Outside Counsel

Extra-Territorial Reach of U.S. Antitrust Laws to Foreign Firms

BY PAUL M. KAPLAN

This paper will examine the decision of the U.S. Supreme Court in F. Hoffman-LaRoche Ltd. v. Empagran SA, which based its decision on the application of the Foreign Trade Antitrust Improvements Act of 1982 (the FTAIA) to "vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador." Id. at 159.


Discussion

‘F. Hoffman-LaRoche Ltd. v. Empagran SA.’ In interpreting the reach of the FTAIA, which was intended to limit the Sherman Act as applied to foreign commerce, the Supreme Court concluded that, “a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.” F. Hoffman-LaRoche at 159.

The anticompetitive effects from business arrangements adversely impacting foreign markets was not the concern of the Sherman Act—as long as such arrangements had no domestic consequences. In citing to a U.S. House of Representatives Report, the Court observed that the FTAIA “removed[] from the Sherman Act’s reach, (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities in the United States.” Id. at 161.

The FTAIA sets forth the general rule of 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 the antitrust laws considers harmful, i.e., the “effect” must “give[] rise to a Sherman Act claim.” Id. at 162 citing 15 USC §6a(1), (2).

According to Professor Hovenkamp, courts interpreting this poorly worded statute have generally required the plaintiff to show an injury, not merely to the plaintiff itself, but also to the trade or commerce of the United States. Read together, §§(1) and (2) mean that the requisite effect must be one of the following:

(1) an American domestic market;
(2) a market for importing goods into the United States;
(3) a market for exporting goods from the United States but only if the injury occurs to the exporting business within the United States.

The plaintiffs brought a class action suit on behalf of foreign and domestic purchasers of vitamins claiming that the foreign and domestic vitamin manufacturers and distributors engaged in a price fixing conspiracy in violation of §1 of the Sherman Act and §§4 and 16 of the Clayton Act, which resulted in increased vitamin prices to customers in the United States and in foreign countries. The U.S. District Court for the District of Columbia dismissed plaintiffs’ claims finding that none of the FTAIA exceptions applied.7 F. Hoffman-LaRoche at 160. The U.S. Court of Appeals for the District of Columbia Circuit reversed, concluding that both the FTAIA’s general exclusionary rule as well as the domestic-injury exception applied. Id. The court accepted certiorari based on a decision among the circuits about the application of the domestic exception contained in the FTAIA. Id. This division was reflected in the U.S. Court of Appeals for the Fifth Circuit, Den Norske Stats Oljeselskap As; in the U.S. Court of Appeals for the Second Circuit, Kruman; and, in the D.C. Circuit, Empagran.

By finding that the adverse foreign effect of the price-fixing conduct was independent of any adverse domestic effect, the court held that the domestic exception of the FTAIA was not applicable and, hence the Sherman Act did not apply.7 Id. at 164.

The court appeared to be perfectly content to extra-territorially apply U.S. antitrust laws where it was satisfied that it was necessary and reflective of a legislative effort “to redress domestic antitrust injury that foreign anticompetitive conduct has caused.” Id. at 165.

As a preface to this conclusion, the court observed that,

“[n]o one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive country….” Id.

The court is largely correct in noting the longstanding application of the antitrust laws to foreign anticompetitive conduct. In 1993, the Court applied the FTAIA to London reinsurers unlawfully conspiring to affect the U.S. insurance market, and in fact producing substantial effect. Hartford Fire Ins. Co. v. California, 509 US 764, 796 (1993).8

While not applying the FTAIA to the case at hand, the Court in 1986 in Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 US 574, 582 n. 6 (1986), did acknowledge that, “The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce.”

The conduct/effect dichotomy can be notably traced back to United States v. Aluminum Co. of America, 148 F2d 416, 443-444 (2d Cir. 1945), where the court concerned itself with the congressional intent to apply U.S. law to foreign conduct by noncitizens.

That being said, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law…. We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. (citations omitted). On the other hand, it is settled law …that any state may impose liabilities, even upon persons not

Paul M. Kaplan, a member of Sheppard, Mullin, Richter & Hampton, also is an adjunct professor of law at Fordham Law School. Disclosure: It should be noted that Sheppard Mullin was counsel to one of the defendants, Tanabe U.S.A. Inc. in ‘Empagran, S.A. v. F. Hoffman-LaRoche Ltd.,’ 542 US 155 (2004).
within its allegiance, for conduct outside its borders that has consequences within its borders which the state regards…]. Id. at 443.

It seems readily apparent that this analysis utilized by Judge Learned Hand in reversing the district court's decision dismissing the government's claim that Aluminum Company of America, (Alcoa) violated §2 of the Sherman Act and should be dissolved was the correct basis for the FTAIA. While acknowledging the decision of American Banana Co. v. United Fruit, 213 US 347 (1909), where Justice Oliver Wendell Holmes recognized the limitations of U.S. law in affirming the circuit court's dismissal of the case, Judge Hand had to be particularly aware of the repercussions that his decision would have on foreign trade at a time when the country engaged in a war for four years and World War II was fortunately nearing an end. Perhaps there was never a time like the 1930s-1940s when foreign conduct had such a decisive effect on the United States.

Reflective certainly of another era, the Court in the 1909 decision, American Banana Co., was duly deferential to the world order as it then existed. In interpreting the application of the Sherman Act to foreign conduct, the Court declined to extend the reach of the statute, declaring that "the act is done… The very meaning of sovereignty is that the decree of the sovereign makes law… A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." 213 US at 356-359.

While not exactly reflecting the conduct/effect division of the Alcoa case and its progeny, the Court in the America Banana Co. case demonstrated a deference to sovereign power regardless of its impact in the United States. And, perhaps more importantly, Justice Holmes was reflecting a time when the economic order, as it was, was dominated by Europe and the role of the United States was one of largely an upstart. It hardly could be appropriate for the U.S. to be so boldly applying its law abroad. Perhaps the British and the Germans might undertake such a task. After all, the Sherman Act had only been enforced for 19 years.

The 'Krumann' Case

On the other hand, in Krumann v. Christie's International PLC, the Second Circuit held that the FTAIA applied even where the foreign injury was independent of the domestic harm. This decision was reversed as a result of the F. Hoffman-LaRoche decision.

The 'HeereMac' Case

Similarly, in Den Norske Stats Oljeselskap, As v. HeereMac Vof, the Fifth Circuit dismissed the plaintiff's claim for lack of subject matter jurisdiction, holding that the plaintiff's injury did not arise from the required domestic harm. This decision was reversed as a result of the F. Hoffman-LaRoche decision.

Conclusion

The evolution of the domestic exception to the FTAIA appears to coincide with the historical trend in which the United States, generally and its economy's role in the global economy, specifically have increased and dominated over time. Nevertheless, it is important for foreign corporations to recognize that the U.S. antitrust laws could reach its activities when they export goods to the United States. Erring on the side of being overcautious and acting as if all of its commercial activities would be subject to U.S. antitrust scrutiny is always the more prudent course to follow. Consequently, establishing an antitrust audit followed with a compliance program is a more advisable course for foreign corporations conducting business in the United States.

While the Hoffman-LaRoche case represents the first time that the Supreme Court has attempted to untangle the rather complex meaning of the FTAIA, nevertheless the conduct/effect dichotomy still leaves much to be desired with regard to what factual cases will trigger its application.

Where the courts will take up the mantle and provide guidance to foreign corporations as to the meaning of the FTAIA on its business activities remains to be seen.

The Supreme Court's decision in Hoffman-LaRoche resolved some of the conflicts that were presented by the Krumann, Den Norske and the appellate decision of Hoffman-LaRoche.

Certainly, more issues remain to be resolved. Namely, what is the nature of the conduct abroad that must be asserted in order to satisfy the two-part test? And, what kind of effect on U.S. commerce must be shown to satisfy the second prong of this test? What is the nature of the market for which this test would be applied? Is there a threshold determination as to how large the market should be and what the litigants' share of that market might be? Will the Court provide any further guidance on the interconnection between the "domestic effect" requirement and the "giving rise to a Sherman Act Claim"?

Hopefully, the Supreme Court can divine Congress' intent from the FTAIA in subsequent cases without being accused of legislating from the bench.