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7th Circ. LCD Antitrust Case: Foreign Vs. US Interests

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Foreign competition authorities have long been concerned about the application of U.S. antitrust law — in particular civil claims for treble damages — to conduct occurring outside the United States. Over the years, courts and Congress have adopted different tests for determining when U.S. antitrust law applies to foreign conduct. Questions regarding the most recent of these tests — the Foreign Trade Antitrust Improvements Act — are now before the Second, Seventh and Ninth circuits.

In Motorola Mobility LLC v. AU Optronics Corporation, the Korean Fair Trade Commission ("KFTC"), the Japanese Ministry of Economy, Trade and Industry ("METI") and the Belgian Competition Authority ("BCA") recently filed amicus curiae briefs urging the Seventh Circuit to dismiss claims related to foreign sales of liquid crystal display panels. To preserve the delicate balance between antitrust enforcement and international comity inherent in the FTAIA, the Seventh Circuit will need to weigh carefully the views of these foreign agencies against the U.S. Department of Justice's interest in prosecuting foreign cartels that harm U.S. consumers.

The FTAIA and Changing Views on the Extraterritorial Application of U.S. Antitrust Law

Courts have been trying to strike this balance for nearly a century. In 1919, the U.S. Supreme Court held in American Banana Co. v. United Fruit that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[1] Nearly 30 years later, in United States v. Alcoa, the Second Circuit, acting as the court of last resort, rejected the strict territorial approach of American Banana. The Alcoa court adopted an "effects test" that allowed for the extraterritorial application of the Sherman Act where the plaintiff could show a direct and intended effect on US commerce.[2]

In 1982, Congress passed the FTAIA in an effort to address these issues. The FTAIA "excludes from the Sherman Act's reach much anti-competitive conduct that causes only foreign injury."[3] 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 in the United States."[4]

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 that 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.[5] Thus, the FTAIA "initially lays down a general rule placing all (nonimport) 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 effects [on] American commerce, … and (2) has an effect of a kind that the antitrust law considers harmful."[6]

Motorola Mobility

In Motorola Mobility, Motorola purchased LCD panels from Asian manufacturers. Motorola's LCD panel purchases fell into three categories: (1) 1 percent of these panels were purchased in the United States for use in the United States; (2) 42 percent of the panels were purchased outside the United States but were incorporated into smartphones that were later sold in the United States; and (3) 57 percent of LCD panels were purchased overseas by Motorola affiliates and were incorporated into smartphones sold outside the United States. Motorola's appeal concerns only the second and third categories of LCD panel sales.

The FTAIA arguments in the Seventh Circuit are surprisingly fact intensive. Most of the discussion involved how Motorola incorporates LCD panels into smartphone screens and distributes finished smartphones. In general, Motorola's foreign subsidiaries purchased LCD panels from Asian manufacturers under purchase orders that were governed by foreign law. Motorola and LCD manufacturers negotiated the prices for these LCD panels in Asia, Europe and the United States. After they were sold to Motorola, the LCD panels were incorporated into smartphone screens by third-party manufacturers and various Motorola subsidiaries in China, Brazil and Germany. Then the completed smartphones were shipped to the United States and other countries where they were sold to consumers.

Finding the Right Balance

The amicus briefs submitted by the BCA, KFTC and METI ask the Seventh Circuit to determine how comity concerns and U.S. antitrust enforcement priorities should be assessed under the FTAIA. The agencies make two basic arguments: (1) the extraterritorial application of US antitrust law would undermine the complex antitrust enforcement regimes maintained by Belgium, Japan, South Korea and other countries and (2) allowing civil plaintiffs in U.S. antitrust litigation to recover treble damages for antitrust violations that occurred abroad would offend the sovereignty of foreign nations.

The amici argue that in the 10 years since the Supreme Court issued its Empagran decision, antitrust enforcement mechanisms have spread throughout the globe, offering adequate remedies for foreign conduct that only tangentially affects U.S. commerce. The BCA argues that Belgian law contains significant tools for remedying cartel conduct such as corporate fines, a leniency program and collective actions.[7] Likewise, METI notes that Japan's Antimonopoly Act allows for criminal enforcement, administrative fines, cease-and-desist orders, search and seizure of corporate records, and corporate leniency.[8] The amici contend that the extraterritorial application of civil Sherman Act claims would upend their respective antitrust enforcement regimes. For example, a corporation would have little incentive to seek leniency for foreign conduct if the leniency application could lead to a treble damages judgment in the United States.[9]

In addition, the amici claim that allowing U.S. plaintiffs to recover treble damages for anti-competitive activity that occurred abroad would conflict with their approach to damages. No antitrust enforcement regime, other than the Sherman Act, allows a plaintiff to recover treble damages in a civil action. In many other nations, a plaintiff can only recover actual compensatory damages.[10] Thus, the amici argue that subjecting foreign companies to treble damages in the United States for conduct that occurred abroad offends their sovereignty.

The challenge for Seventh Circuit will be how to balance and accommodate these comity concerns while still allowing the U.S. Department of Justice to enforce U.S. antitrust law against foreign cartels that harm U.S. consumers; another challenge will be to more precisely define what that harm is and when it occurs. By now, products that contain foreign-made components are ubiquitous in the United States, but, as the amici make clear, foreign antitrust remedies are increasingly pervasive, as well. The Seventh Circuit will need to be careful not to undermine foreign competition regimes that can offer meaningful and complementary enforcement and relief. Ultimately, a case-by-case approach may be the best way to strike the balance between international comity considerations and robust antitrust enforcement that has eluded antitrust practitioners for the last century. Oral argument in the case is scheduled for Nov. 13, 2014.

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[1] 213 U.S. 347, 356 (1909) (Holmes, J.).

[2] United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (Hand, C.J.).

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

[4] Id. at 161.

[5] 15 U.S.C. §6a(1)(A).

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

[7] Brief of the Belgian Competition Authority as Amicus Curiae in Support of Appellee's Position Seeking Affirmation of the District Court's Order at 3-4, Motorola Mobility LLC v. AU Oprtronics Corp., No. 148003 (7th Cir. Oct. 10, 2014) (ECF No. 109).

[8] Amicus Curiae Brief of Professor Akira Negishi in Support of Appellees at 2-3, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. Oct. 16, 2014) (ECF No. 120).

[9] Brief of the Korea Fair Trade Commission as Amicus Curiae in Support of Appellee's Opposition to Rehearing En Banc at 4, Motorola Mobility LLC v. AU Optronics Corp., No. 14-8003 (7th Cir. May 27,

2014) (ECF No. 42) ("If the U.S. antitrust laws are applied to claims arising out of transactions that take place outside the United States without any direct effect on the U.S. markets, companies will be discouraged from seeking leniency from non-U.S. antitrust authorities[.]").

[10] See, e.g., Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law of Infringements of the Competition Law Provisions of the Member States and of the European Union, at Art. 2 (Apr. 9, 2014) (allowing only single damages).

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