Prepare For Extraterritorial Enforcement Of US Antitrust Law

By **Michelle Freeman, David Hickerson and William McCaughey** (March 30, 2023)

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The U.S. Department of Justice recently reaffirmed its commitment to act decisively and to aggressively investigate and prosecute antitrust violations that affect consumers in the U.S.

President Joe Biden's budget proposal for fiscal year 2024 includes a historic increase of $100 million for the Antitrust Division over the 2023 enacted level. [1]

The additional funding will support DOJ efforts to ramp up enforcement. It carries potentially significant implications for foreign companies, particularly considering that, as of July 2021, of the 157 Sherman Act violations resulting in criminal fines and penalties of $10 million or more, 142 were violations involving international cartel activities.[2]

As part of its focus on antitrust, the Biden administration has also worked to improve cross-agency and cross-border collaboration and information sharing. Strengthening international partnerships has made extradition to the U.S. for antitrust violations a more viable threat and should be a real concern for individuals involved in global cartel activities as well.

Given the recent invigoration of U.S. antitrust enforcement, understanding the Foreign Trade Antitrust Improvements Act is vital. This article explores the key aspects of the FTAIA in order to help companies understand how and when foreign commerce could give rise to criminal antitrust liability in the U.S.

This article then discusses notable DOJ criminal antitrust investigations involving foreign conspiracies. Finally, this article considers what the changing views on extradition and cross-border collaboration may mean for international criminal antitrust enforcement going forward.

Overview of the Foreign Trade Antitrust Improvements Act

The FTAIA plays a pivotal role in international antitrust enforcement by limiting the application of U.S. antitrust laws on foreign trade. The FTAIA specifies that Sections 1 to 7 of the Sherman Act do not apply to conduct involving trade or commerce — excluding import trade or import commerce — with foreign nations unless:

> (1) Such conduct has a direct, substantial, and reasonably foreseeable effect —
>
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> >
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) Such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.[3]

Congress enacted the FTAIA to clarify the application of U.S. antitrust laws on foreign trade. But the statute has been heavily criticized for its convoluted language.

As noted by the U.S. Supreme Court in its 1993 Hartford Fire Insurance Co. v. California decision, "the FTAIA was intended to exempt from the Sherman Act export transactions that do not injure the United States economy."[4]

The FTAIA specifies that the Sherman Act cannot apply to foreign conduct unless the conduct (1) involves import trade or import commerce or (2) there is a direct, substantial and reasonably foreseeable effect on commerce in the U.S. and the defendant's conduct gives rise to a Sherman Act claim.[5]

The FTAIA's restrictions apply to all sections of the Sherman Act.[6] Thus, the FTAIA serves to restrict the DOJ's ability to pursue civil or criminal actions against certain foreign conduct and conspiracies.

The two exceptions to the FTAIA's limitations are known as (1) the import commerce exception; and (2) the effects exception. Under the import commerce exception, the Sherman Act applies where the alleged anti-competitive conduct is directed at import trade and import commerce. A party's conduct can fall under the import commerce exception even if the party does not act as an importer itself.[7]

Under the effects exception, the Sherman Act applies to alleged anti-competitive conduct if there is a direct, substantial and reasonably foreseeable effect on U.S. commerce. "Reasonably foreseeable" is an objective standard. The substantial effect does not need to be quantified or to meet some particular threshold.

There remains uncertainty among courts on the scope of the import commerce exception, what qualifies as "direct" for purposes of the effects exception, whether the FTAIA is a limit on jurisdiction or on merits, and how much of the conduct must have occurred in the U.S.

Import Commerce

Courts do not agree on what qualifies as "import commerce" under the FTAIA beyond the classic situation where two companies conspire overseas and then one of the companies sells its product directly to a purchaser in the U.S.

In its 2019 decision in Biocad JSC v. F. Hoffman-La Roche, the U.S. Court of Appeals for the Second Circuit considered whether alleged price fixing in a foreign market to prevent a pharmaceutical company's entrance into the U.S. would be considered import commerce for purposes of the FTAIA.[8]

While the Second Circuit held that it would be too broad to read the FTAIA as applying to actions taken abroad that may have the intent to affect domestic imports without evidence of some actual effect on U.S. commerce, this case illustrates how difficult it can be to draw lines under the FTAIA's exceptions.

Direct Effects Test

Additionally, there is no consensus regarding how direct the nexus must be between the foreign action and the effect on U.S. commerce to qualify under the FTAIA's exceptions.

The U.S. Court of Appeals for the Ninth Circuit uses an "immediate consequence" standard, taking guidance from the Supreme Court's interpretation of parallel language — "causes a direct effect in the United States" — in the Foreign Sovereign Immunities Act, or FSIA.

In its 2004 decision in U.S. v. LSL Biotechnologies, the Ninth Circuit ruled that a direct effect is one that "follows an immediate consequence of the defendant's activity." The court held that a direct effect is not one that merely has the possibility of delaying a product innovation or market entry, nor is it an effect stemming from a contract clause that allows a company to charge American consumers more, absent evidence that prices were in fact inflated.

Under the Ninth Circuit's ruling, if the court finds there are "uncertain intervening developments" between the action and the effect, then the domestic effects provision of the FTAIA is not satisfied.[9]

By comparison, the Second Circuit and the U.S. Court of Appeals for the Seventh Circuit, as well as the DOJ, have adopted a "reasonably proximate cause" standard.[10]

In its 2012 decision in Minn-Chem Inc. v. Agrium Inc., the Seventh Circuit disagreed with analogizing the FSIA to the FTAIA because, unlike in the FSIA, the words "substantial" and "foreseeable" are written into the FTAIA expressly, illustrating congressional intent to be less strict than the "immediate consequence" language of FSIA.

Instead, in the Second and Seventh Circuits' views, the FTAIA's standard indicates the intent to allow for a broader range of effects as long as the conduct at issue is not too remote.[11]

In its 2014 Lotes Co. v. Hon Hai Precision Industries. Co. decision, the Second Circuit added that the FTAIA's "direct effect" requirement is met even if the consequence is not immediate, so long as there is a "reasonably proximate causal nexus between the conduct and the effect."[12]

To illustrate the "reasonably proximate cause" standard, the Seventh Circuit in Minn-Chem found a reasonably proximate causal nexus to the U.S. where the defendants operated a "tight-knit global cartel ... that restrained global output of potash so that prices throughout [the] homogeneous world market would remain artificially high."

The defendants in that case allegedly controlled approximately 90% of the global potash market, and the U.S. was one of the two largest potash-consuming nations in the world. The court found these facts to be compelling evidence that the defendants had satisfied the reasonably proximate cause standard.[13]

In contrast to the direct effects test, the substantial effect language of the FTAIA has tended to be less disputed. However, there is no statutory guidance or clear standard regarding

when an effect becomes substantial, making this yet another ambiguity in the FTAIA.[14]

Jurisdictional or Merits Question

Last, there is a circuit split regarding whether the FTAIA is an element of an antitrust claim or a jurisdictional requirement. This difference matters, because it determines whether the plaintiff or the defendant has the burden of proof in showing an exception to the FTAIA when filing a motion to dismiss.

If the FTAIA is a substantive element, then the burden of proof falls on the defendant; however, if the FTAIA is a jurisdictional requirement, then the burden of proof falls on the plaintiff.[15]

Taken together, these cases and questions demonstrate that the application of the FTAIA often involves a fact-intensive inquiry and that a particular case's outcome may depend on the forum in which it is decided.

Recent Criminal Antitrust Cases Involving Foreign Conspiracies

Despite the uncertainty created by the FTAIA, the DOJ has successfully prosecuted foreign antitrust conspiracies involving the automotive, manufacturing, defense and other industries. The auto parts antitrust investigations are notable examples of the DOJ targeting foreign antitrust conspiracies.

As a result of these investigations, over 100 companies and executives were charged, over $2.9 billion in criminal fines were imposed, and more than 30 foreign executives were sentenced to prison terms.[16] Cases relating to these investigations were prosecuted by the DOJ as late as 2020.

Another example is the liquid crystal display, or LCD, panel investigation, which involved 30 individuals and companies and has led to approximately $2 billion in fines.[17] The conduct dates back to the early 2000s.[18]

One significant case from the LCD panel investigation is U.S. v. Hui Hsiung — a 2015 Ninth Circuit criminal price-fixing case.[19] When Taiwanese and Korean electronics manufacturers appealed their conviction for conspiring to fix prices, they argued that there was no direct import into the U.S. since the LCD panels were sold to third parties outside the United States.

The Ninth Circuit rejected this argument and affirmed the conviction, finding that the FTAIA's "domestic effects" threshold was satisfied based on the high volume of LCD panels sold to U.S. consumers.

The airline industry has also been the target of criminal antitrust enforcement by the DOJ. An international price-fixing investigation uncovered violations by 22 airlines, and led to charges against 21 executives, with several receiving jail time and more than $1.8 billion in criminal fines.

A case from this investigation, U.S. v. Martinair Holland in the U.S. District Court for the District of Columbia, involved two executives who were charged with participating in a conspiracy to suppress and eliminate competition by fixing cargo rates from September

2001 until February 2006.

One executive entered into a plea agreement in 2008, agreeing to a criminal fine of $42 million.[20] The other — a fugitive for almost 10 years — pled guilty after being extradited to the U.S. from Italy. The executive was sentenced to 14 months in prison, with credit for the time spent in the custody of the Italian government, and paid a $20,000 fine.[21]

Increased Cooperation, International Partnerships and Extradition

The U.S. has signed a variety of agreements that are designed to enhance international antitrust enforcement cooperation. These efforts to strengthen international partnerships will make it easier for the DOJ to investigate and prosecute international cartels.

Notably, in 2020, the DOJ, the Federal Trade Commission, and antitrust regulators in Australia, Canada, New Zealand and the United Kingdom, signed onto the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities. The framework is designed to strengthen cross-border investigations by facilitating cross-border evidence gathering and sharing of confidential information.

More recently, the Antitrust Division formed an international working group, focused on global supply chain collusion during the COVID-19 pandemic with the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission, and the U.K. Competition and Markets Authority.[22]

There are also efforts by the U.S. and its partners to become more aligned on policy directives and to foster international best practices for high-risk industries.

Historically, extradition to the U.S. for antitrust violations has been rare, but this is starting to change as well. Since 2014, three individuals have been extradited based solely on antitrust offenses:

Maria Christina Ullings, former Martinair N.V. senior vice president, was extradited from Italy in 2020 and two individuals were extradited from Germany – former Parker ITR Srl executive Romano Pisciotti in 2014 and former accounts manager for Continental Automotive Korea Ltd. Eun Soo Kim in 2020.[23]

While Germany and Italy are the only countries to extradite to the U.S. based solely on antitrust violations, the DOJ has extradited defendants from Bulgaria, Canada, Israel, Madagascar, and the U.K. for crimes that involve antitrust as well as nonantitrust violations, such as money laundering or fraud.

Extradition for antitrust violations is likely to become more common moving forward, reflecting the DOJ's aggressive and evolving approach to criminal enforcement.

Additionally, in March 2022, Volker Hohensee, the president of a parking heater manufacturing company pled guilty to conspiring to fix prices for parking heaters. He previously fled to Canada following his 2015 indictment, but was then arrested while attempting to enter the Canary Islands, and was incarcerated in Spain until his plea was finalized with the DOJ.[24]

While technically not an extradition, this case is another example of increased coordination between the DOJ and international partners to hold individuals accountable for foreign antitrust conspiracies.

Finally, the U.S. has worked to increase domestic cross-agency collaboration and information sharing for antitrust investigations, with initiatives such as the creation of the Procurement Collusion Strike Force. The PCSF, which was created in 2019, is composed of representatives from the DOJ's Antitrust Division, U.S. attorneys' offices, the FBI and multiple agencies' inspectors general.

The PCSF's first criminal resolution involved a foreign antitrust conspiracy. Belgium defense contractor G4S Secure Solutions NV pled guilty to charges based on its participation in a conspiracy to fix prices, allocate customers and rig bids while bidding and working for the U.S. Department of Defense and NATO.[25] Several top executives pled guilty to charges based on their involvement in this conspiracy as well.

Since then, the PCSF has become more active, indicting and prosecuting a number of foreign companies and individuals for antitrust violations. In fall 2020, the DOJ announced PCSF: Global, which formalized efforts to build relationships with foreign competition authorities to better monitor U.S. procurement internationally.[26]

Conclusion

The DOJ's push for more aggressive criminal antitrust enforcement will almost certainly result in more investigations and prosecutions of foreign companies and individuals. While the FTAIA is riddled with ambiguity, it will nonetheless play a pivotal role in deciding the outcome of these cases.

There are several steps companies can take to limit their antitrust risk:

- Ensure they have an up-to-date and robust compliance program to deter unlawful conduct and criminal exposure, which includes specific guidance on U.S. antitrust laws;

- Audit their sales activities to determine if any goods or services are sold in U.S. markets or will be in the future and monitor these business lines to detect and deter anti-competitive conduct;

- Provide regular antitrust training that is tailored to the business activities of the organization and that helps employees spot cartel activities such as price-fixing, bid-rigging, and market, product or customer allocation; and

- Monitor developments in this area of law as well as U.S. antitrust enforcement priorities and adjust the compliance program and employee training to reflect these changes.

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[1] President Biden's FY24 Budget, https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf.

[2] Antitrust Division, Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More, Dep't of Justice (Feb. 3, 2022), https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

[3] 15 U.S.C. §6a.

[4]509 U.S. 764 n.23, 796 (1993) (N.23 cites to the FTAIA's legislative history, see H. R. Rep. No. 97–686, pp. 2–3, 9–10 (1982)); See also, United States v. Nippon Paper, 109 F. 3d 1, 2-3 (1st Cir. 1997) (while the First Circuit did not consider the FTAIA, its holding, which finds that the Sherman Act applies to wholly foreign conduct if there is an intended and substantial effect in the U.S, is relevant precedent for this discussion).

[5] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1982).

[6] United Phosphorus Ltd v. Angus Chemical co., 131 F. Supp.2d 1003 (N.D. Ill. 2001) (dismissal of Sherman Act Section 1 & 2 claims because of the limitations imposed by the FTAIA); see generally, 15 U.S.C. § 1.

[7] Animal Sci. Prods., Inc. v China Minmetals Corp., 654 F.3d 462, 470 (3d Cir. 2011).

[8] Biocad JSC v. F. Hoffman-La Roche, 942 F. 3d 88 (2d Cir. 2019).

[9] U.S. v. LSL Biotechnologies, 379 F.3d 672, 680-681 (9th Cir. 2004).

[10] Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395 (2d Cir. 2014). In its brief in LSL Biotechnologies, the DOJ argued that proximate cause by the defendant should satisfy the "direct" effect component of the FTAIA.

[11] Minn-Chem, 683 F. 3d at 857.

[12] Lotes, 753 F. 3d at 398.

[13] Minn-Chem, 683 F.3d at 858-59.

[14] Hui Hsiung, 778 F.3d at 759 ("TFT LCS were a "substantial cost component of the finished products […] [and] substantial numbers of finished products were destined for the United States."); Minn-Chem, 683 F.3d at 856 (noting that 5.3 million tons of potash were

imported in 2008 to the U.S., a majority of the potash came from the defendants, and potash prices increased by over 600 percent, making the effects substantial).

[15] The Second, Third, Seventh, and Ninth Circuits have held that the FTAIA is a substantive element of a claim.

[16] Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge (March 3, 2020), https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge.

[17] DOJ TFT-LCD Cartel Investigation Chart (illustration), in Practical Law Antitrust, westlaw.com (Dec. 31, 2021), https://us.practicallaw.thomsonreuters.com/w-001-3569.

[18] Id.

[19] 778 F.3d 738 (9th Cir. 2015).

[20] Plea Agreement, United States v. Martinair Holland, No. 1:08CR00183 (D.D.C. July 2, 2008), ECF No. 13.

[21] Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Extradited Former Air Cargo Executive Pleads Guilty for Participating in a Worldwide Price-Fixing Conspiracy, (January 23, 2020), https://www.justice.gov/opa/pr/extradited-former-air-cargo-executive-pleads-guilty-participating-worldwide-price-fixing.

[22] Further signaling international cooperation, in June 2022, Assistant Attorney General Jonathan Kanter participated in meetings of the Organization for Economic Cooperation and Development (OECD) Competition Committee, and chaired the working party on enforcement and cooperation.

[23] Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge (March 3, 2020), https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge, (A former accounts manager for Continental Automotive Korea was extradited from Italy for his role in a bid-rigging and market allocation conspiracy involving the sale of instrument panel clusters to automobile producers); https://www.justice.gov/opa/pr/first-ever-extradition-antitrust-charge.

[24] Indictment, United States v. Haeusler, No. 5:15CR20784 (E.D. Mich. Dec. 9, 2015), ECF No. 1; see also Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Fugitive Executive Pleads Guilty in Parking Heaters Price-Fixing Conspiracy (March 3, 2022), https://www.justice.gov/opa/pr/fugitive-executive-pleads-guilty-parking-heaters-price-fixing-conspiracy.

[25] Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Belgian Security Services Firm Agrees to Plead Guilty to Criminal Antitrust Conspiracy Affecting Department of Defense Procurement, (June 25, 2021), https://www.justice.gov/opa/pr/belgian-security-services-firm-agrees-plead-guilty-criminal-antitrust-conspiracy-affecting.

[26] U.S. Dep't of Just., Antitrust Division Spring Update 2021: PCSF Expansion and Early Success (2021), https://www.justice.gov/atr/division-operations/division-update-spring-2021/pcsf-expansion-and-early-success.