Three Perkins Coie attorneys discuss a recent order from the Southern District of New York affirming the broad reach of U.S. antitrust law. The authors note that the decision raises several considerations relevant to international companies managing antitrust risk.

Court: Department of Justice May Prosecute Foreign Defendants for Antitrust Crimes Committed Overseas

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On May 4, 2018, in United States v. Usher, No. 1:17-cr-00019 (RMB) (unpublished), a district court in the Southern District of New York issued an opinion that affirmed the broad reach of U.S. antitrust criminal law to conduct that takes place in foreign countries. In that decision, the Court ruled that the U.S. Department of Justice (“DOJ”) may prosecute three former currency traders who worked and traded in London, even though all of the alleged conduct occurred in the United Kingdom and the U.K.’s own prosecutor (the Serious Fraud Office, or “SFO”) had declined to prosecute them for that conduct.

The opinion is a reminder of the global reach of the U.S. antitrust laws. Antitrust crimes committed on foreign soil are subject to prosecution in the U.S. because what matters for jurisdiction is the location of the effect, not the location of the conduct. In particular, when the DOJ can credibly allege that foreign conduct had an effect within the United States, on interstate commerce, then the unsettled legal questions in this area (such as what constitutes “import commerce”) do not matter.

The Indictment

The Indictment concerns anticompetitive conduct in the foreign exchange (or “FX”) spot market. The FX spot market is a global market for the purchase and sale of foreign currencies. Traders, like the Defendants, try to make a profit “by selling a currency at a price that is higher than the price at which the trader acquired that currency, or by buying a currency at a price that is
lower than the price at which the dealer sold that currency.” Indictment ¶ 5, United States v. Usher, No. 1:17-cr-00019 (RMB) (S.D.N.Y. Jan. 10, 2017) ECF No. 1 (“Indict.”).

The Defendants in this case traded in the popular Euro/U.S. Dollar (“EUR/USD”) currency pair. They worked for London banks or the London-affiliates of U.S. Banks. Their trading occurred in London.

The exchange rates for foreign currencies are derived from transaction-based, “on the spot,” trading. Exchange rates are not standardized. However, published “currency fixes” (including two dominant “fixes” for the EUR/USD market) calculate the de facto exchange rate at a given point in time. Such “fixes” assist traders in formulating their bidding by identifying commonly accepted pricing. Id. ¶ 9.

The DOJ and the SFO each investigated anticompetitive behavior in the FX spot market. In May 2015, Citicorp, Barclays, JPMorgan, and RBS pleaded guilty to one count of conspiring to fix prices and rig bids for the EUR/USD in the FX spot market. The DOJ found the banks were implicated because of actions taken by their traders, and the banks collectively agreed to pay more than $2.5 billion to the U.S. government for their involvement. A fifth bank, Barclays, agreed to pay $60 million in criminal fines for its FX trading practices, which it admitted violated the terms of its non-prosecution agreement in the separate LIBOR investigation. See DOJ press release, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

The SFO declined to prosecute the three Defendants in the Usher case. It concluded in March 2016 that “there is insufficient evidence for a realistic prospect of conviction.” Decision and Order at 2, United States v. Usher, No. 1:17-cr-00019 (RMB) (S.D.N.Y. May 4, 2018), ECF No. 95 (“Order”) (quoting letter from SFO). The SFO commented, however, that its conclusion “does not reflect or impact on any decision which might be taken by any other agency, whether domestic or overseas, in relation to the same conduct.” Id.

Indeed, the DOJ proceeded against Defendants, and in January 2017 a federal grand jury indicted them for criminal violations of Section 1 of the Sherman Act. According to the Indictment, from December 2007 through at least January 2013, the Defendants conspired to fix the price of and rig bids and offers for EUR/USD in the FX spot market. The Defendants allegedly communicated with each other in a private electronic chat room where they agreed to refrain from trading against each other’s interests and coordinated their bidding, offering, and trading of EUR/USD. At times, they referred to themselves as “The Cartel” or “The Mafia.” Order at 2. Trial is scheduled for Oct. 1, 2018.

The Motion to Dismiss

Prior to trial, the Defendants moved for the Court to dismiss the Indictment. They argued, among other things, that the conduct for which they had been indicted was not subject to U.S. antitrust laws because their alleged conduct occurred in the United Kingdom and (according to Defendants) it had little or no effect in the United States. Memorandum of Law in Support of Defendants’ Motion to Dismiss the Indictment at 1, United States v. Usher, No. 1:17-cr-00019 (RMB) (S.D.N.Y. Nov. 17, 2017), ECF No. 63 (“Mot.”). Defendants made three primary extraterritoriality arguments. The Court rejected each and affirmed the adequacy of the Indictment.

First, citing the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), the Defendants argued that they could not be held liable in the United States for what they contended were “foreign transactions conducted by foreigners in foreign commerce.” Order at 8. The FTAIA (a somewhat convoluted statute) bars the application of the Sherman Act to conduct with an effect on non-import commerce between the U.S. and foreign countries unless the DOJ can prove the “direct, substantial and reasonably foreseeable effect” of that conduct in the United States. Order at 8-9 (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004)).

The Defendants argued that the Indictment did not allege a “direct, substantial, and reasonably foreseeable effect” in the United States, purportedly relying on an “attenuated causal chain” predicated on assumptions that the Defendants’ behavior influenced global demand for currencies. Mot. at 23-24. In the Defendants’ view, the Indictment was a “House-That-Jack-Built” accumulation of intervening causes that did not state the direct, substantial or reasonably foreseeable effect on U.S. commerce required by the FTAIA. Mot. at 23-27.

The Defendants also argued that the Indictment failed to allege Defendants’ conduct affected import commerce (which is exempt from the FTAIA) because the Indictment contained only a “bald assertion” without any facts describing the actual “goods, currency, or anything else being brought into the United States.” Mot. at 21-22.

The Court rejected these arguments. The Court ruled that the FTAIA did not even apply because, although the conduct took place in London, the effect of the conduct was actually “among the several states,” i.e., in interstate commerce. Because interstate commerce was affected, the FTAIA (which limits application of antitrust law in cases involving U.S. foreign commerce) was irrelevant. The Court cited the Indictment’s allegations that the Defendants received orders from U.S. customers, filled those orders in part through trades with U.S. counterparties, and directed the transfer of substantial quantities of Euros and U.S. Dollars in a “continuous and uninterrupted flow” of interstate commerce between customers in different states. Order at 9 (quoting Indict. ¶ 25). The Court ruled in the alternative that the Indictment sufficiently alleged conduct affecting import commerce because it alleged that the conduct “caused the transfer of substantial quantities” of currencies to U.S. counterparties. Order at 11 (quoting Indict. ¶ 25).

The Court similarly gave short shrift to the Defendants’ argument that the Indictment failed to allege conduct that had “substantial effects” in the United States. See Hartford Fire Insurance Co. v. California, 509 U.S. 764, 796 (1993) (identifying “substantial effects” as additional requirement to sustain a Sherman Act claim). The Court was satisfied that the Indictment alleged that the Defendants’ conduct had affected prices for the purchase and sale of U.S. dollars.

Second, the Defendants argued that the Indictment should be dismissed because, according to Defendants, the Sherman Act has not been used to prosecute foreign conduct that did not specifically target the U.S. market. The Court rejected this argument as well, noting that at
least two courts of appeal have held that conduct occurring outside the United States may form the basis for a criminal prosecution if it had a "substantial and intended effect" inside the United States. Order at 12 (quoting United States v. Nippon Paper Indus. Co., 109 F.3d 1, 3 n.2 (1st Cir. 1997)).

Finally, the Court rejected the Defendants' argument that the Indictment violated their due process rights. The Court ruled that the Indictment alleged a sufficient nexus between the Defendants' conduct and U.S. commerce, and that they had received "fair warning" that their conduct was criminal. Order at 13-15.

The Takeaways

The motion to dismiss was a test of the Indictment, i.e., what the DOJ has alleged. Now that the Court has denied the Defendants' motion to dismiss, the case will move forward to a jury trial where the DOJ will have to prove that the allegations in the Indictment are true. The Defendants may raise the same extraterritoriality arguments again in post-trial briefing, after the evidence has been submitted to the jury.

The decision raises several considerations relevant to international companies managing antitrust risk:

- The Sherman Act has a broad reach. Its criminal and civil provisions apply even to wholly foreign conduct.
- The U.S. is free to prosecute foreign companies and individuals even if the relevant foreign country decides not to prosecute.
- The U.S. has brought, and will continue to bring, cases based on entirely foreign conduct when it targets or affects U.S. consumers. Under U.S. law, what matters is the location of the effect, not the location of the conduct.
- Even though the law about the precise contours of the FTAIA remains unsettled, as long as the U.S. can credibly allege (and ultimately prove) that foreign conduct impacts interstate commerce, it has jurisdiction to prosecute.
- It is often easy for the U.S. to allege an effect on interstate commerce, even in cases like this one involving conduct occurring overseas.