

Some FTAIA Clarity From 2 Appellate Decisions



Law360, New York (June 20, 2014, 3:41 PM ET) -- Recent decisions issued from the Second and Seventh Circuits have clarified the applicability of U.S. antitrust law to foreign conduct. On June 4, 2014, the Second Circuit Court of Appeals decided *Lotes Co. Ltd. v. Hon Hai Precision Industry Co. Ltd.*, an important case regarding the applicability of federal antitrust law to foreign conduct. The Second Circuit's opinion comes two months after *Motorola Mobility LLC v. AU Optronics Corp.*, in which the Seventh Circuit issued a ruling concerning the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a.

Both opinions address the applicability of U.S. antitrust law to foreign anti-competitive conduct that affects the price of components that are later incorporated into consumer products sold in the United States. In *Motorola Mobility*, Motorola's foreign subsidiaries purchased liquid crystal display chips abroad, integrated them into smartphones in China or Singapore, and then shipped the phones to the United States for sale. In *Lotes*, Lotes manufactured universal serial bus connectors in China and sold these USB connectors to other Chinese companies. These other companies then incorporated the USB connectors into computers that were shipped to the United States and sold under brand names such as Dell, HP and Apple.

Both cases involved allegations of foreign anti-competitive conduct that may have had an impact on the U.S. economy. In *Motorola Mobility*, Motorola claimed that LCD manufacturers fixed the price of LCD chips at a series of "crystal meetings" held in Asia. In *Lotes*, Lotes alleged that the defendants conspired to monopolize the market for USB 3.0 connects (the newest industry standard for USB connectors) by refusing to license patents necessary to manufacturing USB 3.0 connectors.

The Second Circuit and Seventh Circuit applied the same standard when analyzing the FTAIA. The FTAIA states that the Sherman Act does not apply to conduct involving foreign trade or commerce (other than import trade or commerce) with foreign nations unless the trade or commerce (1) has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and (2) the domestic effect "gives rise to a claim" under federal antitrust law.[1] Both circuits defined the word "direct" to mean "a reasonably proximate causal nexus," rejecting the Ninth Circuit's more narrow definition: "follows as an

immediate consequence of the defendant's activity."

The FTAIA analysis of the Second Circuit and Seventh Circuit differed. While acknowledging that there was "room for difference of opinion," the Seventh Circuit found that a foreign subsidiary's acquisition of a component that was integrated into a finished product abroad and later sold in the United States was insufficiently "direct" to be actionable under the Sherman Act. In contrast, the Second Circuit faulted the district court for placing "near-dispositive weight" on the fact that the USB connectors at issue were manufactured in China before being shipped to the United States.

In dicta, the Second Circuit stated that "[t]here is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects impermissibly remote and indirect." Unlike the Seventh Circuit, which appeared to take a bright-line approach, the Second Circuit stated that district courts should examine multiple factors when determining whether a domestic effect is "direct" — including the "structure of the market" and the "nature of the commercial relationships at each link in the causal chain."

Despite different approaches to the "direct" prong of the FTAIA in each case, both claims failed at the second prong of the FTAIA — both the Second Circuit and the Seventh Circuit agreed that neither claim "gave rise to" a federal antitrust claim. In *Motorola*, the Seventh Circuit held that the nature of Motorola's global supply chain meant that the alleged foreign price-fixing did not give rise to a claim in the United States. For example, the effect of the alleged price-fixing was "mediated" by "Motorola's decision on what price to charge U.S. consumers." Likewise, the Second Circuit held that whatever anti-competitive harm Lotes may have suffered occurred in China. Consequently, Lotes' injury preceded a domestic effect in the causal chain.

While the definition of "direct" will be clarified further, these results signal that companies that sell components that are integrated into finished products before they are sold into the United States may have significant defenses to antitrust liability in the United States.

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[1] 15 U.S.C. § 6a(1)(A).