

Recent Developments in the Extraterritorial Reach of the US Antitrust Laws

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Recent decisions interpreting the Foreign Trade Antitrust Improvements Act (FTAIA) are bringing the courts into closer alignment on the extraterritorial reach of the US antitrust laws, which has been the subject of substantial debate for years. While the trend seems to be toward more expansive extraterritorial reach, important questions about the scope of the FTAIA remain open.

The FTAIA, which applies to both criminal and civil antitrust claims, governs when federal antitrust laws apply to alleged anticompetitive conduct occurring outside the US. The FTAIA provides that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless the “domestic effects” exception is met. Under that exception, the Sherman Act applies to non-import trade or commerce with foreign nations when the foreign conduct both has a “direct, substantial and reasonably foreseeable” effect on US commerce and gives rise to an antitrust claim.

Jurisdictional or element of a claim?

Notorious for its awkward wording, the FTAIA has spawned considerable litigation over its scope, including whether the FTAIA established prerequisites for subject matter jurisdiction or simply set out an element of an antitrust claim.

On July 10, 2014, just weeks after the 7th Circuit’s decision in *Motorola Mobility LLC v. AU Optronics Corp.* and the 2nd Circuit’s opinion in *Lotes Co. Ltd. v. Hon Hai Precision Industry Co. Ltd.*, the 9th Circuit quelled this point of contention in *United States v. AU Optronics (AUO)*, joining the 2nd, 3rd and 7th Circuits—and ending a Circuit split—in holding that the FTAIA sets out substantive elements of a plaintiff’s antitrust claim and does not go to the district court’s subject matter jurisdiction. This is an important distinction, as subject matter jurisdiction can be challenged at the outset of a case before the expense and burden of full-fledged discovery, whereas the substantive elements of a claim generally are difficult to

challenge before summary judgment, when the parties have the benefit of a complete discovery record.

The *AUO* defendants appealed their convictions for fixing prices of TFT-LDC panels that were both imported into the US and sold to foreign third parties and incorporated into finished products (such as computer monitors) before being imported into the US. The 9th Circuit, like the 2nd and 7th Circuits, held that foreign anticompetitive conduct is per se illegal (not subject to the rule of reason analysis) and upheld the convictions based solely on the imported goods sold to customers in the US, on the grounds that the Sherman Act covers import trade; the FTAIA does not exclude it at all.

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Disagreement over proof of “domestic effects”

There remains, however, a Circuit split over the evidence necessary to fall within the “domestic effects” exception to the FTAIA. In *AUO*, the 9th Circuit left intact its decision in *United States v. LSL Biotechnologies* on the “domestic effects” exception of the FTAIA, defining “direct” effect on US commerce as one that “follows as an immediate consequence of the defendant[s] activity.” This “immediate consequence” standard is stricter than the test adopted in the 7th Circuit in 2012 and 2nd Circuit in 2014, which held that “direct effect” means “a reasonably proximate causal nexus” between the conduct and the effect in the US. The 7th Circuit roundly criticized the 9th Circuit for imposing the idea of “immediate consequence” on top of the express language of the FTAIA because it “comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA’s coverage.” Concluding that “direct” simply addresses “the classic concern about remoteness,” the 7th Circuit found it excludes from the reach of the Sherman Act “foreign activities that are too remote from the ultimate effects of US domestic or import commerce.”

In *Motorola Mobility*, a civil case against AUO involving the same TFT-LCD cartel, the 7th Circuit once again addressed—perhaps too hastily—the application of the “direct effects” prong of the FTAIA. While the 9th Circuit focused on AUO’s imports into the US, the 7th Circuit decided, without full briefing or oral argument, that AUO’s price fixing of panels it sold to Motorola’s foreign affiliates, which then incorporated the panels into cellphones Motorola ultimately imported into the US, did not have a “direct effect” on US commerce—with no mention of the “reasonably proximate causal nexus” standard previously articulated. Rather, the court found this conduct “closer to the situation” where the FTAIA would block liability because the foreign action “filter[ed] through many layers and finally cause[d] a few ripples in the [U.S.].” The 7th Circuit, however, recently vacated the opinion and will rehear the case, with full briefing and argument.

Observations

The determination that the FTAIA goes to the merits of a plaintiff's claims, not to a district court's jurisdiction, will directly impact defendants' ability to exit antitrust lawsuits early. Instead, assuming sufficient allegations of domestic effects, defendants may not be able to challenge the claim until summary judgment — after they have incurred the often substantial costs of discovery.

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Open questions also remain under the FTAIA that may impact future litigation involving foreign cartelists. The 9th Circuit *AUO* opinion left open two issues that could be determinative in future cartel matters arising out of foreign conduct. First, whether the import exclusion applies only where the defendant cartelists are directly involved in the imports, or are imports by customers or a third party sufficient? Second, whether the FTAIA reaches collusion in sales of components to customers outside the U.S. that were incorporated into finished products outside the US, then subsequently imported into the US—would such collusion have a “direct effect” on US commerce? Finally, the 9th Circuit may ultimately abandon its more stringent direct effects standard, as its rationale in *LSL* for adopting the narrower “immediate consequence” definition was closely intertwined with its holding that the FTAIA is jurisdictional, a holding now reversed. These issues are likely headed to the Supreme Court.

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