Legal Backgrounder

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 22 No. 16 May 25, 2007

# INTERNATIONAL COMITY IN ANTITRUST: ADVANCES AND CHALLENGES

by

William Kolasky

As former U.S. Department of Justice Assistant Attorney General of the Antitrust Division, Douglas Melamed, once stated, our economy is now global, but our laws are not.[1] So long as we have nation states, international comity – that is, the respect each nation accords to the laws and interests of other nations – must continue to be one of our guiding principles if our global economy is to function efficiently.

Fifteen years ago, after the Supreme Court's decision in *Hartford Fire*,[2] some saw comity as playing a less important role in shaping the reach of U.S. antitrust laws.[3] But in the ensuing years, with such high-visibility clashes as we saw on the GE/Honeywell merger, we have come to appreciate more than ever the importance of international comity in antitrust enforcement, especially in a world where more than 100 countries now have antitrust laws.

Today, the good news is that in the last several years we have made substantial progress in restoring comity to international enforcement. We have done so in part, however, by redefining what we mean by comity. Rather than using comity to block the enforcement of one jurisdiction's antitrust laws against conduct or transactions occurring in other jurisdictions, we have come to accept that in a global economy, conduct will often have effects in multiple jurisdictions and that each jurisdiction has not only the right, but the obligation to protect its own consumers. We have shifted our attention more, therefore, to promoting greater cooperation among jurisdictions and to achieving greater substantive convergence of our legal standards for dealing with anticompetitive conduct and transactions. But, despite the progress we have made, there will inevitably still be times when antitrust enforcers in different jurisdictions will reach different conclusions. For this reason, there is still a role for comity in the more traditional choice-of-law sense – in which the jurisdiction with the less substantial interest in the conduct or transaction defers to the jurisdiction with the greater interest.

This LEGAL BACKGROUNDER will first address the progress we have made in restoring international comity to antitrust enforcement, and then discuss some of the remaining potential sources of conflict, which will benefit from the application of traditional principles of comity.

---

[1] A. Douglas Melamed, *Antitrust Enforcement in a Global Economy* 1 (Oct. 22, 1998), reprinted at http://www.usdoj.gov/atr/public/speeches/2043.htm.

[2] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

[3] *See, e.g.*, Varun Gupia, *After* Hartford Fire*: Antitrust and Comity*, 84 GEO. L.J. 2287 (1996).

---

**William Kolasky** is the co-chair of the Antitrust and Competition Department of WilmerHale, based in Washington, D.C. He served as Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice in 2001-2002, where he was responsible for international antitrust enforcement and policy. This paper represents his personal views and not those of the firm or its clients.

***The Good News: Progress Toward Greater Cooperation, Convergence, and Comity***. In the immediate wake of GE/Honeywell, the Antitrust Division of the U.S. Department of Justice undertook four key initiatives designed to promote greater comity in international antitrust enforcement. The first was to engage the EU in a constructive dialogue in an effort to narrow the areas of divergence between the world's two leading antitrust enforcers. The second was to form the International Competition Network (ICN) to serve as a vehicle for promoting greater cooperation and convergence among competition authorities worldwide. The third was to undertake an outreach program to spread the gospel of American-style antitrust enforcement. The fourth was to use the Division's amicus program to make sure we lived by what we preached. All four initiatives succeeded well beyond expectations**.**

**U.S./EU Cooperation**. In the Division's first initiative – narrowing the transatlantic gap – it received an enormous boost from the European courts, which in 2002 issued three consecutive decisions reversing EC merger prohibitions, in one of which the Commission had relied on the same highly speculative conglomerate effects theories as in *GE/Honeywell*. These losses, coupled with a strong lobbying effort both by the U.S. antitrust authorities and the European business community, led the Commission to undertake a thorough-going reform both of its procedures and of its substantive enforcement policies. As part of these reforms, the European Commission embraced the all-important principle that competition laws are to be used to protect competition, not competitors. Equally importantly, the Commission created a new chief economist post and appointed as its first occupant a distinguished economist, Lars-Henrik Roeller, who brought to the post exactly the kind of economic rigor we had hoped for. Thanks to these reforms, there are now many fewer differences in how the U.S. and EU analyze mergers. This substantive convergence has served to facilitate greater cooperation in individual cases, as a result of which there have been no further dust-ups in the six plus years since *GE/Honeywell*. During this period, the European Commission has also followed the U.S. lead in stepping up its anti-cartel enforcement. The Commission now regularly cooperates with the U.S. authorities on individual investigations and has significantly strengthened its leniency program to join the U.S. in encouraging cartel members to blow the whistle on themselves and their fellow conspirators. This U.S.-EU partnership has succeeded in busting a growing number of major multinational cartels.

**International Competition Network**. The Division's second important initiative was to form the International Competition Network to provide a mechanism to promote both greater cooperation among competition authorities worldwide and greater substantive and procedural convergence in the enforcement of our laws. In designing the ICN, DOJ was fortunate to intuit that, as the British commentators Will Hutton and Anthony Glidden have observed, "networks are the architecture of our new global economy."[4] We did not want a traditional bricks-and-mortar secretariat, like the United Nations or OECD. Instead, we wanted to create a network of competition authorities that would be run by and for the competition agencies themselves. This new approach has succeeded beyond even the most optimistic expectations. ICN has grown from twelve jurisdictions to more than eighty. Through its meetings and working groups, ICN has provided a venue in which these competition authorities have gotten to know one another better – thereby facilitating and encouraging cooperation. The ICN has also produced substantive work – most notably, its merger notification recommended practices – that has already had a dramatic impact in moving jurisdictions to improve their procedures and reduce the burden on multinational businesses. ICN is now increasingly turning its focus to substantive law – including in the important area of abuse of dominance – and there is reason to hope that it can make the same progress in these areas as it has in the areas of merger and cartel enforcement.

**Preaching the Gospel**. In the last speech I gave in Europe before I left the Justice Department in November 2002, the title of which was "What Is Competition?,"[5] I joked that I felt a little like John the Baptist – and we all knew what happened to him. More seriously, based on our early discussions with the EU over *GE/Honeywell*, we quickly discovered that the different outcomes in that merger review stemmed from profound differences in how the U.S. and EU viewed the objectives of competition policy and that these differences were manifest in many other areas, including cartel enforcement and abuse of dominance. This led us to realize that

[4]Will Hutton & Anthony Glidden, *Global Capitalism* 61 (2000).

[5]William Kolasky, *What Is Competition?* (Oct. 28, 2002), reprinted at http://www.usdoj.gov/atr/public/speeches/2043.htm.

we needed to do a better job explaining why American-style antitrust enforcement, which puts consumers ahead of competitors and places greater faith in markets than in regulators, would do a better job promoting economic growth than a more interventionist approach. We quickly found that there was a receptive audience worldwide for the message we were seeking to communicate. I'm pleased that since I left Justice, my successors have continued preaching the gospel, giving a series of very thoughtful and effective speeches, explaining how competition laws should be enforced to promote efficiency, economic growth, and consumer welfare.

***Amicus* Filings**. Our final initiative was to make sure that we practiced what we preached by encouraging the U.S. courts to interpret our own antitrust laws in a manner consistent with our emphasis on protecting competition, not competitors. The Solicitor General's *amicus* filings in *Trinko*,[6] *Independent Ink*,[7] *Dagher*,[8] and, most recently, *Twombly*[9] are all good illustrations of this initiative and its effectiveness. Of these *amicus* filings, the one most directly relevant to this paper's topic was the brief in *Empagran*,[10] in which the Solicitor General cautioned that opening the U.S. courts to treble damage claims by foreign victims of multinational cartels would jeopardize the effectiveness of leniency programs worldwide and endanger continued cooperation in anti-cartel enforcement. Fortunately, the Supreme Court listened and in a decision that warned against "legal imperialism," invoked principles of comity to hold that foreign victims of cartels may not sue under the U.S. antitrust laws unless their injuries were a direct and proximate result of the cartel's anticompetitive effects on U.S. commerce.[11]

***The Challenges We Face Going Forward***. That's the good news. Now I will turn to some caution signals flashing ahead of us which show the importance of applying comity as we enforce our own antitrust laws so that we will be better positioned to insist that other jurisdictions do the same.

**Application of U.S. Antitrust Laws to Foreign Governmental Action**. One immediately looming challenge is the desire of some to use our U.S. antitrust laws to attack the actions of the OPEC countries in regulating their production of oil so as to conserve their most valuable natural resource. In the last few years, several lawsuits have been filed seeking to find a way around the U.S. Court of Appeals for the Ninth Circuit's wise 1981 decision in *International Association of Machinists v. OPEC*,[12] in which the court held that OPEC's oil production decisions could not be challenged under the Sherman Act. In addition, proposed legislation has been introduced to overrule that decision legislatively through the so-called NOPEC bill.[13] While we can all understand consumer resentment over high gasoline prices, we should not let that resentment lead us to turn our plaintiffs' bar loose on the world's major oil producing nations, when nothing is more important to our national security than our relations with those countries.

**Merger Reviews**. Even with the progress we've made toward substantive convergence in our merger review standards, it is inevitable that there will always be cases where the U.S. and EU – and perhaps other jurisdictions – may reach different conclusions. In most cases, this will be because of different market conditions in different geographic markets, but in some cases, it will reflect honest differences of opinion. Merger reviews necessarily require making judgments about how a merger will affect competition in the future and, as Yogi Berra once said, nothing is harder to predict than the future. Even our own enforcement authorities do not always

---

[6] *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

[7] *Independent Ink, Inc. v. Illinois Tools Works Inc*., 547 U.S. 28 (2006).

[8] *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006).

[9] *Bell Atlantic Corp. v. Twombly*, 126 U.S. 2965 (Mem.) (2006) (granting cert.).

[10] *F. Hoffman LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

[11] *Id.* at 169.

[12] 649 F. 2d 1354 (9th Cir. 1981).

[13] *No Oil Producing and Exporting Cartels* Act, S.879, 110th Cong., 1st Sess. (introduced Mar. 14, 2007).

  ISBN 1056 3059

agree – the Justice Department's loss in *Oracle/PeopleSoft* being a notable recent example[14] – so there is no reason we should expect that the U.S. and EU will always agree. This is an area where comity can play a very constructive role. In close cases, the jurisdiction with fewer contacts with the transaction should, in general, defer to the jurisdiction with more contacts. Likewise, in structuring remedies, jurisdictions should be flexible enough to take into account the interests of other jurisdictions in crafting their own remedies. A recent example where this approach would have been constructive was a merger in which I advised one of the parties. In that case, the EU – where the competitive effects would be felt most directly – was prepared to allow the transaction to close subject to a post-order divestiture. The FTC's unwillingness to do likewise resulted in a costly delay in securing merger clearance and in a cascading divestiture remedy broader than either jurisdiction initially sought.

**Compulsory Licensing of Intellectual Property**. Another area where comity principles can play an important role is in the enforcement of our competition laws with respect to single-firm conduct – what we call monopolization in the U.S. and abuse of dominance in Europe. There are still important differences in the interpretation of our laws in this area. There are several possible explanations for these differences. Some have suggested that the differences have cultural roots – that Americans favor a model of competition rooted in the cowboy culture of the American west whereas Europeans favor a more gentlemanly model.[15] An alternative explanation is that these differences are the product of institutional differences. U.S. courts may have a greater concern over the potential chilling effects of false positives because of our reliance on lay juries and the availability of treble damages and class actions with one-way fee shifting. In Europe, where expert administrative authorities enforce the competition laws, there may be greater confidence in the ability of the enforcers and tribunals to get it right. Whatever the explanation, we must recognize that while in some cases, conduct remedies can be limited to a single jurisdiction, remedies that require compulsory access to intellectual property can rarely be so limited. Having different standards, therefore, inevitably invites forum shopping, just as we have seen in several recent cases in which most of the complainants in Europe were American companies. Principles of comity would caution that, in these circumstances, a jurisdiction should be especially cautious in imposing remedies that may affect the incentives to innovate of companies residing outside that jurisdiction. Even more important is that jurisdictions not give in to the temptation to order compulsory access to intellectual property to benefit their own domestic industry – as some Asian jurisdictions have done recently.[16]

***Conclusion***. As this brief review shows, principles of comity continue to play a very important role in international antitrust enforcement. We simply cannot hope to have cooperation and substantive convergence unless we live by the golden rule in enforcing our own antitrust laws – do unto others as you would have them do unto you.

[14] *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[15] *See, e.g.*, J. Bruce McDonald, *Section 2 and Article 82: Cowboys and Gentlemen* (June 16, 2005), *reprinted at* http://www.usdoj.gov/atr/speeches/210873.htm.

[16] *See* Notice of initiation of an examination on obstacles to trade within the meaning of Council Regulation (EC) No 3286/94, consisting of measures adopted by the separate customs territories of Taiwan, Penghu, Kinman, and Matsu affecting patent protection in respect of recordable compact discs (Jan. 15, 2007).

  ISBN 1056 3059