No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

_____

MOTOROLA MOBILITY LLC,
Plaintiff-Appellant ,

v.

AU OPTRONICS CORP., et al.,
Defendants-Appellees.

_____

On Interlocutory Appeal from an Order of the

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FOREIGN STATUTES

INTRODUCTION

On June 2, 2014, this Court requested that the United States share its views "concerning the potential impact on U.S. foreign commercial relations, and on U.S. foreign relations more

its own commercial affairs," courts have "long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused." F. Hoffmann-LaRoche Ltd. v. Empagran S.A. , 542 U.S. 155, 165 (2004).

Section 6a guards against unreasonable interference by "lay[ing] down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act's reach,"[1] and then "bring[ing] such conduct back within the Sherman Act's reach" only when the two requirements of the section's effects exception are met.Id. at 162. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce. 15 U.S.C. § 6a(1). Second, the "effect" must "giv[e] rise to a [Sherman Act] claim." Id. § 6a(2). Section 6a thus makes the Sherman Act inapplicable to conduct involving non-import foreign commerce whose effect on the United States is highly attenuated, insignificant, or unpredictable and separately limits the class of claims and plaintiffs that may recover for injuries depending on the connection between those injuries and the requisite U.S. effect.

In this case, the Japanese Ministry of Economy, Trade and Industry (METI), the

unreasonably interfere with sovereign authority and violate fundamental principles of international law"); [2] MEA Letter 1 ("unduly expansive extraterritorial application of U.S. law would undermine principles of international comity"); KFTC Br. 1 ("unduly expansive application of the U.S. antitrust laws, if adopted by this Court, could create

jurisdictions. The panel decision suggests that defendants' conduct could not possibly

In any event, the panel's concern over international friction is unwarranted because the panel's view of the direct effect requirement is not necessary to avoid harm to the United States' general or co

ed. 2013). Thus, as this Court noted in Minn-Chem , the price fixers' host countries "often have no incentive" to enforce their antitrust laws and "would logically be pleased to reap economic rents from other countries." 683 F.3d at 860. If a country cannot redress injury to its consumers from foreign cartels, that victimization of its consumers could become a source of tension with the countries of conspiring sellers.

It is not surprising then that the extraterritorial application of antitrust laws on the

on the WTO Consistency of Trade Policies by Major Trading Partners 639, available at http://www.meti.go.jp/english/report/down loadfiles/2013WTO/02_14_reference.pdf. [6]

Similarly, Korea's antitrust law has been amended to provide that it "shall apply to any extraterritorial conduct when it affects domestic market." Monopoly Regulation and Fair Trade Law art. 2-2, as translated at http://eng.ftc.go.kr/bbs.do?command=getList &type_cd=62&pageId=0401; see alsoKyung-Min Koh & Jung-Won Hyun, Competition Law in the Republic of Korea 29 (2011). A former Secretary-General of the Korean Fair

electrode producers for cartel activity outside Korea that adversely affected Korean commerce. SeeHur, supra, at 184-86.

The practice and views of other jurisdictions also undermine the Korean Commission's assertion. For instance, the European Union finds the application of its antitrust laws to conduct involving sales outside Europe "justified under public international law" when that conduct has an "immediate, substantial, and foreseeable effect" in Europe. Case T-286/09, Intel Corp. v. Comm'n ¶¶ 231, 233-36, 243-44, http://curia.europa.eu/juris/document/document.jsf?text=&docid=153543&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=340077 (Gen. Ct. June 12, 2014) (citing Case T 102/96 Gencor v. Comm'n [1999] ECR II

In light of the widespread antitrust law and practice in foreign jurisdictions, as well as the effects exception's "gives rise to" requirement limiting redress to claims arising out of the effect on U.S. domestic and import commerce, a decision holding that defendants' LCD price-fixing conspiracy had a direct effect on that commerce should not adversely impact U.S. foreign relations, including foreign commercial relations. Indeed, the United States has criminally prosecuted several foreign defendants for fixing the price of LCD panels manufactured abroad, based in part on effects of that price fixing on import commerce in products incorporating those LCD panels. As explained in the May 19, 2014 letter from the Solicitor General, we are not aware of any instance in which a foreign government has expressed disapproval of those prosecutions to any official of the United States, despite regular consultations between officials of the U.S. antitrust agencies and their foreign counterparts. The United States carefully considers international comity and exercises prudence before bringing any antitrust enforcement actions that might implicate the interests of a foreign jurisdiction. See Empagran, 542

2. "Gives Rise To" Requirement. Even when conduct involving wholly foreign commerce has the requisite effect on U.S. commerce, a plaintiff also must show that the effect on U.S. commerce "gives rise to" the claim at issue. 15 U.S.C. § 6a(2); Empagran, 542 U.S. at 174-75. This requirement serves two functions. It ensures that the effect on U.S. commerce is "an adverse (as opposed to a beneficial) effect." Empagran, 542 U.S. at 174 (citing H.R. Rep. No. 97-686, at 11, reprinted in 1982 U.S.C.C.A.N. 2487, 2496). It also ensures that the plaintiff's injury is sufficiently related to that domestic effect so that its redress furthers "the FTAIA's basic intent" consistent with considerations of "comity and history." Id.

The way this requirement limits private plaintiffs' damages claims has garnered significant attention from foreign governments. For example, it was the focus of the Brief of the Government of Japan in Empagran, which the Japanese Ministry of Economy, Trade and Industry resubmitted to the district court in this case. There, Japan expressed its concern that Japanese companies not be subject to claims by "private foreign plaintiffs who purchased vitamins from Petitioners only in foreign markets and are now seeking treble damages in private lawsuits filed in United States" for such foreign purchases. Brief of the Government of Japan in Support of Petitioners at 1, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724); see id. at 8-9; Brief for Government of Federal Republic of Germany and Belgium As Amici Curiae Supporting Petitioners at 2-3,

foreign plaintiffs—whose injuries were sustained in transactions entirely outside United States commerce—seeking treble damages in private lawsuits against German [and Belgian] companies"), available at 2004 WL 226388 (Feb. 3, 2004).

The United States took the view in Empagran that allowing foreign plaintiffs to seek damages for independently caused foreign harm would "open United States courts to suits that are strikingly localized to foreign countries"—a result "Congress could not have intended." Brief for the United States as Amicus Curiae Supporting Petitioners at 12, F. Hoffmann-La Roche Ltd. v. Empagran S.A. , 542 U.S. 155 (2004) (No. 03-724), available at http://www.justice.gov/osg/briefs/2003/3mer/1ami/2003-0724.mer.ami.pdf.

The Supreme Court agreed that "Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach." Empagran , 542 U.S. at 173. No case prior to the FTAIA had applied the Sherman Act to allow foreign plaintiffs to recover for "foreign injury" caused by "foreign anticompetitive conduct" producing both "an adverse domestic effect" and "an independent foreign effect giving rise to the claim." Id. at 158-59. And the FTAIA did not expand the Sherman Act's reach.Id. at 169-73. Consistent with the pre-FTAIA understanding that the antitrust laws "redress domestic antitrust injury that foreign anticompetitive conduct has caused," and with "principles of prescriptive comity," the Court explained, the term "gives rise to a claim" must mean gives rise to "the 'plaintiff's claim' or 'the claim at issue.'" Id.

leniency program and thus not help protect U.S. consumers.[8] While the potential liability for treble damages would greatly expand, overall deterrence would be undermined because price fixers would be discouraged from applying to the leniency program and thus from exposing cartels in the first place. U.S. Empagran Br. 5, 21.

Here, the Korea Fair Trade Commission also expresses a concern about its own leniency program, contending that, under Motorola's expansive view of the U.S. antitrust laws, companies would be discouraged from applying to the KFTC leniency program because it would "result in a greater likelihood of facing private antitrust damages actions in the United States." KFTC Br. 4. The Commission's concern appears based on the prospect of a U.S. treble damages remedy—not on the potential for any damages, and it acknowledges its own damages remedy, KFTC Br. 3. But a qualifying leniency applicant in the United States only faces single damages based on the applicant's own affected commerce. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 § 213, Pub. L. No. 108–237, 118 Stat. 661, 666-67 (codified as amended at 15 U.S.C. § 1 note).

a valid concern—one the United States expressed in *Empagran*, see id. at 19-21. By contrast, to the extent the Commission's concern is premised on its program being undermined by the redress in U.S. courts of injury arising from U.S. effects, that premise would not provide a basis to change the balance struck by Congress in Section 6a. Moreover, in the United States' experience, the damages exposure price fixers face from claims with the requisite U.S. connection has not discouraged them from seeking leniency. If Motorola's claims have the requisite connection to U.S. effects, then U.S. law can be applied without undermining foreign leniency programs.

Some of Motorola's claims resemble the failed claims in *Empagran*, but others do not. *Empagran* involved "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." 542 U.S. at 159. Even though the conspiracy had an "adverse domestic effect" on domestic commerce and import commerce in vitamins, foreign purchasers could not recover for their independently caused foreign harm. Id. at 175. Motorola's claims based on purchases of LCD panels that never entered the United States, the so-called Category III claims, closely resemble the foreign purchasers' claims in *Empagran* because, in both cases, the product never entered the United States and any effect on U.S. commerce of the price fixing would likely be independent of those purchases.

Motorola's claims based on purchases of LCD panels that were incorporated into cellphones imported to and sold in United States, the so-called Category II claims, are quite different from the claims in *Empagran*. Contrary to defendants' suggestion, Resp. to Rehearing Pet. 5, *Empagran* does not require that a plaintiff suffer its injury in the United States. As the D.C. Circuit explained on remand in *Empagran*, that proposition

"has no support from the text of the statute" and is dispelled by the legislative history, which provides that the effects exception "'does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.'" Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. , 417 F.3d 1267, 1269 (D.C. Cir. 2005) (quoting H.R. Rep. No. 97-686, at 10).

Instead, the Supreme Court directed lower courts to distinguish claims arising from independent foreign injury—which are barred by the FTAIA—from claims sufficiently linked to the anticompetitive conduct's effects on U.S. commerce. Empagran , 542 U.S. at 175. In the proceedings on remand, Japan and other foreign governments acknowledged that the Supreme Court had "left open" the possibility that foreign plaintiffs could bring claims for foreign injury "in a narrow set of cases" in which those injuries were "'inextricably bound up with . . . domestic restraints of trade' and the plaintiff 'was injured . . . by reason of an alleged restraint of our domestic trade.'" Brief of the Federal Republic of Germany et al. as Amici Curiae in Support of Defendants-Appellees at 7, Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. , 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115).

while avoiding unreasonable interference with the regulation of foreign markets by other countries.

Respectfully submitted.

/s/ Nickolai G. Levin

MARY C. MCLEOD
Principal Deputy Legal Adviser
U.S. Department of State
Washington, D.C. 20520

KELLY R. WELSH
General Counsel
U.S. Department of Commerce
Washington, D.C. 20230

DAVID C. SHONKA
Acting General Counsel
JOHN F. DALY
Deputy General Counsel for Litigation
MARK S. HEGEDUS
Attorney
Office of the General Counsel
Federal Trade Commission
Washington, D.C. 20580

WILLIAM J. BAER
Assistant Attorney General
BRENT SNYDER
Deputy Assistant Attorney General
KRISTEN C. LIMARZI
JAMES J. FREDRICKS
NICKOLAI G. L

June 27, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 12-point Georgia font in text and the footnotes.

June 27, 2014 /s/ Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on June 27, 2014, I electronically filed the foregoing Supplemental Brief for the United States as Amicus Curiae with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send 30 copies to the Clerk of the Court by FedEx.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

June 27, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin