

MLex Ab Extra:

Foreign Trade Antitrust Improvement Act – recent developments

Sylvie Kern examines the Foreign Trade Antitrust Improvement Act, now a hot topic in US antitrust litigation



Sylvie Kern

Sylvie Kern, a San Francisco-based attorney, has represented plaintiffs and defendants in complex commercial litigation for more than 20 years. She focuses on international antitrust issues and currently represents indirect purchaser plaintiffs in a large federal class action alleging a global price-fixing conspiracy. Sylvie also consults on US antitrust litigation strategy.

MLex's online market intelligence services have become indispensable primary resources for anyone requiring reliable, comprehensive, real-time intelligence, commentary and analysis about the impact of European regulation on businesses around the world.

FOREIGN TRADE ANTITRUST IMPROVEMENT ACT – RECENT DEVELOPMENTS

Sylvie Kern examines the Foreign Trade Antitrust Improvement Act, now a hot topic in US antitrust litigation

The Foreign Trade Antitrust Improvement Act of 1982 (“FTAIA”), enacted by Congress to limit the reach of the Sherman Act, has after years of dormancy become a hot topic in US antitrust litigation. The reason lies in the increasing number of actions by foreign and/or US consumers alleging that global price-fixing conspiracies have caused them injury. Recent decisions interpreting the FTAIA have significant implications both for foreign plaintiffs seeking relief in US courts and for foreign defendants named in these antitrust lawsuits.

FTAIA provisions

Congress enacted the FTAIA in order to limit the application of the Sherman Act, the federal antitrust statutory scheme, to foreign commerce matters affecting the US economy. The FTAIA amends the Sherman Act to provide that conduct involving trade or commerce with foreign nations, other than import trade or import commerce (such as commerce involving a product or service brought into the United States from abroad), is not subject to the Sherman Act, unless it falls under what has been termed the “domestic exception.”¹

This domestic exception contains two provisions. First, under the “domestic effect” prong, the conduct involved must have a “direct, substantial, and reasonably foreseeable effect” on domestic commerce or on US exports. Second, under the “gives rise” prong, that effect must give rise to a Sherman Act claim.

In analysing whether the FTAIA permits a claim to go forward, the first line of inquiry is whether import trade or commerce

is involved; if so, the FTAIA does not come into play. If the challenged conduct involves other types of trade or commerce, that conduct is only subject to the Sherman Act if both prongs of the FTAIA are satisfied.

Recent decisions

Interpretation of the FTAIA’s provisions has generated a fair amount of case law, and that trend is likely to continue. Because of the globalisation of product manufacturing and sales, courts are being called upon to interpret and apply the FTAIA in increasingly complex, and novel, factual situations.

In a recent example involving the first or “domestic effect” prong, the district court addressed whether the FTAIA bars a federal antitrust action by direct purchasers alleging price-fixing of static random access memory (SRAM), where the SRAM was billed to a United States address but shipped to a foreign country. The court concluded that the geographic target of the alleged anticompetitive conduct is significant, and if that target is US commerce – which it was here – there is a domestic effect. Therefore, claims based on SRAM purchases billed to the US were not precluded by the FTAIA, even if the SRAM ended up elsewhere.

Separate claims for damages based on indirect SRAM purchases (that is, purchases in the US of finished products containing SRAM, where the SRAM was originally sold to a customer in a foreign country) were subject to a stricter test. They could go forward only if the indirect purchasers could show that certain SRAM products were specifically designed for sale to a particular manufacturer, for incorporation into a

product specifically designed for sale in the US market, and then actually sold in the US. The court required the plaintiffs to segregate foreign transactions with a domestic effect from those without.²

The second, “gives rise” prong, particularly relevant to foreign plaintiffs seeking to sue in US courts, has received the most attention. In *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (“*Empagran P*”), the United States Supreme Court resolved a conflict among circuits on whether the effect of the price-fixing conduct must give rise to the plaintiff’s specific claim, or merely to “a” Sherman Act claim in general (a claim by any injured domestic customer). In that case, foreign vitamin purchasers alleged a global price-fixing conspiracy where the price-fixing conduct affected customers both inside and outside the US, but the plaintiffs’ foreign injury was independent of the domestic US harm. The Court held that the effect of the conduct must give rise to the plaintiffs’ own claim.

The *Empagran I* plaintiffs alternatively argued that a link existed between the domestic effects of the anticompetitive conduct alleged and their foreign injury—that “but for” higher prices in the US, the sellers could not have maintained a global price-fixing scheme and the foreign plaintiffs would not have been injured. Significantly, *Empagran I* did not decide whether this “but for” test satisfied the “gives rise” prong; the issue was tossed back to the lower court for further proceedings.

On remand, in *Empagran II*, the D.C. Circuit Court of Appeals rejected “but for” in favour of a stricter “proximate cause” (legal cause) standard.³ This is a difficult test to satisfy because it requires plaintiffs to establish that the domestic harm from the price-fixing conduct, rather than the conduct itself, caused their foreign injury. Other courts, mindful of comity considerations (i.e. respect for the laws of other countries) and perhaps also reluctant to open the litigation floodgates, have followed suit. The Ninth Circuit Court of Appeals, for example, recently held that allegations of a mere correlation between US and foreign prices, and allegations of market interdependence, are both legally insufficient.⁴ As one of the judges observed, it is reasonably foreseeable that price-fixing in the US would affect consumers in the US and elsewhere. However, because the economic interests of foreign consumers are normally not what US law is intended to protect, it is difficult to persuade courts that price-fixing in the US has caused those consumers’ injury. Thus, “[l]ocation, not logic,” keeps foreign consumers out of court.⁵

Many class actions resting on global price-fixing allegations have since been dismissed, because claims of arbitrage or price

correlation have been held insufficient to establish proximate cause. A recent action by a US-based company alleging that products purchased abroad by its foreign subsidiaries and later shipped to the US were purchased at artificially high levels also has incurred dismissal. The district court rejected the company’s “single enterprise” theory based on a global procurement strategy. It further rejected the argument that the company’s foreign subsidiaries had acted as its agents; the company could not show that the purchases by the subsidiaries had been made on its behalf.⁶

Trends and unresolved issues

Cartel activity

We are likely to see more variations on the global conspiracy theme in the future – more price-fixing cases involving product components manufactured in foreign countries and then sold as part of a finished product in the US, or involving sales to foreign subsidiaries of US companies. Parties will continue to test the legal boundaries of the FTAIA, and resolution of these cases will be highly fact-specific.

For example, foreign plaintiffs challenging international cartel activity may renew the argument that the FTAIA does not

bar their claim if their alleged injury is inseparable from the domestic (US) injury. Although courts have often rejected such arguments, the Supreme Court has yet to speak to this issue. *Empagran I*, as noted, only addressed claims of wholly independent foreign injury: “We conclude that the [FTAIA] exception does not apply where the plaintiff’s claim rests solely on the independent foreign harm.”⁷ The Court expressly distinguished case

law involving foreign injury “inextricably bound up with . . . domestic restraints of trade,” and thus not “dependent upon” domestic harm.⁸ Nor has the Supreme Court yet decided whether proximate cause is the correct standard for purposes of the “gives rise” prong.

Plaintiffs may also ask courts to consider cartel activity and comity concerns in light of the FTAIA’s legislative history. The House Report explicitly addresses – and rejects – the possibility that the legislation might be misinterpreted as approval of international cartel activity, especially when it involves US firms. “Any major activities of an international cartel would likely have the requisite impact on United States commerce,” and creation of global shortages or artificially-inflated global prices that had the effect of raising domestic prices ultimately would have a “direct, substantial and reasonably foreseeable effect” on domestic commerce and thus fall within the reach of US laws.⁹

Parties will continue to test the legal boundaries of the FTAIA, and resolution of these cases will be highly fact-specific

AB EXTRA – FOREIGN TRADE ANTITRUST IMPROVEMENT ACT

The legislative history also establishes that Congress did not intend to prohibit all foreign claims against global cartel activity. The House Report acknowledges the right of foreigners to sue in the US “when the conduct in question has a substantial nexus to this country.”¹⁰ While the domestic effect must also be the basis for the alleged injury alleged, this does not mean that the plaintiff’s injury must occur within the United States: “It is sufficient that the conduct providing the basis of the claim has had the requisite impact” on domestic commerce.”¹¹

Jurisdiction

Finally, a separate unresolved issue concerns whether the FTAIA is a jurisdictional statute (whether federal courts have jurisdiction to hear cases), or whether it merely adds substantive elements of the antitrust claim. This is an important question because the strategy of foreign defendants often is to move for dismissal, early on in the proceedings, for lack of subject-matter jurisdiction under the FTAIA. That strategy can confer important advantages. For example, unlike other motions to dismiss, a factual attack on subject matter jurisdiction permits the court to consider extrinsic evidence and to resolve factual disputes; further, the plaintiff bears the burden of proof. Even if defendants do not prevail, subject-matter jurisdiction may be raised at any time during the course of the action, and even by the court itself, so the spectre of dismissal always looms.

Although Congress apparently intended to affect subject-matter

jurisdiction when it enacted the FTAIA,¹² the actual language of the statute contains no express jurisdictional limitations and its provisions are separate from those granting jurisdiction. The Supreme Court has recently held that statutory requirements are jurisdictional only if the statute “clearly states” that they are, otherwise they define the substantive elements of the claim.¹³ For that reason, recent decisions strongly suggest that the FTAIA provisions are substantive rather than jurisdictional.¹⁴ Should courts conclude that the FTAIA provisions are indeed substantive, dismissals under the FTAIA are likely to occur, if at all, during the merits stage of proceedings rather than at an earlier stage.

Conclusion

The FTAIA has become increasingly important in the litigation of antitrust actions targeting international cartel activity. To date, defendants have had substantial success in obtaining dismissals under its provisions. Nonetheless, the parameters of the statute have not yet been fully established, and plaintiffs may still score some victories. ■

Sylvie Kern, a San Francisco-based attorney, represents plaintiffs and defendants in complex commercial litigation. She focuses on international antitrust issues and currently represents indirect purchaser plaintiffs in a large federal class action alleging a global price-fixing conspiracy.

Footnotes

- 1 The FTAIA provides that the Sherman Act: “shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade and 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 [the Sherman Act] other than this section.” 15 U.S.C. § 6a, amending the Sherman Act, 15 U.S.C. §§ 1-7.
- 2 See *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819 CW (N.D. Cal.), December 31, 2010 Order, pp. 11-17.
- 3 See *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).
- 4 See *In re DRAM Antitrust Litig.*, 546 F.3d 981, 990 (9th Cir. 2008). There, a British computer manufacturer sued American and foreign manufacturers and sellers of DRAM (dynamic random access memory). The plaintiff sufficiently alleged that the defendants’ conduct created a domestic effect, but could not show that this effect proximately caused the injury alleged.

- 5 *Id.* at 991 (Noonan, J. concurring).
- 6 See *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1185-89 (N.D. Cal. 2009).
- 7 *Empagran I*, 542 U.S. at 159 (emphasis added).
- 8 *Id.* at 171-72 (emphasis in original).
- 9 H.R. Rep. No. 97-686 (1982), as reprinted in 1982 U.S.C.C.A.N. 2487, at 2498.
- 10 *Id.* at 2495.
- 11 *Id.* at 2497.
- 12 *Id.* at 2496 (“This bill only establishes the standards necessary for assertion of United States antitrust jurisdiction. The substantive antitrust issues on the merits of the plaintiffs’ claim would remain unchanged.”).
- 13 See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006); *Reed Elsevier Inc. v. Muchnick*, 130 S.Ct. 1237, 1243-44 (2010).
- 14 See, e.g., *Litcubes, LLC v. Northern Lights Products, Inc.*, 523 F.3d 1353, 1365 (Fed. Cir. 2008); *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 243 n.6 (S.D.N.Y. 2008).