The Role of Comity in Antitrust Discovery

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"Comity" refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states. As will be discussed in this article, difficult comity issues arise when U.S. courts must resolve discovery disputes involving documents that have been submitted to foreign antitrust enforcement agencies by a company under investigation, party to an enforcement action, or third party. In such cases, the U.S. courts weigh the competing interests of the party seeking the discovery and the interests of the foreign enforcement agency in respecting the rights of companies under investigation and defendants in their cases. U.S. courts also have recognized the importance of maintaining cooperative relationships with foreign enforcers.

Comity was analyzed by the U.S. Supreme Court in 1987 in *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa* (*"Aerospatiale"*).[1] Although the Supreme Court there directed the lower courts to supervise pretrial procedures with "special vigilance" in accordance with the demands of comity, it declined to "articulate specific rules to guide this delicate task of adjudication."[2] Instead, the Court relied on §437(1)(c) of the Restatement of Foreign Relations Law of the United States to guide lower court analysis.[3] It noted that "[w]hile we recognize that §437 of the Restatement may not represent a consensus of international views on the scope of the district court's power to order foreign discovery in the face of objections by foreign states, these factors are relevant to any comity analysis:

1. the importance to the … litigation of the documents or other information requested
2. the degree of specificity of the request
3. whether the information originated in the United States
4. the availability of alternative means of securing the information; and
5. the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important foreign sovereign interests.[4]

The *Aerospatiale* balancing test has since been applied by the lower courts with varying results in a number of antitrust cases in which a party has sought discovery of documents submitted to foreign competition law enforcement agencies by the opposing party or by third parties. The fifth factor, which requires a comparison of the national interests at stake, has been regarded as the most important, but the decisions have varied.[5]

For example, in 2007, in *In re Rubber Chemicals Antitrust Litigation*,[6] the plaintiff moved to compel disclosure of the defendant's communications with the European Commission("EC") when it confessed to its participation in a worldwide conspiracy in order to take advantage of that Agency's Leniency Program. The district court performed the *Aerospatiale* balancing test and determined that: (i) the contested documents were not relevant to the plaintiff's claims of a conspiracy to keep it out of the American rubber chemical industry; and (ii) disclosure of the documents would undermine the EC's interest in the confidentiality of its Leniency Program by creating disincentives for cooperation, and these concerns outweighed plaintiff's need for the documents.[7] Accordingly it denied the motion to compel disclosure of the desired documents.

In 2010, in *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation,*[8] the antitrust class action plaintiffs moved to compel discovery of documents that Visa and MasterCard produced during an EC investigation. The EC filed an objection, contending that "the investigation, notice, and hearing portions of its own enforcement proceedings are confidential under European law, and that this court should respect that confidentiality by denying the motion to compel." [9] The district court recognized that this required it to determine "whether, in these circumstances, the need for deference to a foreign sovereign entity trumps the Federal Rules' usual liberal approach to discovery."[10]

After reviewing the comity analysis performed in various other cases, the court concluded that the EC's interest in maintaining the confidentiality of the MasterCard oral hearing recording and Visa statement of objections "outweighs the plaintiffs' interest in discovery of the European litigation documents . . . . The Commission has established that confidentiality plays a significant role in assisting the effective enforcement of European antitrust laws . . . . The Commission's interests would be significantly undermined if its confidentiality rules were disregarded by American courts in this case and others like it." The court therefore denied plaintiffs' motion to compel.[11]

The following year, 2011, a class of Direct Purchaser Plaintiffs in *In Re: TFT-LCD (Flat Panel) Antitrust Litigation,*[12] moved to compel Hitachi to produce documents it had provided to the EC and Japan Fair Trade Commission ("JFTC") in connection with alleged price fixing conspiracies. The documents submitted to the JFTC related to sales of the applicable products in Japan. The EC-related materials included requests for information from the EC and Hitachi's responses.[13] The EC and JFTC both objected to production, expressing concerns that "leniency programs have been fertile avenues for enforcement of antitrust laws, and that parties would be dissuaded from applying and furnishing information if they feared that the information would be made available in private antitrust actions in the United States." [14]

The *Flat Panel* district court emphasized that balancing the U.S. interest in enforcing the antitrust laws against the interest of foreign regulators in confidentiality was the most important and most difficult *Aerospatiale* factor to evaluate.[15] The court concluded that "the JFTC's and EC's interests in maintaining the confidentiality of materials obtained or generated in connection with ongoing antitrust investigations outweighs the United States' interest in allowing discovery of the materials in this case. ... this factor weighs strongly against requiring disclosure of any EC-related or JFTC-related documents . . ."[16] The court thus denied the motion and did not require Hitachi to produce its foreign regulatory productions.

On the other hand, in *In re Air Cargo Shipping Servs. Antitrust Litigation,*[17] plaintiffs sought production of a defendant's documents obtained by the DOJ from the French Government. The district court required production because the French government had previously authorized disclosure to the DOJ.[18]

Similarly, in *In re Vitamins Antitrust Litig.,*[19] adopting recommendations in a Special Master's Report, a district court required production of documents provided by defendants to six foreign antitrust enforcement agencies on a "voluntary" basis rather than in response to compulsory demand.[20] According to the SpecialMaster, the defendants had not established that the government authorities, by statute or regulation, practice, procedure or agreement expressly or specifically guaranteed that their submisssions would be kept confidential.[21] Moreover, concerns espressed by the EC and Australian authorities that production would harm their ability to obtain leniency settlements and voluntary cooperation by investigated parties in the future, were considered by the Special Master to be outweighed by the interests of the United States in open discovery and enforcement of the U.S. antitrust laws.[22]

Most recently, the *Aerospatiale* balancing test was applied in *FTC v. Qualcomm, Inc.,* a monopolization suit in which Qualcomm has been charged by the FTC with engaging in allegedly unlawful monopolistic restrictions in supplying cellphone components.[23] Qualcomm sought documents submitted by third parties to the FTC as well as to the EC and Korea Fair Trade Commission ("KFTC").[24] The two foreign agencies filed objections on comity grounds. Specifically, the EC expressed concern that disclosure of the submissions would undermine its law enforcement efforts in its current investigation of Qualcomm and in future investigations. Similarly, the KFTC contended that it relies on voluntary cooperation of third parties, which would be jeopardized by disclosure of the documents to the target of an investigation. [25]

Qualcomm responded that any comity concerns were irrelevant because *Aerospatiale* only addressed the scope of discovery from parties located *outside* the United States, but it was seeking discovery directly from a U.S. enforcement agency that is a party to the litigation.[26] The FTC emphasized that nevertheless, the court "must consider the objections of foreign governments under the multi-factor comity test, regardless of where the documents are found."[27] Qualcomm pointedly disagreed with all three agencies' expressions of concern, because "it is the industry participants whose cooperation these agencies seek that provided the materials to the FTC, knowing the FTC's investigation may result in U.S. litigation and discovery."[28]

The district court agreed with Qualcomm, and required disclosure, declaring: "First, and most importantly, this case is distinguishable from *Aerospatiale* because the documents in dispute were also provided to the FTC, an American governmental entity. The disputed documents are *in* the United States. The court noted: "it is skeptical that the test in *Aerospatiale* even applies here."[29] The court added that even if it had applied the *Aerospatiale* balancing test, it would "still find that Qualcomm is entitled to discovery of the dual submission documents. Though the disclosure may undermine and circumvent [the third parties'] specific confidentiality interests . . . no legal provision or principle on point has been undermined or circumvented."[30]

Conclusion.

While the law remains unsettled, it appears that U.S. courts are most likely to deny motions seeking documents obtained by foreign enforcement agencies during investigations or settlements pursuant to their leniency policies only when the foreign agency specifically requests the court to deny production on the ground that the confidentiality of the information is protected by a confidentiality statute, regulation, or an express assurance of confidentiality by the agency pursuant to a general policy.

Footnotes

[1] 482 U.S. 522 (1987).

[2] *Id.* at 545-46.

[3] Restatement of Foreign Relations Law of the United States (Revised) §437(c) (Tent.Draft No. 7, 1986)(approved May 14, 1986)(Restatement).

[4] 482 U.S. at 544 n.28.

[5] *See, e.g., Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1476 (9th Cir. 1992); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.,* 201 WL 3420517, at *6-7 (E.D.N.Y.Aug. 27, 2010).

[6] 486 F.Supp.2d 1078 (N.D. Cal. 2007).

[7] *Id.* at 1080-81.

[8] 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010).

[9] *Id*. at *6

[10] *Id.* at *4-5.

[11] *Id.* at *8-9.

[12] 2011 WL 13147214 (N.D. Cal. Apr. 26, 2011).

[13] *Id.* at *2-*3

[14] *Id.* at *6.

[15] *Id.*

[16] Id. at *6. Plaintiffs had also obtained about seven million documents in discovery from defendants.

[17] 2010 WL 1189341 (E.D.N.Y. Mar. 29, 2010).

[18] *Id. at *4.*

[19] 2002 WL 35021999 (D.D.C. Jan. 23, 2002), *report adopted,* Apr. 4, 2002.

[20] *Id. at *31-35.*

[21] *Id.* at*32.

[22] *Id.* at *34.

[23] FTC v. Qualcomm Inc., No. 17-cv-00220 (N.D. Cal. Filed Jul. 18, 2017),

[24] Id. at 1-2.

[25]

[26]

[27] Id. at 4.

[28] Defendant Qualcomm Inc.'s and Plaintiff Federal Trade Commission's Joint Discovery Statement at 2, FTC v. Qualcomm Inc., No. 17-cv-00220 (N.D. Cal. Filed Jul. 18, 2017), ECF No. 152.

[29] Order on Discovery Dispute, FTC v. Qualcomm Inc., No. 17-cv-00220 at 2 (N.D. Cal. Filed Aug. 24, 2017), ECF No. 176

[30] Id. at 3.

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