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Ambiguities Remain Despite 9th Circ. AU Optronics Ruling

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One of the most important topics in cartel enforcement today is the extent to which the Foreign Trade Antitrust Improvements Act ("FTAIA") limits the extraterritorial reach of the Sherman Act. On July 10, 2014, the Ninth Circuit weighed in on this question by affirming a broad application of the Sherman Act in United States v. AU Optronics Corporation. The Ninth Circuit's ruling comes on the heels of two other appellate rulings — one by the Second Circuit and another, since vacated, by the Seventh Circuit — addressing the same issue. Taken together, these decisions suggest that: (i) the FTAIA is an element of a plaintiff's claim; (ii) foreign price-fixing that affects the United States may be analyzed under the per se rule; and (iii) price-fixing that affects import commerce is actionable under the Sherman Act. However, several ambiguities remain.

The FTAIA

For many years, there has been substantial debate and confusion about whether and when U.S. antitrust law applies to foreign conduct. In an effort to address this issue, Congress passed the FTAIA. The FTAIA "excludes from the Sherman Act's reach much anti-competitive conduct that causes only foreign injury."[1] It does so by "removing … (1) export activities and (2) other commercial activities taking place abroad" from the ambit of the Sherman Act "unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States."[2]

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 (i) has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce and (ii) the domestic effect "gives rise to a claim" under federal antitrust law.[3] Thus, the FTAIA "initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct has both (1) sufficient affects [on] American commerce, … and (2) has an effect of a kind that antitrust law considers harmful[.]"[4]

Points of Agreement

The Ninth Circuit's opinion in AU Optronics comes weeks after the Seventh Circuit's decision in Motorola Mobility LLC v. AU Optronics Corp. (which has been vacated pending rehearing) and the Second Circuit's opinion in Lotes Co. Ltd. v. Hon Hai Precision Industry Co. Ltd. The three decisions have much in common.

First, each opinion held that the FTAIA goes to the merits of a plaintiff's claims, not to whether the district court has subject matter jurisdiction over the antitrust dispute. As the Second Circuit observed in Lotes, "we have little difficulty concluding that the requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction." Likewise, the Ninth Circuit held that "[t]he FTAIA does not limit the power of the federal courts; rather, it provides substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations."

Second, the courts held that foreign anti-competitive conduct is per se illegal, not subject to a rule of reason analysis. In AU Optronics, the Ninth Circuit observed that "[f]or over a century, courts have treated horizontal price-fixing as a per se violation of the Sherman Act." In AU Optronics, the Ninth Circuit saw no reason to deviate from the per se rule when analyzing foreign conduct, holding that district courts are "bound to apply the per se rule" to foreign conduct.

Third, each opinion recognizes that anti-competitive conduct that affects import commerce is actionable under the Sherman Act. However, there appears to be some disagreement on this issue between the Ninth Circuit and the Seventh Circuit. The Seventh Circuit's now vacated opinion in Motorola Mobility focused on where the allegedly price-fixed product was manufactured and sold — China and Singapore. The Ninth Circuit's holding in AU Optronics focused on where the conspirators negotiated the sale of the products — Houston, Texas and Cupertino, California. While the Second Circuit did not directly address this issue, it faulted the district court for placing "near-dispositive weight" on where the product in question was manufactured. Because the Seventh Circuit has agreed to rehear Motorola Mobility, there is no longer a clear split between the Ninth and Seventh Circuits on this point. Even so, it is likely that courts will continue to come to divergent results when applying the FTAIA to complex global supply chains.

Continued Disagreement

While there are several areas of agreement in Lotes, Motorola Mobility and AU Optronics, a key circuit split remains. Unfortunately, the text of the FTAIA does not provide much guidance on how "direct" an effect on U.S. commerce must be for it to come within the scope of the Sherman Act, and subsequent case law has not settled the issue. The courts that have grappled with the question have gone in different directions with inconsistent reasoning and results. The latest three cases continue the debate over the issue.

Following prior Ninth Circuit precedent, the AU Optronics court defined the word "direct" to mean "if it follows as an immediate consequence of the defendant[s'] activity." Lotes criticized this definition at length, arguing that the Ninth Circuit's standard was based on shaky statutory construction. The Second Circuit found that "[i]nterpreting 'direct' to require only a reasonably proximate causal nexus, by contrast, avoids these problems while still addressing antitrust law's classic aversion to remote injuries." But the Second Circuit acknowledged that its definition also has problems, such as the fact that "proximate causation is a notoriously slippery doctrine."

The Remaining Arguments

While each appeal raised several arguments regarding the reach of U.S. antitrust law, the opinions did not discuss one potentially important challenge to the scope of the Sherman Act. Relying on Morrison v. Nat'l Australia Bank Ltd., which holds that when "a statute gives no clear indication of an extraterritorial application, it has none," the defendants in AU Optronics argued that the Sherman Act has no extraterritorial application. The Ninth Circuit did not reach this argument. Instead, it found that the defendants waived this argument. As a result, this challenge to the extraterritorial reach of the Sherman Act remains unresolved.

Next Steps

Although there are several areas of consensus in the approach that the Second, Seventh and Ninth Circuits take to the FTAIA, further litigation will be necessary to resolve the differences between how each court applies U.S. antitrust law to foreign conduct. This is particularly true with respect to complex supply chains with foreign manufacturers that integrate component parts into finished products that eventually make their way to the United States and to consumers. A critical issue will continue to be how "direct" and "substantial" the connection must be between a price-fixed product and its effect on U.S. markets and U.S. commerce.

A bright line rule continues to be elusive because of the highly individualized nature of the facts in each case, which may be where we end up: a case-by-case analysis of each alleged conspiracy. The next opportunities for resolving these issues will be the rehearing in Motorola Mobility and potential en banc briefing in Lotes and AU Optronics. Other issues, such as the Morrison argument that was raised belatedly in AU Optronics, must wait to be litigated in future international cartel cases. Come what may, these issues look like they are headed to the Supreme Court in the not-to-distant future.

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[1] F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004).

[2] Id. at 161.

[3] 15 U.S.C. § 6a(1)(A).

[4] Empagran S.A., 542 U.S. at 162.
