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7th Circ. Boosts DOJ's Leverage In Foreign Cartel Crackdowns

By **Melissa Lipman**

Law360, New York (June 28, 2012, 9:37 PM ET) -- The Seventh Circuit backed the U.S. Department of Justice's more expansive view of the foreign reach of federal antitrust laws Wednesday, giving the watchdog more leverage as it pursues its probes of international cartels, including its record-breaking auto parts investigation, attorneys say.

In an en banc ruling, the appeals court explicitly endorsed the regulator's take on a key section of the Foreign Trade Antitrust Improvements Act dealing with how "direct" of an effect foreign activities that don't relate to U.S. imports have to have on domestic commerce to still fall under the purview of U.S. antitrust laws. Coming from one of the nation's most respected and influential appeals courts, the opinion gives the DOJ a strong hand to play both in bringing cases over foreign conspiracies in the first place and in seeking higher cartel fines, experts said.

"This increases the already enormous bargaining power of the DOJ," said Briggs. "To the extent that you have imports that many people would say are indirect, but the DOJ says are direct and the DOJ is unwilling to negotiate ... the defendant will go to trial or pay a higher fine than he or she would have [before the ruling]."

At the heart of the case is the much-maligned FTAIA, which is, in the appraisal of the Third and Seventh circuits, an "awkwardly" and "inelegantly" phrased statute that uses convoluted language to keep U.S. antitrust laws from applying to trade that doesn't affect the country.

The ruling — which revived a putative class action accusing potash producers in Canada, Russia and Belarus of cutting production and coordinating prices — addressed a key question about how to interpret the FTAIA's exceptions, endorsing a more relaxed standard suggested by the DOJ and the Federal Trade Commission in an amicus brief and setting up a split with the Ninth Circuit in the process.

Under the law, conduct that is truly foreign must have "a direct, substantial and reasonably foreseeable effect" on U.S. domestic commerce, U.S. import commerce or U.S. export commerce for the Sherman Act and other federal antitrust statutes to apply, according to the Seventh Circuit. The "substantial" and "reasonably foreseeable" requirements are fairly straightforward, the appeals court said, but the question of just what Congress meant by "direct" has led to considerable debate.

The Ninth Circuit considered the question in 2004 and adopted the same definition that the U.S. Supreme Court used in interpreting the Foreign Sovereign Immunities Act more than a decade earlier, holding that an effect counts as "direct" if it "follows as an immediate consequence of the defendant's … activity." But the Seventh Circuit rejected that logic in favor of the definition the DOJ proposed in an amicus brief with the court that, under the FTAIA, "direct" means "a reasonably proximate causal nexus."

"We are persuaded that the Department of Justice's approach is more consistent with the language of the statute," U.S. Circuit Judge Diane Wood wrote for the court.

That ruling unquestionably puts the DOJ in a better position going forward when it comes to pursuing international cartel cases, an ever-growing portion of the Antitrust Division's enforcement efforts, attorneys said.

"That decision is only going to embolden the DOJ and FTC in international enforcement activities to have the court explicitly adopting their view," said Paul Hastings LLP partner Jeremy P. Evans. "It's going to strengthen the DOJ's argument that U.S. antitrust laws can reach overseas conduct even if the cartel participants may not have specifically had U.S. markets in mind."

Not only does the decision give the department something to cite in any FTAIA challenges in court; it also will make it easier for them both to bring cases and to exact bigger fines during the plea bargaining process, attorneys said.

"It could play at the very front end when the DOJ has initiated an investigation and the target company may be trying to dissuade the DOJ that they don't actually have the ability to see it through," said Skadden Arps Slate Meagher & Flom LLP counsel Tiffany Rider.

In particular, the department could gain leverage from the decision in deciding to pursue cases involving companies that operate almost completely outside of the U.S., according to Morgan Lewis & Bockius LLP partner J. Clayton Everett Jr.

The ruling may also afford the DOJ the chance to be more aggressive when it comes to negotiating just how big a fine a foreign defendant has to pay in order to settle criminal antitrust probes, attorneys said.

"This does come up in settlement discussions and … if it's easier for the DOJ to show that there's ... a direct effect on U.S. commerce, it gives them more leverage in negotiating settlement terms," Skadden partner Gary A. MacDonald said.

And once a company decides to pursue a plea deal, the key issue to negotiate with the DOJ is what the volume of commerce would be, according to Evans, because that figure allows the agency to exact fines above the $100 million maximum corporate fine under the Sherman Act.

"For companies raising FTAIA arguments ... when you have a decision by the Seventh Circuit that basically expands the scope ... on this, that's the point where it's really going to come into play," Evans said.

Though the DOJ always has taken a fairly aggressive position when it comes to negotiating fines, the agency now is likely to be even less interested in entertaining arguments that some sales should be excluded from the volume of commerce calculation, according to Evans.

"This will only just reinforce that and embolden them," Evans said. "They'll just cite this decision and say, 'Our view has been endorsed by the Seventh Circuit.'"

The additional leverage could prove particularly important in the DOJ's auto parts investigation, which officials have described as the division's largest-ever criminal probe, based on both its scope and the potential value of business affected by the alleged schemes.

The DOJ, as well as private plaintiffs pursuing follow-on damages cases for the conspiracies that already have been charged, is likely to point to the Seventh Circuit's decision in response to any FTAIA arguments defendants make to dismiss litigation, according to Evans.

"Presumably they're still further investigating this, and it will certainly ... strengthen their arguments in dealing with companies as to what counts as commerce when they do their volume of commerce calculations," Evans said.

The ruling also likely will encourage the DOJ and the plaintiffs bar to do a bit of forum-shopping when it comes to bringing antitrust cases that could raise FTAIA issues, attorneys said.

"If the conduct doesn't involve a domestic buyer ... the Seventh Circuit appears to encourage a practical review of the conduct that would capture a broader range of conduct than would be permitted in the Ninth Circuit," said Dickstein Shapiro LLP partner James Martin. "If I'm the government or a private plaintiff, I bring my international cases in the Seventh Circuit, not the Ninth."

While it's too soon to know whether the defendants in the Seventh Circuit case will ask the Supreme Court to hear the case, attorneys said the ruling clearly puts the Seventh Circuit in conflict with the Ninth.

"It expands pretty dramatically or at least potentially expands dramatically the extraterritorial scope of the Sherman Act," Everett said. "The standard that the agencies urged and the Seventh Circuit ultimately adopted — I'm not aware of that standard ... ever [being] applied by another U.S. court."

And even though the court adopted what attorneys described as a broad reading of the FTAIA exceptions, the fact that the ruling came from one of the circuit courts most respected for its antitrust expertise is likely to carry a lot of weight beyond the Seventh Circuit, attorneys said.

"The embrace of the Seventh Circuit en banc of that definition ... is really influential," Briggs said. "Unless the Supreme Court deals with the split in the circuits at some point, I think the Seventh Circuit view is likely to be the dominant view in the country outside the Ninth Circuit."

--Editing by Elizabeth Bowen and Richard McVay.