Has the Reach of the Sherman Act to Foreign Anticompetitive Conduct Changed?

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The Antitrust Division of the Department of Justice has aggressively pursued international cartel cases in the recent past, including one recent jury trial in San Francisco that resulted in a $500 million fine against AU Optronics Corp. The Ninth Circuit recently affirmed the conviction in *United States v. Hui Hsiung*, 2014 U.S. LEXIS 13051 (9th Cir. July 10, 2014). However, in a related civil case brought by Motorola Mobility LLC against AU Optronics, the Seventh Circuit adopted a position that would appear at first to make it more difficult for the antitrust enforcement agencies and private plaintiffs to pursue foreign anticompetitive conduct where the court deems the effects of that conduct on U.S. commerce to be too remote. The Seventh Circuit panel has since decided voluntarily to withdraw that decision and to rehear the case after a full briefing on the merits and oral argument. Nevertheless, this decision, when compared with a recent case from the Second Circuit that would appear to make it easier to enforce U.S. antitrust laws against foreign conduct, have raised questions about the scope and interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (hereinafter "FTAIA"). To the extent there is any inconsistency among the circuits as to the reach of the Sherman Act to foreign anticompetitive conduct, this can only lead to confusion among the enforcement agencies, companies and practitioners.

Background

The FTAIA limits the extraterritorial reach of the U.S. antitrust statutes by exempting from the Sherman Act certain conduct that does not have a sufficient effect on U.S. domestic or import commerce. Specifically, the FTAIA provides that:

> Sections 1 to 7 of this title [*i.e.*, the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade of import commerce) with foreign nations unless—
>
> 1. such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> A. on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> B. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> 2. such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a. This statute is undeniably complex, and therefore it is worthwhile to quote the Supreme Court's helpful distillation of the FTAIA:

> This technical language 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 *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "give[] rise to a [Sherman Act] claim."

F. Hoffman-La Roche Ltd. v. Empagram S.A., 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a(1), (2)).

Within the last five months, three U.S. circuit courts of appeals have weighed in with their interpretation of the FTAIA, with some of these courts staking out differing positions on important aspects of the FTAIA, namely, for purposes of this article, the requirement that foreign anticompetitive conduct have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce in order to fall outside the FTAIA's general exemption for foreign conduct.

In *Motorola Mobility LLC v. AU Optronics Corp*, 746 F.3d 842 (2014), reh'g granted and opinion vacated by *Motorola Mobility LLC v. AU Optronics Corp.*, 2014 U.S. App. LEXIS 12704 (7th Cir. July 1, 2014), Motorola brought suit against foreign manufacturers of liquid-crystal display (LCD) panels, who sold the LCD panels to Motorola's foreign subsidiaries. The subsidiaries then incorporated the panels into finished products and sold the finished products to Motorola in the United States. The Seventh Circuit panel held that the alleged anticompetitive conduct (agreeing on prices of LCD panels to be sold to Motorola's foreign subsidiaries) could not satisfy the requirement that such conduct have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce in order to be exempted from the FTAIA:

> The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is indirect….

746 F.3d at 844. The panel does not appear to have thoroughly considered whether there might have been "a reasonably proximate causal nexus" between the defendants' conduct and an effect on US domestic commerce—the standard adopted by the Seventh Circuit in its earlier en banc decision in *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 854 (7th Cir. 2012)—but concluded, rather summarily it would appear, that the conduct was simply too remote. Ultimately, the panel's decision with regard to the "direct…effect" requirement had no impact on the outcome of the case, as the court also held that the plaintiff's claims foundered on the FTAIA's requirement that the effect of the defendants' conduct "give[] rise" to the plaintiff's claim. *Id*. at 845.

In perhaps the most note-worthy portion of the opinion, the panel fretted over the practical effect Motorola's claim might have on international relations if the claim were to be countenanced by the court: "The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer,' a primary concern motivating the foreign trade act." *Id*. at 846 (quoting *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960-62 (7th Cir. 2003) (en banc) (dissenting opinion), overruled on other grounds by *Minn-Chem, Inc. v. Agrium, Inc., supra*)). The panel's concern over the effect its decision might have on international relations possibly affected the court's reading of the FTAIA requirements.[1]

The Second Circuit's decision in *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395 (2014), stands in marked contrast to the decision in *Motorola* because in *Lotes*, the Second Circuit clearly adopted and applied the standard articulated by the Seventh Circuit in *Minn-Chem*, which deemed foreign anticompetitive conduct to have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce if there is a "reasonably proximate causal nexus between the conduct and the effect." 753 F.3d at ___. In other words, the FTAIA's statutory requirement does not mean that the effect must follow as an *immediate* consequence of the defendant's conduct. The district court had dismissed the plaintiff's claims because, on its view, the "direct...effect" test required that the defendants' conduct have "immediate consequences" in the United States.[2]

The Second Circuit rejected the "immediate consequences" interpretation of the "direct...effect" test applied by the district court and adopted instead the "reasonably proximate causal nexus" standard advocated by the United States and the FTC. However, the Second Circuit did not undertake to apply its newly adopted understanding of the requirement to the

1 As noted above, the panel has vacated its decision in *Motorola* and will hold a hearing on the case after the parties have fully briefed the issues. It is tempting to view the panel's decision as an indication that it has decided to change course and will eventually render an opinion more palatable to the FTC or DOJ, though this prediction is anything but certain.

2 The district court apparently borrowed the "immediate consequences" interpretation from the Ninth Circuit's decision in *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004).

"rather difficult question" of whether the defendants' foreign conduct had the requisite "direct...effect" on U.S. commerce, because it found as a matter of law that, regardless of whatever effect the conduct may have had on US commerce, any such effect did not "give[] rise to" the plaintiff's claim.

Consequently, a lengthy discussion of the facts in *Lotes* isn't necessary. However, it is important to note that the defendants in *Lotes* were manufactures of USB 3.0 components, which were assembled into finished computer products later sold into the United States, much like the LCD screens at issue in *Motorola*. Unlike the Seventh Circuit panel in *Motorola*, however, the Second Circuit appeared much more willing to find that the downstream effects of anticompetitive conduct in the foreign market for component parts on the US market for finished goods can have a "direct, substantial, and reasonably foreseeable effect":

> This kind of complex manufacturing process is increasingly common in our modern global economy, and antitrust law has long recognized that anticompetitive injuries can be transmitted though multi-layered supply chains.
> ...
> There 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.

753 F.3d at ___ (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989)).

However, not only must the foreign conduct have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, that effect must "give[] rise to" plaintiff's claim. 15 U.S.C. § 6a(2). In other words, "the domestic effect must proximately cause the plaintiff's injury." *Id*. at ___ (adopting the proximate cause standard articulated by its sister circuits with respect to the FTAIA's "gives rise to" language). In *Lotes*, the Second Circuit held that even if the defendants' conduct "had the effect of driving up prices of consumer electronics devices incorporating USB 3.0 connectors in the United States," those higher prices did not cause Lotes's injury, which resulted directly from the defendant's exclusionary foreign conduct. *Id*. at ___. Therefore, the plaintiff's claims could not proceed, irrespective of whether the foreign conduct had a "direct, substantial, and reasonably foreseeable effect" on US commerce.

In the most recent circuit court decision to interpret the FTAIA, the Ninth Circuit upheld the convictions of Taiwanese and Korean electronics defendants for fixing prices for LCD screens manufactured abroad and sold into the United States and affirmed a $500 million fine against AU Optronics Corp. under the Alternative Fine Statute, 18 U.S.C. § 3571(d). *Hui Hsiung*, 2014 U.S. LEXIS 13051. The defendants challenged the conviction on several bases, including the government's supposed failure to properly allege or to prove the domestic effects exception to the FTAIA. The Ninth Circuit held that the indictment sufficiently alleged that the defendants' conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. However, the court did not need to decide whether the evidence presented by the government was sufficient to warrant a conviction on this basis, since it held that the government had introduced sufficient evidence to prove a conspiracy as to import trade, *i.e.*, a conspiracy to fix the prices of LCD screens sold *directly* into the United States, which conduct is expressly exempted from the FTAIA.

Nevertheless, it is interesting to consider how the Ninth Circuit interpreted the FTAIA's domestic effects exception for foreign conduct, even if that interpretation is nothing more than dicta for purposes of its decision in *Hui Hsiung*. The government's expert testified that there was "not good data" to explain exactly how the LCD panels ended up in the finished products, e.g., computer monitors, sold in the United States. This, according to the court, "raise[d] a significant question regarding whether the effects were sufficiently domestic to uphold a directed verdict based on the domestic effects claim." *Id*. at *53. The court went on to state that foreign anticompetitive "[c]onduct has a "direct" effect for purposes of the domestic effects exception to the FTAIA 'if it follows as an immediate consequence of the defendant[s'] activity.'" *Id*. at 54 (citing *LSL Biotechnologies*, 379 F. 3d at 680-81).[3]

Conclusion

These decisions leave at least a couple of important questions unresolved, questions that significantly impact upon the

3 The court expressly declined to address the Second Circuit's interpretation of the "direct…effect" test in *Lotes*. The court also declined to address the substance of the Seventh Circuit's decision in *Motorola*, since that decision had been vacated.

reach of the Department of Justice and the Federal Trade Commission.[4]

First, for foreign conduct to have a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce, must the effect follow as "immediate consequence" of the alleged conduct, or is it sufficient for the conduct and the effect to have only "a reasonably proximate causal nexus"? Clearly the scope and reach of the Sherman Act as to foreign anticompetitive conduct is significantly more expansive if the latter approach is adopted. Also, as noted by the Second Circuit in *Lotes*, the more restrictive interpretation adopted by the Ninth Circuit would appear to render the "direct… effect" language of the FTAIA meaningless since, "[t]o demand that any domestic effect must follow as an immediate consequence of a defendant's foreign anticompetitive conduct would all but collapse the FTAIA's domestic effects exception into its separate import exclusion." 753 F.3d at ___.

Second, to what extent can foreign anticompetitive conduct affecting the market for component parts that are incorporated into finished goods later sold into the United States ever come within the reach of the U.S. antitrust statutes? The Second Circuit in *Lotes* appeared to conclude that such conduct could have the requisite "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, but it declined to apply that test to the conduct at issue in that case. The decision in the *Motorola* case, written by Judge Posner, suggests that foreign anticompetitive conduct in the market for component parts might rarely, if ever, satisfy the "direct…effect" exception to the FTAIA since the effects of this conduct will necessarily be felt only indirectly. Notwithstanding, the Seventh Circuit has agreed to reconsider Judge Posner's opinion with merits briefs to be filed.

If these, and the other pressing questions concerning the applicability of the FTAIA, cannot be resolved by the circuits themselves, they would likely have to be resolved by the U.S. Supreme Court. This would be extremely critical to the government's enforcement and focus in the cartel area.

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4 The Antitrust Division has imposed fines and penalties of approximately $6.8 billion from the first quarter of 1999 through the first quarter of 2013. See BEA Briefing, Christopher Bach, Fines and Penalties in the U.S. International Transaction Accounts, (July 2013), http://www.bea.gov/scb/pdf/2013/07%20July/0713_fines_penalties_international_accounts.pdf

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