Expansion in Global Reach of U.S. Antitrust Laws

Introduction

The U.S. Court of Appeals for the Seventh Circuit (the "Court") recently potentially expanded the extraterritorial reach of the U.S. antitrust laws. Its unanimous *en banc* decision in *Minn-Chem, Inc. v. Agrium Inc.* (7th Cir. 2012) may make it easier for the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC") and private litigants to challenge the conduct of foreign parties in foreign markets under the U.S. antitrust laws. The decision also creates and entrenches several circuit splits regarding the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), and thereby increases the likelihood that the Supreme Court will elect to weigh in on these questions.

The Case

The decision reviewed the dismissal of a putative class action complaint (the "Complaint") brought on behalf of U.S. purchasers of potash, a naturally occurring mineral used in agricultural fertilizers and other products, against various foreign producers of potash.

The Complaint alleged that the defendants formed a cartel to restrain global potash output in order to inflate prices. The defendants moved to dismiss under the FTAIA, which places certain limits on the extraterritorial reach of the U.S. antitrust laws.

The defendants' motion was originally denied by the United States District Court for the Northern District of Illinois, Eastern Division. A panel of the Seventh Circuit reversed. The Court then agreed to rehear the case *en banc*. On June 27, 2012, in a much-anticipated opinion by Judge Diane Wood, it upheld the District Court's denial.

Two Questions About the FTAIA

The decision resolved two important questions regarding the impact of the FTAIA: (1) whether it imposes a jurisdictional limit on the power of federal courts to hear antitrust cases involving foreign conduct; and (2) under what circumstances does foreign conduct have a sufficiently "direct" effect on U.S. domestic commerce to warrant scrutiny under the U.S. antitrust laws notwithstanding the limitations imposed by the FTAIA.

No Jurisdictional Limitation

With some important exceptions (discussed below), the FTAIA excludes foreign conduct from the scope of the U.S. antitrust laws.

Numerous federal courts have grappled with the question of whether the statute merely sets forth a substantive element of antitrust claims or instead imposes a jurisdictional limit on the power of federal courts to hear antitrust cases involving foreign conduct.

In an earlier case, the Seventh Circuit adopted the latter interpretation. *United Phosphorus v. Angus Chemical*, 322 F.3d 942, 952 (7th Cir. 2003). The D.C. Circuit and the Ninth Circuit reached the same conclusion. *Empagran SA v. F. Hoffmann-La Roche*, 417 F.3d 1267, 1269 (D.C. Cir. 2005); *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004).

However, citing a recent Supreme Court decision, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which emphasized the need to draw a careful distinction between jurisdictional limits and other types of rules, and pointing to the language of the statute and considerations of procedural soundness, the Seventh Circuit overturned its *United Phosphorus* decision. Going forward, this means that courts in the Seventh Circuit possess subject-matter jurisdiction to adjudicate antitrust cases involving foreign conduct. This is consistent with the position recently adopted in the Third Circuit. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011).

In practical terms, this means that defendants who wish to contest the propriety of claims involving foreign conduct must do so under Federal Rule of Civil Procedure 12(b)(6) and may not rely on Rule 12(b)(1). This may disadvantage defendants in several respects: unlike motions for lack of subject-matter jurisdiction under 12(b)(1), a motion under 12(b)(6) must be brought early (at or before trial). In addition, and again unlike motions under 12(b)(1), the burden lies with the defendant, and the court is required to assume the truth of the factual allegations in the complaint.

"Direct" Effects

The limitation imposed by the FTAIA on extraterritorial application of the U.S. antitrust laws is not absolute. Notwithstanding the FTAIA, foreign conduct is governed by the U.S. antitrust laws if it "involv[es] . . . import trade or import commerce" or "has a direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import or export commerce.

The Seventh Circuit concluded that much of the price-inflating conduct allegedly undertaken by the alleged cartel members fell squarely within the scope of the first exclusion—conduct "involving trade or import commerce"—and was therefore plainly subject to the U.S. antitrust laws. It found that this was the case because many of the cartel members entered into direct import transactions with the U.S. plaintiffs.

More complicated, however, was the position of cartel members who did not sell directly into the U.S. but who nonetheless allegedly engaged in conduct (*e.g.*, setting benchmark prices in foreign markets) that contributed to price inflation that allegedly ultimately impacted plaintiffs.

The Court considered whether such conduct fell within the scope of the second exclusion—foreign conduct that "has a direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import or export commerce.

It concluded that it did, and in so doing clarified the scope of the exclusion, in particular the requirement that the foreign conduct have a "direct" effect.

Paying close attention to the language of the statute, the Court rejected the Ninth Circuit's interpretation of that term in *LSL Biotechs.,* 379 F.3d at 680, according to which an effect is "direct" only if it is an "immediate consequence" of a defendant's conduct. Instead, the Court adopted the looser interpretation advanced by the DOJ in its *amicus* brief, according to which an effect is "direct" so long as there exists "a reasonably proximate causal nexus" to defendant's conduct.

Using this interpretation, the causal link between the foreign conduct and the effect need not be entirely pure and unbroken for the conduct to be subject to U.S. antitrust laws. This holding therefore likely expands, at least in the Seventh Circuit, the reach of the U.S. antitrust laws to a wider range of foreign conduct than had previously been the case.

Discussion

The FTAIA has been an important tool for companies seeking to limit liability for conduct that takes place abroad.

Both of the Seventh Circuit's main holdings—that the FTAIA does not impose a jurisdictional limit on the power of federal courts, and that the conduct of a foreign party in a foreign market may be subject to the U.S. antitrust laws if a plaintiff can demonstrate "a reasonably proximate causal nexus" to effects in the U.S.—may have significant consequences for companies engaged in business in foreign markets.

The decision may encourage the DOJ, FTC and private litigants to challenge more foreign conduct. It may also make it easier for plaintiffs to survive motions to dismiss and may therefore increase their leverage in settlement negotiations.

It is not yet known whether the defendants will seek cert. in the Supreme Court. The existence of circuit splits on both of the main holdings in the case increases the likelihood that the Supreme Court may wish to weigh in on the proper interpretation of the FTAIA.

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