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Comity in International Competition Law Enforcement

Presented by

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The Importance of Comity

- With the global spread of competition law, the need for comity is more important than ever
 - As the number of competition policy regimes increases arithmetically, the potential for conflicting substantive standards increases geometrically
 - Substantive competition policy standards are particularly likely to conflict when jurisdictions review foreign conduct due to its perceived effects on domestic commerce
- Comity can be either “strong” or “weak”
 - “Strong” comity respects both more and less restrictive foreign regimes
 - “Weak” comity respects only more restrictive regimes
 - Recent developments illustrate the pitfalls of practicing only weak comity

Substantive Competition Policy Varies among Jurisdictions

- For example, consider U.S. and E.U. competition policy, which appear to be quite similar
 - Different origins – 1890s vs. 1950s
 - Different initial objectives – break up monopolies versus police state-owned firms
 - Different monopoly standards – e.g., monopoly power thresholds or treatment of vertical restraints
 - Additional prohibitions in E.U. – e.g., excessive pricing or state aid
- There are also significant differences between these regimes and those elsewhere, particularly in Asia and South America

Efforts to Avoid Conflicts Despite the Differences

- For broad policy matters, several formal standing fora – including the OECD and the ICN – promote meaningful discussion of these differences and study potential areas of convergence
- For individual cases, agencies cooperate through both formal agreements and case-specific discussions:
 - Typically, a bilateral agreement includes some mechanism for resolving substantive conflicts, e.g.
 - Consultation process, e.g., as the U.S. invoked in its agreement with the E.U. to discuss the Boeing / McDonnell Douglas transaction, or
 - Commitment to the principle of comity, e.g., as announced in the preamble in the U.S.-Japan cooperation agreement
 - Case-specific discussions are more limited
 - Focused on information sharing, not conflict avoidance
 - Frequently subject to the parties granting a waiver
- Formal bilateral agreements are fairly rare; the U.S. is party to only 11

Importance of Comity in Avoiding Conflict

- The “effects doctrine” causes a competition agency or court to review foreign conduct
 - Doctrine first adopted by the U.S. in 1945 *Alcoa* decision and subsequently spread internationally
 - *Alcoa* court recognized that “international complications [were] likely to arise” when U.S. courts applied the doctrine to foreign conduct
 - Comity was made part of U.S. positive law in 1982
 - Foreign Trade competition policy Improvements Act (FTAIA)
 - But the scope of comity has fluctuated, contracting under *Hartford Fire* (1993) and expanding under *Empagran* (2004)
- Even when comity does not apply, American courts have endorsed related concepts, such as the foreign sovereign compulsion defense.
 - E.g., *In re Vitamin C Litigation* (2d Cir. 2016);
 - Review pending in Supreme Court

Comity in Action - Generally



- The U.S. competition agencies apply comity in two situations
 - When another competition agency regulates the conduct in a different way
 - When another competition agency has decided not to regulate the conduct in question
- It is unclear whether other competition agencies apply similar principles

Comity in Action – Two Qualcomm Remedies

- The KFTC's recent decision to impose a global licensing remedy in the *Qualcomm* matter, even to patents not registered in Korea or enforceable there, ignores comity
 - KFTC has prohibited conduct in the U.S. that is allowed or encouraged there!
 - *E.g.*, the KFTC condemns portfolio licensing as *per se* unlawful even though other jurisdictions do not preclude it and the U.S. regards it as usually efficient
 - Based on a weak form of comity that applies only “if a foreign competition authority or court renders a binding and final decision or measure/order that conflicts with these remedial orders and thus makes it impossible to comply with both at the same time”
 - In effect, sets a precedent that the most restrictive regime should apply globally
- China's NDRC's decision in *Qualcomm* stands in clear contrast to that in Korea
 - Remedy is explicitly limited to China: it covers (1) licensing of Chinese standard essential patents (2) to Chinese manufacturers (3) for use in China

Conclusion

- The spread of competition law globally makes comity more important
- The application of comity may differ along two dimensions:
 - Locus of comity: Who applies the principle? (Courts or agency.)
 - Type of conflict required: When should comity principles apply?
 - Strong: Defer to both more restrictive and less restrictive regimes
 - Weak: Defer only to more restrictive regimes
- Weak comity principles risk a “race to the bottom”
- Most restrictive rule would apply globally, e.g., if the KFTC insists that Qualcomm abide by the KFTC order when licensing U.S. patents for U.S. uses