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Vitamin C Purchasers Awarded $162 Million in First-Ever Civil Price-Fixing Verdict Against Chinese Companies

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On March 14, 2013, a federal jury in Brooklyn, New York returned a verdict in *In re Vitamin C Antitrust Litigation*, No. 1:06-md-1738 (E.D.N.Y.), finding that two Chinese companies had unlawfully fixed prices and controlled the supply of vitamin C exports from China to the United States. The jury rejected the companies' defense that their actions were compelled by the Chinese government. The jury awarded the plaintiffs $54.1 million, which was trebled by the court to $162.3 million.

The case represents the first time that a Chinese company has been found liable for violating United States antitrust laws. It is equally noteworthy for the Chinese government's unprecedented appearance in the case in support of the companies' claim of immunity under the foreign sovereign compulsion doctrine. The verdict sends a strong signal to non-US manufacturers that the application of foreign laws may not be enough to avoid antitrust liability in US courts. Given China's growing role in global commerce and the economic realities that Chinese companies face domestically, the jury's verdict in this case is only the first word on whether US courts will accept a Chinese company's argument that "the government made me do it."

Antitrust Liability and Comity Considerations

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, prohibits a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Agreements among competitors to fix prices or output are *per se* illegal under Section 1. Participants in a price-fixing cartel face both significant civil exposure (e.g., damages in a private lawsuit) and criminal penalties (e.g., jail time, fines). Besides wholly domestic conduct (i.e., within the US borders), the Sherman Act also applies to conduct occurring outside the United States that was intended to, and did in fact, produce a direct, substantial and foreseeable effect in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

The extraterritorial application of US antitrust laws to companies in countries where the government regulates export commerce often involves inquiries into the specific role of the government in the allegedly anti-competitive conduct, the power of a US regulator to investigate the conduct, and the court's power to adjudicate a matter. Foreign antitrust defendants often rely on principles of international comity, foreign sovereign immunity, or the foreign sovereign compulsion doctrine, to eliminate or mitigate their risk of exposure. Although these doctrines are not limited to the antitrust context, they are frequently encountered in the antitrust sphere because of the inter-connectedness of global commerce and competition. Nevertheless, foreign corporations should be aware that these doctrines are rarely accepted in civil antitrust cases.

International Comity

Under principles of international comity, a US court may, in its discretion, refuse to exercise jurisdiction where doing so would interfere with a foreign sovereign's legislative, judicial, or executive acts. A court will consider a number of factors, including (1) the degree of conflict with foreign law or policy; (2) the relative importance of the alleged conduct in the United States versus the non-US jurisdiction; (3) the availability of a remedy abroad and the pendency of the litigation there; (4) whether there was an intent to harm or affect American commerce, and the foreseeability of such harm; and (5) the possible effect upon foreign relations if the court exercises jurisdiction and grants relief. *See In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 552 & n.5 (E.D.N.Y. 2006); DOJ/FTC's Antitrust Enforcement Guidelines for Internal Operations § 3.32 (1995) ("Antitrust Guidelines").

Foreign Sovereign Immunity

Where a foreign government is the commercial actor, its conduct may be immune from antitrust (and other) liability under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1602, *et seq*. The FSIA's protection extends to corporate entities that are an organ of a foreign state or where the entity is majority-owned by the state. US courts, however, will retain jurisdiction if the foreign government's action in question falls within the "commercial activity" exception to the FSIA, which includes an act taken outside the United States in connection with commercial activity that causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2). In determining whether a sovereign's act is commercial, US courts have looked at whether the action is one which only a sovereign can perform or whether it is an activity that would customarily be carried out for a profit. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 780 (9th Cir. 1991). Where a foreign government acts not as a regulator of a market but in the manner of a private player within it, the sovereign's actions are generally considered commercial and thus outside the protections of the FSIA. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

Foreign Sovereign Compulsion Doctrine

While the aforementioned principles focus primarily on matters of diplomacy, the foreign sovereign compulsion doctrine is designed to protect a non-sovereign defendant that is subject to conflicting obligations under two different legal regimes. To succeed on this defense, a defendant must establish that it was compelled to engage in anticompetitive conduct by a foreign government, that its refusal to comply would result in the imposition of penal or other severe sanctions, and that the foreign government's mandate was basic and fundamental to the alleged antitrust behavior. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293 (3d Cir. 1979); Antitrust Guidelines § 3.32. The doctrine recognizes that a foreign antitrust defendant may find itself "between the proverbial rock and a hard place where compliance with one country's law results in violation of another's." *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d at 551.

Though not often applied by courts, the foreign sovereign compulsion defense has been successfully asserted in antitrust cases by Venezuelan oil exporters whose group boycott of the plaintiff was mandated by the Venezuelan government, and by the New Zealand Dairy Board and its distributors in the United States whose government-mandated system for distributing cheese deprived American importers of a price-competition system. *See Interamerica Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *Trugman-Nash, Inc. v. N.Z. Dairy Bd. Inc.*, 954 F. Supp. 733 (S.D.N.Y. 1997).

China's Vitamin Regulatory Regime

Over the past three decades, China has become the dominant global manufacturer of vitamin C, filling a void in the market left by the prosecution of European and Japanese vitamin cartels in the 1990s. Recent data from the US International Trade Commission shows that the United States imports nearly 70% of its vitamin C supplies from China. China's highest administrative authority authorized to regulate international trade is the Ministry of Commerce ("MOFCOM"). As China transitioned from a state-controlled command economy to a more market-based system, regulation of the vitamin C industry passed from wholly state-owned and state-controlled entities to quasi-governmental chambers of commerce established to regulate imports and exports and to enforce China's national policy in foreign trade. Vitamin C exports are regulated by the Chamber of Commerce of Medicines and Health Products Importers and Exporters (the "Chamber"), which operates under MOFCOM's direct and active supervision. The Chamber in turn established a Vitamin C Subcommittee (the "Subcommittee") to coordinate the vitamin C export market and prices and to improve the competitiveness of Chinese-produced vitamin C in the world market.

China's vitamin C regime can be separated into two distinct periods. Beginning in 1997, MOFCOM issued rules that established an export license system, set quotas for vitamin C exports, and directed the Chamber (acting through the Subcommittee) to set a mandatory minimum export price. Only members of the Subcommittee were permitted to receive export licenses. Then, in 2002, as China entered the World Trade Organization, MOFCOM repealed the 1997 rules and implemented a "verification and chop" system to replace the licensing system. Under the verification and chop system, vitamin manufacturers submitted export contracts to the Chamber for verification that the contract complied with export price requirements set by MOFCOM. Only contracts that had been verified by the Subcommittee and affixed with its "chop" (a traditional Chinese stamp or seal) would be approved by customs for export. The verification and chop system was repealed in May 2008.

In re Vitamin C Antitrust Litigation

In this multidistrict civil litigation, purchasers of vitamin C in the United States brought suit against China's four main manufacturers of vitamin C (and one affiliate) alleging that defendants illegally conspired to fix prices and reduce their output of vitamin C to the United States. Specifically, plaintiffs alleged that beginning in December 2001, defendants – all of whom were members of the Chamber and the Subcommittee – reached agreements during Subcommittee meetings to raise the price of vitamin C in the United States from $2.50/kg to as high as $7.00/kg. When prices began to fall in 2003, defendants allegedly agreed to limit and then suspend the manufacture and export of vitamin C until the price stabilized. Instead of contesting the plaintiffs' factual allegations, the Chinese companies argued that their conduct was immune from US antitrust liability under international comity principles and the foreign sovereign compulsion doctrine.

As the case proceeded through motion practice, MOFCOM took the unprecedented step of appearing as an *amicus curiae* in support of defendants, which is believed to be the first time the Chinese government has appeared as an *amicus* in a US court. In its *amicus* brief, MOFCOM explained China's vitamin C regulatory structure in detail to support the conclusion that defendants' actions were compelled. On November 6, 2008, the court (Trager, J.) denied defendants' motion to dismiss in light of the ambiguity surrounding the role of the Chinese government. *In re Vitamin C. Antitrust Litig.*, 584 F. Supp. 2d at 559. Judge Trager gave substantial deference to MOFCOM's *amicus* brief, but refused to accept it as conclusive evidence of compulsion. *Id.* at 557. After discovery, the court (Cogan, J.) denied defendants' motion for summary judgment because it found that (1) the verification and chop regime did not involve output restrictions, (2) exporters that failed to reach a consensus on price were not punished, and (3) membership in the Subcommittee was no longer required to export vitamin C. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 553-57 (E.D.N.Y. 2011). Significantly, Judge Cogan declined to defer to MOFCOM's interpretation of Chinese law, choosing instead to rely on "more traditional sources of foreign law" (i.e., governmental directives and Chamber and Subcommittee governing documents). *Id.* at 550. Moreover, Judge Cogan saw MOFCOM's assertion of compulsion as a "post-hoc attempt to shield defendants' conduct from antitrust scrutiny." *Id.* at 552.

After plaintiffs settled with one defendant, trial commenced against the remaining four defendants on February 25, 2013 (two more defendants would settle prior to jury deliberations). The Chinese companies once again argued that their actions were compelled by the Chinese government. The key point in the trial came during the cross-examination of a former MOFCOM official called by the defense who was shown a memo he authored describing the Chamber's rules as a mere formality that "only honest fellows would follow." After three weeks of testimony and less than a day of deliberation, the jury returned a verdict against North China Pharmaceutical Group Corp. and Hebei Welcome Pharmaceutical Co. Ltd. and awarded damages in the amount of $54.1 million. As statutorily required, the judge tripled the damages and entered judgment against the two defendants in the amount of $162.3 million (less $9 million received from a former defendant).

Impact

The $162.3 million price tag in *In re Vitamin C Antitrust Litigation* demonstrates the costly risks associated with engaging in conduct outside the United States that is viewed as anti-competitive under US law, particularly where a foreign government has a heavy hand in export regulations. In the case of China, where the government plays an active role in regulating export commerce, and where the laws are, as Judge Cogan acknowledged, "a departure from the concept of law as we know it in this country," companies may need to reconsider whether their conduct does indeed fall entirely outside the long reach of US extraterritorial jurisdiction. 810 F. Supp. 2d at 550. Notably, two similar cases are presently working their way through US courts. In *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320, 462 (D.N.J. 2010), a federal judge found that Chinese magnesite exporters that were members of a chamber of commerce for metal exporters (the "CCCMC") were compelled to comply with a minimum price requirement established by the chamber on behalf of MOFCOM. In contrast to the *Vitamin C* case, the court focused on whether the exporters were actually compelled to comply with a minimum price, regardless of how the price was derived. *Id.* at 439. The court's decision was ultimately reversed on other grounds, which means the issue of compulsion will likely be revisited in the near future.

In a case involving Chinese bauxite exporters, a federal judge in *Resco Products, Inc. v. Bosai Minerals Group Co., Ltd.*, No. 06-235 (W.D. Pa.) stayed her consideration of defendants' motion to dismiss in light of ongoing WTO proceedings concerning China's regulation of bauxite and other raw materials exports. Under WTO dispute-settlement proceedings, a WTO member-state may challenge another government's trading practices, as well as certain private actions that have some government connection or endorsement. The WTO issued a decision finding that MOFCOM delegated certain implementing authority to the CCCMC for the purpose of coordinating on export prices, and the defendants in *Resco Products* renewed their motion to dismiss. Despite the WTO's decision, the court denied the motion to dismiss without a written decision and the case is now in discovery. As *Resco Products* and *Vitamin C* demonstrate, the foreign sovereign compulsion doctrine is rarely successful when raised in civil litigation. Foreign defendants may, however, have greater success asserting the defense in negotiations with the DOJ by appealing to the Department's prosecutorial discretion. *See* Antitrust Guidelines § 3.32 (noting that the DOJ will generally regard a foreign government's sufficiently-detailed formal representation that refusal to comply with its command would result in penal or other severe sanctions as being sufficient to establish that the conduct in question was compelled).

Although it appears that the DOJ has not prosecuted the defendants in this case, foreign corporations should be mindful of the DOJ's continued focus on bringing criminal antitrust cases. The most recent data released by the DOJ shows that the Department has obtained over $500 million in fines for antitrust violations every year since 2007 (including $1 billion in 2009), and the DOJ's ten largest fines for price fixing were assessed against foreign corporations, with an average fine of approximately $350 million. Moreover, the average prison sentence for foreign nationals convicted of antitrust violations is 10 months, and the overall average has increased from 17 months in 2011 to 28 months in 2012.

Finally, *Vitamin C* raises questions about the likelihood of MOFCOM to appear in US courts going forward. After the passage of Federal Rule of Civil Procedure 44.1, which governs determinations of foreign law in US proceedings, US courts are less likely to accept the statements of a foreign government as the conclusive interpretation of that country's law. Clearly, MOFCOM's unprecedented appearance was a strong indication of the importance it placed on this case. But MOFCOM cannot ignore the fact that its submissions were rejected by two judges, and in the case of Judge Cogan's decision, subjected to rather harsh criticism as "a carefully crafted and phrased litigation position" rather than "a frank and straightforward explanation of Chinese law." 810 F. Supp. 2d at 552. Moreover, MOFCOM's appearance in the US litigation was not without consequences in the WTO proceedings. In finding that CCCMC's coordination of minimum export prices were attributable to the Chinese government and thus subject to challenge in the WTO, the WTO noted that its finding was confirmed by MOFCOM's submissions in *Vitamin C*.

Conclusion

As China's role in the global economy continues to expand, Chinese companies may continue to be seen as antitrust targets by private parties (or the US Department of Justice) in the United States given the role of the Chinese government in export commerce. Despite MOFCOM's noteworthy appearance, two judges and a jury ultimately rejected the defendants' argument that they were compelled by the Chinese government to fix prices and control output. We may soon see this issue play out once again before a jury in *Animal Science Products* and *Resco Products*. Given the economic realities that Chinese companies face domestically, the jury's verdict in the *Vitamin C* case is likely only the first word on whether US courts will accept a foreign defendant's argument that "the government made me do it."

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