

THE U.S. DOJ SECURES TWO EXTRADITIONS OF FOREIGN NATIONALS ON ANTITRUST CHARGES: WHO IS NEXT?



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On April 4, 2014, the Antitrust Division of the United States Department of Justice (DOJ) announced that it successfully secured the extradition of an Italian national for his alleged role in a marine hose bid-rigging conspiracy—its first-ever extradition of a foreign national *based solely on antitrust charges*. The DOJ alleged that Romano Piscioti, a former executive with Parker ITR SRL, a marine hose manufacturer based in Veniano, Italy, entered into an agreement to allocate shares of the marine hose market, to fix prices for marine hose, and to not compete for customers through submitting intentionally high prices or bids or not bidding at all. On April 24, 2014, the DOJ announced that Mr. Piscioti pleaded guilty, and he was sentenced to serve two years in prison.

Similarly, the DOJ has moved closer to securing the extradition from Canada of

Canadian businessman John Bennett for his role in a bid-rigging conspiracy. Mr. Bennett was CEO of Bennett Environmental Inc., an environmental soil remediation company. In 2008, after a DOJ investigation, Bennett Environmental pleaded guilty to one count of conspiracy to defraud the U.S. Environmental Protection Agency and was fined \$1 million. The U.S. applied for extradition in February 2010, but Mr. Bennett sought to fight extradition. After a Canadian judge rejected his defenses and ordered him committed for extradition, Mr. Bennett appealed to the British Columbia Court of Appeal. His appeal was dismissed by the court in April 2014.¹

Extradition is the formal surrender of a person by a country to another country for prosecution or sentencing. Extradition is generally only available between country-signatories to an extradition treaty and only when the principle of dual criminality is satisfied (i.e., when the extraditing country similarly criminalizes the conduct at issue). In the former case, Mr. Piscioti was detained at Frankfurt Airport in Germany during a layover on his way to Italy from Nigeria. Germany has an extradition treaty with the U.S., and bid-rigging in Germany is subject to criminal sanctions of up to five years imprisonment (similar to the U.S., where violation of Section 1 of the Sherman Act is a felony), thus satisfying the dual criminality requirements.

In addition to Germany, nations such as Japan² and South Korea (but not China or Taiwan) have similar extradition treaties with the U.S., and the DOJ likely will use

extradition as another tool in its enforcement efforts. Thus, individuals living or traveling through these countries are now at greater risk. In fact, as recently as June 5, 2014, Brent Snyder, the deputy assistant attorney general for criminal enforcement at the Antitrust Division of the DOJ, cautioned foreign executives charged in the U.S. against seeking “safe havens” abroad, saying, “You may believe you live in a country that will not extradite to the United States, but if you want to get on an airplane, you want to travel to another country, you are going to increasingly be at a high risk of being extradited to the United States.”

The successful extradition of Mr. Piscioti from Germany and the pending extradition of Mr. Bennett from Canada are important because they represent the first extraditions

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¹In addition to this extradition request by the DOJ, Canadian Commissioner of Competition John Pecman disclosed in May 2014 that Canada's Competition Bureau was moving to seek the extradition of a U.S. resident accused of participating in a bid rigging conspiracy on IT services contracts awarded by Library and Archives Canada.

²Hideo Nakajima, the secretary general of the Japan Fair Trade Commission (JFTC), said that Japan is ramping up its cartel enforcement and had increased its maximum prison terms and maximum fines for criminal antitrust violations four years ago. That being said, however, Nakajima reminded that the question of whether to extradite someone to the U.S. is in the hands of the courts, not the JFTC.

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of a foreign national to the U.S. on antitrust charges, but likely not the last. In fact, Bill Baer, the head of the DOJ's Antitrust Division, remarked: "This marks a significant step

forward in our ongoing efforts to work with our international antitrust colleagues to ensure that those who seek to subvert U.S. law are brought to justice."

It is likely only a matter of time before the DOJ seeks extradition in other investigations involving foreign cartels, such as the agency's massive auto parts investigation.

U.S. CIRCUIT COURTS LIMIT REACH OF SHERMAN ACT AGAINST ASIAN CARTELS



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The United States Court of Appeals for the Seventh Circuit has held that the Sherman Act does not apply to price-fixed components sold by Asian manufacturers to non-U.S. subsidiaries of a U.S. company that are later incorporated into a final product and imported into the U.S. In *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Mar. 27, 2014), Motorola and its foreign subsidiaries purchased liquid-crystal display (LCD) panels and incorporated these components into their mobile phone devices for sale in the U.S. and elsewhere. Motorola sought damages against numerous LCD manufacturers for conspiring to raise LCD panel prices in violation of Section 1 of the Sherman Act.

The manufacturer defendants moved for summary judgment, arguing that Motorola's Sherman Act claims were barred by the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA). FTAIA precludes application of the Sherman Act to conduct involving trade or commerce (other than import commerce) with foreign nations unless the conduct in question has both (i) a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import commerce and (ii) "such effect gives rise to" an antitrust claim. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161-62 (2004). On an interlocutory

appeal, the Seventh Circuit affirmed summary judgment for the LCD panel manufacturers.

The lower court had ruled that the claims did not meet the FTAIA requirements because the effects in the U.S. did not "give rise to" Motorola's harm. Judge Richard Allen Posner, a widely respected antitrust judge throughout the U.S., expanded the lower court's ruling to find that the case should be dismissed because there was no "direct" effect on U.S. domestic commerce, pointing to the fact that the alleged foreign cartel participants did not sell the LCD panels in the U.S., but rather sold them to foreign companies (Motorola's non-U.S. subsidiaries) outside of the U.S. The fact that the LCD panels were installed in mobile devices that ultimately were sold into the U.S. by Motorola, presumably at higher prices than if there had been no price-fixing, was not deemed to have resulted in a "direct" effect for purposes of FTAIA. The court found that the higher prices for the LCD panels were paid outside the U.S., and that the subsequent effect in the U.S. was too "indirect" or "remote" to meet the "direct" effects test. The court noted that had the LCD panels been sold directly to a U.S. mobile phone manufacturer, the "direct" effect requirement would have been satisfied. For example, in *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 853-54 (7th Cir. 2012) (en banc), the same Seventh Circuit held that a foreign price-fixing cartel did have a "direct" effect in the U.S. because the alleged foreign cartel participants took steps outside the U.S. to drive up prices of a product that is wanted in the U.S. and sold the products to U.S. customers.

Seeing the "exceptionally" important and broad implications of the *Motorola* decision

on government enforcement actions against foreign conduct with effects in the United States, the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) filed a joint amicus brief that asks all the judges in the Seventh Circuit to rehear the case and reverse the decision of Judge Posner's three-judge panel. The DOJ and FTC argue that, unless vacated, *Motorola* will undermine the U.S. government's ability to prosecute foreign cartels. The DOJ and FTC claim that anticompetitive conduct involving components often causes significant harm in the downstream consumer markets. They assert that the existence of several purchasing steps in the causal chain should not alone render an effect too "indirect" or "remote" to be afforded the protection of the Sherman Act. On the other side, the Korea Fair Trade Commission and the Ministry of Economic Affairs of Taiwan separately filed amicus curiae requesting that the Seventh Circuit deny the motion for a rehearing en banc and affirm Judge Posner's decision.

In a case raising similar issues, the U.S. Court of Appeals for the Second Circuit recently issued a decision interpreting the FTAIA's "direct, substantial and reasonably foreseeable" standard, reaching a different conclusion as to the meaning of the "direct" effects element. In *Lotes Co., Ltd v. Hon Hai Precision Industry Co.*, No. 13-2280 (2nd Cir. Jun. 4, 2014), Lotes alleged that the defendant's exclusionary foreign conduct of breaching RAND-Zero licenses for USB connectors and curbing competition in China had an effect of driving up prices of consumer electronics incorporating the USB connectors in the U.S. The Second Circuit affirmed an order dismissing Lotes' antitrust suit, finding

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that the foreign conduct of the defendants did not “give rise to” Lotes’ claim. Furthermore, the Second Circuit determined that the “direct” effects element of the FTAIA requires only a reasonably proximate casual effect on U.S. domestic commerce. This puts the Second Circuit’s interpretation of that element in line with the position taken by the DOJ and FTC in their joint amicus brief and at odds with Judge Posner’s decision in *Motorola*. The Second Circuit also agreed with the Seventh Circuit’s *Minn-Chem* decision that the FTAIA’s requirements are substantive rather than jurisdictional limitations of the Sherman Act.

The Seventh Circuit decision in *Motorola* has potentially major implications for the

extraterritorial application of U.S. antitrust laws to foreign commerce cases. The “gives rise to” element of the FTAIA has already been interpreted to impose a significant limitation on the ability of foreign purchasers to bring antitrust actions in the United States. However, Judge Posner’s interpretation of the “direct” effects requirement of the FTAIA would further limit the applicability of the Sherman Act to foreign conduct that does not involve direct imports into the United States.

As of this writing, whether the Seventh Circuit will rehear this matter has not been decided. If the ruling stands, *Motorola* will have far-reaching implications for electronics, auto parts, and other components

manufacturers who sell products that end up in finished products sold in the U.S. For Japanese, Korean, Chinese, and other Asian companies involved in pending or future antitrust litigations, such as the auto parts class actions, or in criminal investigations of overseas cartel conduct where sales were not made directly into the United States, *Motorola* may offer a new avenue of attack against government and civil antitrust claims in the U.S. Given that there is now a split of views among the federal circuit courts on the interpretation of the “direct effects” requirement, the stage may now be set for the U.S. Supreme Court to review this issue.

MARK ROSMAN, PARTNER AT WILSON SONSINI GOODRICH & ROSATI AND FORMER LEAD PROSECUTOR WITH THE DOJ, TESTIFIES BEFORE THE UNITED STATES SENATE ON CARTEL ENFORCEMENT



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In November 2013, Mark Rosman, a partner at Wilson Sonsini Goodrich & Rosati, testified before the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights. Mr. Rosman testified first on the U.S. Department of Justice’s increased enforcement against international cartels, particularly Asian manufacturers. He observed that this focus has increased the number of individual defendants subject to prosecution and, in doing so, has raised significant enforcement challenges for the DOJ.

One of these challenges has been prosecuting individuals who may have played a lesser role

than others in an alleged conspiracy. Mr. Rosman noted that while the role of an individual varies on a case-by-case basis, the DOJ has routinely sought to increase an individual’s sentence based on aggravating factors, but has *never* sought to *decrease* an individual’s sentence based on the minor role that a company employee may have played in a cartel. Mr. Rosman suggested that this may not be the most efficient enforcement policy given that an individual playing a lesser role in the alleged conduct may be more likely to challenge the prosecution (i.e., defend at trial) if the DOJ refuses to offer a resolution that accounts for the individual’s lesser role.

Next, Mr. Rosman described how the DOJ’s recent focus on international cartels has resulted in another enforcement challenge relating to the calculation of fines for company defendants: how the DOJ may account for conduct that arguably had an indirect effect in the United States. Under U.S. antitrust law, the DOJ may only prosecute conduct that had a “direct” effect on United States commerce. However, in the

international cartel cases, the conduct’s effect on the United States often is attenuated. Mr. Rosman therefore questioned whether the DOJ is over-reaching its authority and ignoring comity principles underlying the restrictions to the extra-territorial reach of U.S. antitrust laws. Notably, the Seventh Circuit recently agreed with Mr. Rosman’s over-reaching argument in its decision in *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Mar. 27, 2014).

Finally, Mr. Rosman testified that the DOJ needs to “think outside the box” in recommending sentences other than criminal fines or imprisonment in order to provide greater incentives for cooperation by companies and individuals. He observed that the DOJ’s aggressive approach to sentencing may be having a deterring effect on cooperation, as those under investigation are beginning to question the benefits of cooperating when they may still be subject to significant fines and/or onerous prison sentences.

WSGR's ANTITRUST PRACTICE

Wilson Sonsini Goodrich & Rosati antitrust attorneys are uniquely positioned to assist clients on the most important bet-the-company matters, as well as with regular counseling and compliance matters. We represent a number of Asia-based enterprises in matters in the United States and before Asian competition authorities. Our accomplished team consistently is recognized among the leading antitrust practices worldwide by such sources as *Global Competition Review*, *Chambers Global*, and *Competition Law360*.

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