

Extraterritoriality of Antitrust Law in the US and Abroad: A Hot Issue

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“Integrating Comity Considerations into Judicial Decision-Making on Antitrust Issues by Translating it into the Currency of Consumer Welfare”

It is a pleasure to be here to discuss this topical matter with you and, in my opening remarks, I would like to address the question: Should comity play a different role in antitrust cases? My answer is "yes" and I will argue that issues of comity in the context of antitrust matters should be considered in terms of their impact on consumer welfare. This will not be an assumption but rather an implication of developing a practical way in which to integrate extraterritoriality issues into judicial decision-making.

So, why is comity desirable? Eleanor Fox recently wrote: "Why do we (Americans) want to avoid unreasonable interference with foreign sovereign choices? Both as part of a reciprocal compact - to protect our sovereignty when the tables are turned - and to avoid actions that will interfere with our foreign relations."¹ When some issue is truly substantive enough to have an impact on foreign relations - such as a merger that jeopardizes another country's national security - then perhaps comity should trump all other considerations. But surely those instances are rare and should not dictate standard practice; rather they should be exceptions to the rule. Policy should be based on the more common rationale for comity which is reciprocity, under which lies the presumption that both countries will be better off if each limits its intervention on certain matters.

Let me argue by way of example that comity justified on grounds of reciprocity should vary with the domain in which it is operating, whether that domain is international trade, intellectual property rights, or, as with the case at hand, antitrust.

To make this point, consider the Section 1 case in the market for vitamin C. While the U.S. Department of Justice chose not to prosecute a cartel composed of Chinese manufacturers of vitamin C, there is on-going private litigation. The Chinese government has requested that the case be dropped on the grounds that the government compelled firms to collude. The district judge, who did not take the Chinese government's statement at face value, chose to persist with the case. Here, comity would mean dropping the case at the request of the Chinese government. Given that the benefit of comity is reciprocity, we would then be supporting the

¹ Eleanor M. Fox, "Extraterritoriality and Input Cartels: Life in the Global Value Lane – The Collision Course with *Empagran* and How to Avert It," *CPI Antitrust Chronicle*, September 2014 (1), p. 4.

following quid pro quo: The U.S. government does not intervene in a government-supported Chinese cartel harming American consumers and, in exchange, the Chinese government does not intervene in a government-supported U.S. cartel harming Chinese consumers. In other words, the sanctuary of comity is protecting reciprocal behavior that harms consumers in both countries. Now, why is that something to be supported? Such reciprocity is making both countries worse off in the same way that trade barriers do.

The general point I want to derive from this example is that we should assess what exactly is the reciprocal behavior that is implicit in the exercise of comity and then determine whether that behavior actually serves the objectives of the particular domain.

In the case of antitrust, the objective is the maximization of consumer welfare and, therefore, the implications of comity should be assessed in terms of its impact on consumer welfare. I am quite cognizant that such an exercise ignores the broader extraterritoriality implications and indeed I am deliberately taking the view that we should strive to translate all considerations into the same currency, which ought to be consumer welfare in the case of antitrust. For if one does not do so, it would mean comparing the incomparable - consumer welfare and good foreign relations. Given the difficulty in assessing whether more consumer harm is warranted by enhanced amity, the inevitable result would either be always conceding to comity, never conceding, or making arbitrary and inconsistent judgments.

After the proposed merger between Boeing and McDonnell-Douglas was approved by the FTC in 1997, the EU intervened and initially withheld approval. In response, Senator Slade Gorton stated: "I am outraged the Europeans are asserting antitrust authority in an extraterritorial manner where there is no relevance, other than the fact that we sell airplanes in their market." Well, the FTC's evaluation of that merger was based on exactly that property: Those companies sell airplanes in the U.S. market and thereby a merger would affect U.S. consumers. Comity should not mean accepting the consumer harm created by the merger of another country's companies but rather the reciprocal recognition that both countries' consumers would be better off under a regime in which a country can weigh in on a merger that impacts its consumers.

The guiding principle in competition policy is the protection of consumers and, whenever possible, we should use consumer welfare to guide our decisions for it is an objective that is well-founded, well-understood, and well-accepted. On matters of antitrust, comity should serve consumer welfare rather than consumer harm be the collateral damage associated with comity. This does not mean dismissing comity but rather translating the benefits and costs of comity into the currency of consumer welfare.

Joseph E. Harrington, Jr.
Patrick T. Harker Professor
The Wharton School, University of Pennsylvania
harrij@wharton.upenn.edu