The Court's holding in this respect is by no means exceptional, however. The ECJ had earlier applied it in *_Wood Pulp_* (see para 20), and the US Supreme Court endorsed it in *_Hartford Fire Insurance Co v California_, 509 US 764 (1993)*. A5 The *Gencor* Court's narrow reading of the principle of non-intervention in competition matters is open to criticism, as it is undeniable that South Africa's economic policy space had shrunk as a result of the Commission's decision. True comity requires that states balance each other's interests in regulation/non-regulation of economic activities. This rule of reasonableness has not gained a strong foothold in international competition law, although it has been applied in transnational antitrust cases in the United States (see notably *_Timberlane Lumber Co v Bank of America_, NT & SA, 549 F 2d 597, (9th Cir 1976)* and *_Mannington Mills, Inc v Congoleum Corp_, 595 F 2d 1287 (3rd Cir 1979)*).
Further analysis (ie books, journal articles):	• *Morten P. Broberg 'The European Commission's Extraterritorial Powers in Merger Control: the Court of First Instance's Judgment in *Gencor v. Commission*', (2000) International and Comparative Law Quarterly p 172-182* • *G.P. Elliot, 'The *Gencor* Judgment: Collective Dominance, Remedies and Extraterritoriality under the Merger Regulation', (1999) European Law Review p 638* • *Ariel Ezrachi, 'Limitations on the Extraterritorial Reach of the European Merger Regulation', (2001) European Competition Law Review p 137-145*

	• *Cedric Ryngaert, *Jurisdiction over Antitrust Violations*, Antwerp: Intersentia, 2008* • *Piet Jan Slot, 'Case T-102/96, *Gencor Ltd v. Commission*', (2001) Common Market Law Review p 1573-1586* • *Yves van Gerven and Lorelien Hoet, '*Gencor*: Some Notes on Transnational Competition Law Issues', (2001) Legal Issues of Economic Integration p 195-210*
Instruments cited:	International none European • *Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings OJ 1989 L 395, p 1, corrigenda at OJ 1990 L 257, p 13*
Cases cited:	Court of Justice • **Ahlström Osakeyhtiö and others v Commission of the European Communities*, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85; [1988] ECR 05193* European Commission • *Commission Decision of 24 April 1996 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case No IV/M.619 - Gencor/Lonrho), OJ 1997 L 11, p. 30* Domestic • **United States v Aluminium Corp of America*, 148 F 2d 416 (2nd Cir 1945)* • **Hartford Fire Insurance Co v California*, 509 US 764 (1993)* • **Timberlane Lumber Co v Bank of America*, NT & SA, 549 F 2d 597, (9th Cir 1976)* • **Mannington Mills, Inc v Congoleum Corp*, 595 F 2d 1287 (3rd Cir 1979)*

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