



# Motorola Loses Antitrust Claims Based on Foreign Purchases

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In a landmark decision in the long-running TFT-LCD price-fixing litigation, an Illinois federal court last week dismissed more than \$3 billion worth of damages claims by cell phone maker Motorola Mobility, Inc.

Nossaman client, AU Optronics Corporation, and other defendants successfully argued that Motorola had overreached by seeking to invoke Sherman Antitrust Act remedies for claims arising from foreign transactions made by Motorola's Asian subsidiaries in China and Singapore.

Judge Gottschall's ruling reaffirmed the intent of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") in limiting the applicability of the Sherman Act to allegedly anticompetitive conduct that takes place beyond U.S. borders. That statute puts foreign conduct beyond the reach of federal antitrust laws, unless certain exceptions are satisfied.

Motorola argued that purchases of allegedly price-fixed TFT-LCD panels by its foreign subsidiaries satisfied the exception that allows claims that have a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce to be subject of the Sherman Antitrust Act. The Court rejected Motorola's contentions, holding that purchases that were paid for abroad and shipped to foreign assembly centers did not have the requisite effect on U.S. commerce required by the FTAIA. (Like many U.S. manufacturers, Motorola moved assembly operations offshore to take advantage of lower labor costs, favorable tax treatment and other incentives.)

At issue in this case, were three separate categories of purchases by Motorola from defendants: (1) purchases of TFT-LCD panels by Motorola that were delivered directly to Motorola facilities in the United States ("Category I"); (2) purchases of TFT-LCD panels by Motorola's foreign affiliates in China and Singapore that were delivered to the foreign affiliates' manufacturing facilities abroad, where they were incorporated into mobile phones that were later sold in the United States ("Category II"); and (3) purchases of TFT-LCD

panels by Motorola's foreign affiliates in China and Singapore that were delivered to the foreign affiliates' manufacturing facilities abroad and were later incorporated into mobile phones sold outside the United States ("Category III"). Motorola's foreign affiliates assigned their claims to Motorola. Defendants challenged Motorola's Category II and III purchases under FTAIA arguing that no court had "ever held that U.S. antitrust law applies to claims arising out of goods that were manufactured, delivered and paid for abroad."

The FTAIA places all non-import foreign commerce outside the Sherman Act's reach unless such conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on American domestic or import commerce; and (2) such effect gives rise to a Sherman Act claim. The Motorola court began its analysis by relying on the U.S. Supreme Court's decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). In *Empagran*, the U.S. Supreme Court held that it generally construes ambiguous statutes to avoid unreasonable interference with foreign sovereign authority and that the language and history of the FTAIA suggested that Congress wanted to clarify and limit rather than expand the Sherman Act's reach to foreign commerce. The Motorola court next focused on the D.C. Circuit's ruling in the remanded *Empagran* case, *Empagran S.A. v. La Roche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), where that court held that in determining whether domestic effects "give rise to" a Sherman Act claim, courts should look to see whether there is "a direct causal relationship, that is, proximate causation."

Motorola argued that it satisfied the "gives rise to" prong because final pricing decisions took place in the United States and its foreign affiliates issued their purchase orders at the prices and quantities set by Motorola in the United States. However, the Court held that Motorola's domestic conduct did not constitute the required domestic effect (proximate cause), which can give rise to a Sherman Act claim. The Court went further and found even if Motorola's domestic approval of its foreign affiliates' prices paid gave rise to its Sherman Act claims, it found that it wasn't "substantial" enough impact on American domestic or import commerce because the "economic consequences of Motorola's domestic approval of LCD prices were not felt in the U.S. economy, the domestic approval cannot constitute a domestic effect that gives rise to a Sherman Act claim."

### **Domestic Approval of Pricing is Not Enough**

The Motorola court's decision reaffirms the limitations of the Sherman Act's reach into foreign commerce. Simply, domestic approval of pricing is not sufficient to show substantial domestic effects on U.S. commerce when the products at issue were manufactured, paid for, and delivered abroad. The decision shows that the FTAIA was enacted not to unreasonably interfere with sovereign authority of other nations or attempt to regulate anticompetitive conduct abroad.