

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS

-- United States --

27 October 2015

This document reproduces a written contribution from the United States submitted for Item 3 of the 122nd meeting of the Working Party No. 3 on Co-operation and Enforcement on 27 October 2015.

*More documents related to this discussion can be found at:
www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm*

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-- United States --

1. The Sherman Act is the U.S. antitrust law governing cartels and cartel enforcement. Section 1 of the Sherman Act outlaws conspiracies “in restraint of trade or commerce . . . with foreign nations,” which includes conspiracies in the flow of or substantially affecting U.S. import or export commerce. 15 U.S.C. § 1. The Antitrust Division of the U.S. Department of Justice (DOJ) enforces the Sherman Act through criminal and civil actions. The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) added Section 6a to the Sherman Act, which exempts from Section 1 conduct involving only export or wholly foreign commerce absent an adverse “direct, substantial, and reasonably foreseeable effect” on import commerce, export commerce of a U.S. exporter, or commerce within the United States. 15 U.S.C. § 6a(1).

2. Through civil enforcement actions under Section 5 of the Federal Trade Commission Act, the Federal Trade Commission (FTC) can pursue conduct that violates Section 1 of the Sherman Act. 15 U.S.C. § 45. The FTAIA also added to the FTC Act Section 5(a)(3), 15 U.S.C. § 45(a)(3), which closely parallels Section 6a.

3. The hypothetical scenario, which was circulated on July 22, describes a classic conspiracy to fix prices, in this case of a component, which is incorporated into finished electronic products. As a matter of long-standing U.S. practice, price fixing like this is prosecuted criminally by the DOJ. Accordingly, this submission focuses on the Sherman Act.

4. Some of the Sherman Act issues raised by the hypothetical scenario were the subject of two recent decisions by U.S. courts of appeals. The first, *United States v. Hsiung*, 778 F.3d 738 (9th Cir.), *cert. denied*, 135 S. Ct. 2837 (2015), affirmed criminal convictions obtained by the DOJ of a foreign manufacturer, two of its executives, and its U.S. subsidiary for fixing the price of LCD panels. The second, *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir.), *cert. denied*, 135 S. Ct. 2837 (2015), affirmed judgment against a U.S. company seeking damages for overcharges paid by its foreign subsidiaries for LCD panels and explained that its ruling would not block DOJ from seeking criminal or injunctive remedies.

5. In this submission, we consider U.S. antitrust law and our enforcement policy from the perspective of each of the three countries mentioned in the hypothetical.

1. Country A

6. Assuming the United States is Country A in the hypothetical scenario, from that perspective, Alpha and Beta’s conspiracy to fix the prices of Component X appears to be conduct involving U.S. export commerce. They manufacture Component X in the United States and sell it to integrators outside the United States. Accordingly, the DOJ would focus on whether the “direct, substantial, and reasonably foreseeable effect” specified in Section 6a exists. For example, we would investigate whether the price increase in Component X directly, substantially, and reasonably foreseeably affected commerce in the finished electronic products imported into the United States. But in the hypothetical scenario, there is no indication that the finished electronic products incorporating price-fixed Component X were sold in, or for delivery to, the United States or that there were any other adverse effects on U.S. commerce. Thus, on these limited facts, the DOJ would not bring an enforcement action.

2. Country B

7. Assuming the United States is Country B, Alpha and Beta's conspiracy to fix the prices of Component X appears to be conduct involving U.S. import commerce. They manufacture Component X outside the United States and sell to, or for delivery to, integrators located inside the United States. Accordingly, the conduct is prohibited by Section 1 as a conspiracy in restraint of "trade . . . with foreign nations." And Section 6a would not exempt this conspiracy from U.S. antitrust law because Section 6a is limited to conduct involving non-import foreign commerce. *Hsiung*, 778 F.3d at 751; *Motorola*, 775 F.3d at 818. In exercising its prosecutorial discretion, the DOJ would consider all the relevant circumstances, including the amount of harm to U.S. commerce and U.S. purchasers and the need to deter similar anticompetitive conduct in the future. In this scenario, the conspiracy harms U.S. import commerce and U.S. integrators. On the limited facts here, the DOJ would likely bring a criminal enforcement action.

8. Alpha and Beta cannot escape the reach of U.S. antitrust law by carrying out their conspiracy to fix the price of U.S. imports entirely outside the United States. "Section One of the Sherman Act applies to wholly foreign conduct which has an intended and substantial effect in the United States." *United States v. Nippon Paper Indus. Co., Ltd.*, 109 F.3d 1, 9 (1st Cir. 1997) (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)). Therefore, whether U.S. antitrust law applies would not necessarily depend on whether Alpha and Beta attended price-fixing meetings in the United States.

9. But if Alpha and Beta did carry out the conspiracy in the United States by, for example, attending meetings, marketing to clients, or making sales calls in the United States, then the conduct is not wholly foreign because one or more of the conspirators acted in furtherance of the conspiracy in the United States. And those acts in the United States can be attributed to all the conspiracy's members because a Sherman Act "conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all.'" *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940). Thus, in our view, a separate showing of an "intended and substantial effect in the United States" would not be required given the acts in the United States. Section 1 would only require the showing of a nexus with U.S. commerce, including that the conspiracy was in the flow of or substantially affected U.S. commerce.

10. The DOJ would likely pursue criminal sanctions against Alpha, Beta, and their culpable officers and employees. The DOJ's primary goal is to achieve criminal sentences that fairly reflect the offense's harm and the need for deterrence. Following the U.S. Sentencing Guidelines, the DOJ would seek criminal fines based on the volume of each corporation's commerce that was affected by the conspiracy. Specifically, subject to adjustments for culpability and cooperation, each corporation's base fine for purposes of the guidelines would be 20 percent of its sales of Component X during the conspiracy period.

11. In negotiating plea agreements or making sentencing recommendations, the DOJ would include all the relevant circumstances, including the final destination of finished products containing Component X, the extent to which the cost of Component X was passed along to the integrators' customers located abroad, and sanctions imposed by other jurisdictions. The sentencing court would ultimately determine the criminal fine after considering the sentencing guidelines, the DOJ's recommendation, the terms of the plea agreement if applicable, and any other relevant circumstances.

3. Country C

12. Assuming the United States is Country C, Alpha and Beta's conspiracy to fix the prices of Component X appears to be conduct involving wholly foreign commerce, that is, commerce between Country A and Country B. Such conduct can constitute a conspiracy in restraint of "trade . . . with foreign nations" in violation of Section 1 if the conduct sufficiently affects U.S. import commerce. To determine whether Section 6a exempts the conduct, the DOJ would focus on whether the conduct has a direct, substantial, and reasonably foreseeable effect on import commerce in finished electronic products incorporating the price-fixed Component X.

13. The circumstance that the price-fixed component was first sold to integrators in Country B, where it was incorporated into finished electronic products which were then sold in, or for delivery to, the United States would not render indirect an effect on import commerce in those products. *See Hsiung*, 778 F.3d at 758-60. Nor would the circumstance that the finished products were sold around the world or that Alpha and Beta were unaware or indifferent to whether the finished products were sold in the United States render insubstantial or not reasonably foreseeable the effect on import commerce. In this context, substantiality is not a question of proportion. So long as the effect on U.S. commerce was not insignificant, even if smaller than the effect outside the United States, it is substantial. And reasonable foreseeability is an objective standard, which asks not whether the conspirators actually foresaw the effect, but rather whether a reasonable person would foresee the effect on U.S. commerce.

14. Of course, evidence that the conspirators actually expected their conduct to cause an effect on commerce in the finished products would help to show that a direct, substantial, and reasonably foreseeable effect existed. Such evidence might include Alpha and Beta's contacts with purchasers in the United States, including negotiations regarding Component X pricing, as well as Alpha and Beta's discussing market conditions and tracking sales of the finished products in the United States. But the presence or absence of such evidence would not fundamentally alter the analysis. Likewise, whether the integrators are wholly owned subsidiaries of the finished-product purchasers in the United States would not fundamentally alter the analysis.

15. As explained in the Country B section above, whether Alpha and Beta attended price-fixing meetings in the United States is not determinative. If one or more conspirators took actions in the United States to further the conspiracy, however, a U.S. enforcement action would not be an application of the Sherman Act to wholly foreign conduct, even if a particular defendant's actions were all taken outside the United States.

16. In exercising its prosecutorial discretion, the DOJ would consider all the relevant circumstances, including the amount of harm to U.S. commerce and U.S. purchasers and the need for deterrence. In this scenario, the conspiracy harms U.S. import commerce in finished electronic products and U.S. purchasers of those products. If Country B, whose upstream integrators were also harmed, brought an enforcement action and obtained sanctions, the DOJ would consider those sanctions when weighing the need for deterrence. But the existence of foreign sanctions would not preclude U.S. enforcement action. On the limited facts here, assuming sufficient proof of the specified effect on import commerce, the DOJ would likely bring a criminal enforcement action.

17. The DOJ would likely pursue criminal sanctions against Alpha, Beta, and their culpable officers and employees. As explained in the Country B section above, in each case the DOJ would seek criminal sentences that fairly reflect the offense's harm and the need for deterrence. Under the U.S. Sentencing Guidelines, subject to adjustments for culpability and cooperation, each corporation's base fine would be 20 percent of its affected commerce. The guidelines do not exclude foreign sales from the volume of affected commerce. For example, the affected commerce of the foreign manufacturer in *United States v. Hsiung, supra*, included foreign sales. In that case, however, the DOJ took a conservative approach that did not include all foreign sales. Instead, the DOJ sought a sentence based on defendants' commerce in LCD panels that were incorporated into notebook computers or computer monitors destined for the United States. Under the circumstances of that case, we believed that this approach appropriately reflected the offense's harm and the need for deterrence.

18. In negotiating plea agreements or making sentencing recommendations, the DOJ would consider all the relevant circumstances, including sanctions imposed by other jurisdictions. The sentencing court would ultimately determine the criminal fine after considering the sentencing guidelines, the DOJ's recommendation, the terms of the plea agreement if applicable, and any other relevant circumstances.