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The Sherman Act's Increasingly Long Arm

Law360, New York (April 11, 2012, 12:37 PM ET) -- As competition has become more global in nature, so too has the focus of U.S. antitrust enforcement. The U.S. Department of Justice's No. 1 enforcement priority is to discover, punish and deter international cartels that harm U.S. consumers. Private antitrust litigation in the United States is also increasingly focused on conduct straddling national borders.

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, limits the extraterritorial reach of the U.S. antitrust laws by excluding from its purview all foreign conduct except for conduct "involving" (1) "import commerce" and (2) commerce with a "direct, substantial and reasonably foreseeable effect" on domestic commerce, import commerce, or certain export commerce.

This statute's "convoluted language" and "awkward phrasing"[1] have become the focus of increasing litigation attention, with many questions regarding its interpretation and application bubbling their way through the courts. This creates considerable uncertainty for companies operating in the international marketplace and may ultimately need to be resolved by the U.S. Supreme Court.

Jurisdictional or Substantive?

The FTAIA has historically been considered a jurisdictional statute imposing limits on the subject matter jurisdiction of the U.S. courts to consider claims involving non-U.S. commerce. That designation provides significant advantages for companies defending Sherman Antitrust Act claims — allowing earlier resolution of FTAIA issues based on the court's analysis of actual evidence, rather than mere allegations, and requiring plaintiffs to bear the burden of establishing that the courts can entertain foreign commerce antitrust claims.

However, several district courts have recently ruled that the FTAIA is nonjurisdictional, holding that the FTAIA instead serves to outline the elements of a Sherman Act claim involving foreign commerce. On Aug. 17, 2011, the U.S. Court of Appeals for the Third Circuit became the first circuit to hold that the FTAIA is a substantive limitation.[2] Defendants petitioned the U.S. Supreme Court for certiorari on this point but their petitions were denied on March 19, 2012.[3]

The same jurisdictional/substantive question was presented to the Seventh Circuit in Minn-Chem Inc. v. Agrium, Inc.,[4] but the original panel sidestepped the issue, electing instead to deal with the FTAIA's "import commerce" and "effects" exceptions. The entire Seventh Circuit reheard Minn-Chem on Feb. 8, 2012, and if the court sticks with precedent it could set the stage for a clear circuit split, prompting the Supreme Court to weigh in sooner rather than later to resolve this issue.

What Conduct "Involves" Import Commerce?

The FTAIA does not bar Sherman Act claims that "involve import commerce." Several courts have recently been asked to consider what sort of "involvement" with import commerce is sufficient. The Third Circuit in Animal Science Products rejected the notion that the "import commerce" exception is limited to physical importers of goods. The court defined conduct "involving import commerce" as conduct "directed at" or "targeted at" the U.S. import market. Although the original Minn-Chem Seventh Circuit panel agreed with this approach, neither court gave clear guidance on how to apply this standard. Is a subjective intent to harm the U.S. import market required?

Or is it sufficient to allege a global conspiracy to fix prices or set production limits that had as a consequence (as opposed to its focus or target) higher U.S. import prices? The DOJ's view is that the FTAIA does not require a subjective intent to harm U.S. import commerce and that a price-fixing conspiracy involves U.S. import commerce even "if the conspirators set prices for products sold around the world (so long as the agreement includes products sold into the United States) and even if only a relatively small proportion or dollar amount of the pricefixed goods were sold into the United States."[5]

Courts have also been asked to construe the import commerce exception in the air transportation sector. In re Air Cargo Shipping Services Antitrust Litigation,[6] the issue was whether the alleged price fixing of cargo transportation services to the United States "involved import commerce" even if the services were reserved and paid for outside the United States. The district court concluded the defendants' alleged conduct was inseparably connected to commerce in imported goods because it was targeted directly at airfreight, a channel of import commerce.

Other district courts presented with similar allegations but for passenger fares have held that these claims do not "involve import commerce" because the transportation of people is not tantamount to importing of people. The en banc panel of the Seventh Circuit is also expected to address this issue in its reconsideration of the Minn-Chem case.

How "Direct" Is "Direct"?

The FTAIA permits application of the Sherman Act to conduct involving nonimport foreign commerce if the same conduct causes "direct, substantial, and reasonably foreseeable" effects on U.S. commerce. Among the other issues being considered by the Seventh Circuit in Minn-Chem is how "direct" the effects on U.S. commerce must be to trigger this exception. Defendants in the case argued that "direct effects" in the statute means effects arising as "an immediate consequence" of foreign anti-competitive conduct.

The original Minn-Chem panel accepted that position, which was also the standard adopted by the Ninth Circuit in United States v. LSL Biotechnologies.[7] In contrast, the DOJ would define "direct" as "reasonably proximate."[8] Its position is that the Sherman Act should apply to foreign anti-competitive conduct involving sales of component parts outside the United States if the parts are incorporated into finished products sold in the United States. This view is reflected in the agency's recent criminal enforcement actions targeting the electronic components and auto part industries.

Conclusion

In the current environment, foreign companies involved in the manufacture or distribution of products outside the United States can no longer assume that the U.S. antitrust laws do not apply to their activities. This is presently an evolving area of the law with substantial uncertainty. It will take time for these issues to be sorted out in the courts and for clarity to emerge regarding the extraterritorial reach of the U.S. antitrust laws. Until then, a case-by-case analysis will be required to properly assess foreign companies' potential exposure to criminal penalties (significant fines and jail sentences) and civil treble damages for violations of the U.S. antitrust laws.

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[1] Turicentro SA v. Am. Airlines Inc., 303 F.3d 293, 300 (3d Cir. 2002); and Minn-Chem Inc. v. Agrium Inc., No. 10-1712, 2011 U.S. App. LEXIS 19433, at *17 (7th Cir. Sept. 23, 2011).

[2] Animal Science Products Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).

[3] China Minmetals Corporation, et al. v. Animal Science Products Inc., et al., No. 11-846, U.S. Sup.; Sinosteel Corporation, et al. v. Animal Science Products Inc., et al., No. 11-847, U.S. Sup.

[4] 2011 U.S. App. LEXIS 19433.

[5] Minn-Chem Inc. v. Agrium Inc., No. 10-1712, Brief for the United States and the Federal Trade Commission as amici curiae in support of neither party on rehearing en banc (Jan. 12, 2012), at pp. 19.

[6] Case No.06-cv-1775(JG) (VVP) (E.D.N.Y. Sept. 26, 2008).

[7] 379 F.3d 672 (9th Cir. 2004).

[8] See also In re TFT-LCD (Flat Panel) Antitrust Litig., MDL No. 1827, 2011 U.S. Dist. LEXIS 115212 (N.D. Cal. Oct. 5, 2011), holding in an indirect purchaser action that an effect was direct enough and an "immediate consequence" of the defendants conduct if the "nature of the effect" on U.S. consumers was the same as the effect on foreign commerce in "upstream" transactions.