No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,
Plaintiff and Appellant,

vs.

AU OPTRONICS CORPORATION, *et al.*,
Defendants and Appellees.

On Interlocutory Appeal from an Order of the United States District Court for the Northern District of Illinois, Case No. 09-cv-6610

BRIEF OF THE BELGIAN COMPETITION AUTHORITY AS AMICUS CURIAE IN SUPPORT OF APPELLEE'S POSITION SEEKING AFFIRMATION OF THE DISTRICT COURT'S ORDER

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October 9, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the Belgian Competition Authority states that it is a governmental entity of the Kingdom of Belgium and thus no entity has any ownership interest in it. The law firm of Katten & Temple LLP is the only law firm that has appeared or is expected to appear for Amici Curiae in this case. Katten & Temple LLP has not previously represented a party to this action. Katten & Temple LLP has previously represented another amicus in this action, the Korea Fair Trade Commission.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT[1]

Belgium is a founding member of the European Union ("EU"), a member of the Organisation for Economic Co-operation and Development, and supports the enforcement efforts of the European Commissions and the EU's competition laws. Belgium also has its own competition law and enforcement mechanisms. Belgium recently enacted Book IV of the Code of Economic Law of which the substantive law provisions are modeled on the articles 101 and 102 of the Treaty on the Functioning of the European Union. The *Belgische Mededingingsautoriteit – Autorité belge de la Concurrence* (Belgian Competition Authority, hereafter "BCA") was re-established as an autonomous administrative authority with legal personality by the Act of April 3, 2013 (*Moniteur belge* (hereafter Belgian Official Gazette) of April 26, 2013), entered into force on September 6, 2013 pursuant to the Royal Decree of August 30, 2013 (Belgian Official Gazette of September 6, 2013).

The enforcement of Belgian competition law is impacted by other governments' extraterritorial application of their laws and Belgium thus has an interest in the scope of the Foreign Trade Antitrust Improvements Act ("FTAIA"). On February 3, 2004, Belgium submitted an amicus brief to the Supreme Court in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (the "2004 *Empagran* Amicus Brief"). The Supreme Court acknowledged the interests cited in the 2004 *Empagran* Amicus Brief and that of other foreign countries in *Empagran.*

[1] The views, opinions and statements expressed herein are those of the BCA. The law firm of Katten & Temple LLP assisted the BCA in the preparation of this amicus brief. No party's counsel participated in writing this brief in whole or part. No party or party's counsel contributed money to fund preparing or submitting the brief.

Id. at 167-68.

In the decade since Belgium filed its 2004 *Empagran* Amicus Brief, the proliferation of competition law systems in the world and the need to protect the proper functioning of leniency policies required an enhanced international cooperation as organized in the International Competition Network ("ICN"). The BCA is a member of the ICN, which provides competition authorities with a specialized venue for addressing competition concerns to build consensus and convergence towards sound competition policy principles across the global antitrust community. In particular, convergent views on the geographic scope of application of national laws are of the utmost importance to the BCA and the ICN members.

The BCA understands that the Court has expressed interest in the international relations issues implicated in the *Motorola* case. The BCA has a substantial interest in ensuring that companies acting within Belgium and the EU comply with Belgian and EU competition laws, and ensuring that U.S. antitrust laws and the availability of civil damages actions in U.S. courts do not interfere with Belgian and EU enforcement efforts.

I. Statement.

A. Belgian Antitrust Law.

Belgium has a competition law enacted as Book IV of the *Wetboek van Economisch recht – Code Droit Economique* (the "Code of Economic Law") of which the substantive law provisions are modeled on the articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). The substantive Belgian law

provisions have not been changed in comparison with the substantive anti-trust provisions that were applicable under the Belgian Act on the Protection of Economic Competition effective at the time of the filing of the 2004 *Empagran* Amicus Brief. Accordingly, Belgian law generally prohibits agreements and practices designed to restrain competition and abuses of dominant Belgian market positions. The Belgian courts and the BCA apply both these national rules of competition and the articles 101 and 102 of the TFEU pursuant to the Regulation (EC) no 1/2003 of the Council of December 16, 2001.

Since *Empagran* was decided, Belgium has adopted a leniency program as part of its enforcement regime that is directly affected by extraterritorial application of U.S. antitrust laws. The then-existing Belgian Competition Council published the leniency program in the Belgian Official Gazette of October 22, 2007. The BCA has continued the leniency program defined by the Competition Council, as decided by its board and as published on the BCA's website.[2] The BCA relies to a significant extent on the leniency program for its enforcement of the prohibition of restrictive agreements, associations of undertakings and concerted practices. The proper functioning of a leniency policy requires that the undertakings concerned can make an adequate assessment of the potential consequences of alleged infringements, which requires in turn that they may rely on principles of causality and jurisdiction developed in the spirit of comity.

Belgium also enacted recently rules on collective redress introduced in the

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[2] (http://economie.fgov.be/en/entreprises/competition/restrictive_practices/leniency_program/).

Code of Economic Law by the Acts of March 27 and 28, 2014 (Belgian Official Gazette of April 29, 2014) applicable to consumer claims in respect of damages caused by infringements of the rules of competition pursuant to its article XVII.37, 1° (a). Another enforcement tool introduced since *Empagran* was decided is set forth in Article IV.51 of the Belgian Code of Economic Law, which establishes a new settlement procedure to allow for the early settlement of investigations in order to save time and money. A 10 per cent reduction in the antitrust fine is offered in such settlement agreements. In such cases, the Auditorat is competent to adopt a final settlement agreement, which cannot be appealed.

The BCA adheres to the effects doctrine in delimiting its jurisdiction and the application of the Belgian antitrust laws. Damages claims in antitrust cases can be brought in Belgium depending on the relations between the parties or the choice made by the plaintiff under the law of contract or under the law of tort. The choice of law is governed in respect of the law of contract by model principles developed for the EU.[3] For tort claims, the choice of law is according to the Belgian International Private Law Code the law of the State of the parties' residence when they have residence in the same State, the State in which the illicit conduct and the damage occurred, or the State having the closest connection to the legal obligation.[4]

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[3] Belgium codified its choice of law rules in the *Wetboek van International Privaatrecht – Code de Droit International Privé* ("International Private Law Code") in which article 98 governs choice of law for contractual obligations and applies the articles 3-4 of the Treaty on the Law Applicable to Contractual Obligations signed in Rome in June 19, 1980 (*Official Journal of the European Communities* 1998 C 027/34). Article 99, § 1 (introduced by article 17 of the Act of December 30, 2009 and entered into force on January 25, 2010), governs the choice of law for tort claims.

[4] International Private Law Code, Art. 99, §1.

B. Factual Background.

The BCA understands the factual background to be as described in the Memorandum Opinion & Order of the U.S. District Court for the Northern District of Illinois Eastern Division, Document # 182 in the *Motorola* case.

II. Summary of Argument.

The BCA respectfully submits that the arguments developed in the 2004 *Empagran* Amicus Brief are still valid and have become even more relevant to the BCA because of Belgium's development of the leniency program and provision for damages actions before Belgian courts. In addition, Belgium has played a significant role in efforts by the OECD and the ICN to enhance international cooperation in the enforcement of anticompetition laws. Application of the U.S. antitrust laws to foreign purchases would undermine the comity balance struck by Congress in the FTAIA, as acknowledged in *Empagran* and upon which the BCA relies.

III. Argument.

A. As *Empragan* Held, Principles of Comity Apply to Limit the Enforcement Scope of U.S. Antitrust Laws.

In ruling that the FTAIA precluded application of the Sherman Act to a price-fixing claim based on adverse foreign effects, in *Empagran* the Supreme Court acknowledged that the FTAIA should be interpreted "to avoid unreasonable interference with the sovereign authority of other nations," which "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."

542 U.S. at 164-65. The Supreme Court noted differences between the EU and the United States concerning specific conduct deemed illegal under applicable antitrust laws. *Id.* at 167 (noting differences concerning vertical restraints). The Court also acknowledged territorial differences in the application of appropriate remedies, particularly the unique aspect of private treble-damages remedies under U.S. law, which neither Belgium nor the EU has adopted. *See id.* (citing foreign government amicus briefs filed in *Empagran* and 2 ABA Section of Antitrust Law, Antitrust Law Developments 1208-1209 (5th ed. 2002)). The proliferation of competition law systems can contribute significantly to a better functioning of markets. But without the necessary convergence and comity, conflicting policies may well become a significant obstacle to trade and investment, as recognized by nations across the globe. In April 2009, the ICN noted that in the past seven years, the ICN had grown from 16 to 104 agencies in 92 different jurisdictions. *See* ICN Factsheet and Key Messages, p. 1 (Apr. 2009).[5]

As noted above, Belgium's own antitrust laws focus on the effects of anticompetitive conduct and limit enforcement of its laws only to those foreign actions that have effect in Belgium. Here, the manufacture and sale of LCDs to Belgian purchasers appropriately calls for the application of Belgian antitrust laws under Belgian's competition laws and the FTAIA. The BCA acknowledges that it may be appropriate for the U.S. Government to apply U.S. law to a foreign transaction that adversely affects a U.S. purchaser, but under *Empagran,* the "gives rise to" limitation in the FTAIA confirms that U.S. law does not apply to a claim by

[5] *See* http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

an original foreign purchaser.

Belgium also recently enacted rules permitting collective redress with regard to consumer damages claims for violation of Belgian antitrust laws. *See* Code of Economic Law, Article XVII.37, 1° (a), as adopted by the Acts of March 27 and 28, 2014 (Belgian Official Gazette of April 29, 2014). Allowing Belgian purchasers to sue for damages in U.S. courts would upset the balance calibrated by the Belgian government. Belgium itself has acknowledged the jurisdictional limits of the effects of its antitrust enforcement laws. For instance, on March 12, 2014, the Brussels Court of Appeal annulled the lump sum fine (of €100,000) imposed on a flour mill (Brabomills) by the previous Belgian authority. That fine had not been calculated on the basis of the sales or turnover in Belgium, so the court could not assess whether that fine only punished Brabomills for the infringement it committed in Belgium, or if that fine also covered the infringement committed in the Netherlands, for which Brabomills was already sanctioned in that country. In order to avoid a violation of the non bis in idem principle, the Court annulled the decision of the Competition Council in so far as it imposes a fine on Brabomill. See Decision of the Brussels Court of Appeal of 12 March 2014 in case 2013/MR/6, Brabomills v the BCA, available on the Belgian Competition Authority website.

B. Expansive Enforcement of U.S. Antitrust Laws Undermines Belgium's and Other Nations' Enforcement of Competition Laws.

The Supreme Court in *Empagran* acknowledged the foreign governments' concern that "a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own

antitrust enforcement policies by diminishing foreign firms' incentive to cooperative with antitrust authorities in return for prosecutorial amnesty." *Empagran,* 542 U.S. at 168 (citing amici curiae briefs, including the 2004 *Empagran* Amicus Brief). Since 2004, BCA has developed its leniency program and today relies to a significant extent on that leniency program to enforce unlawful restraints of trade.

The leniency program affords firms which agree to collaborate with the Belgian Competition Authority to fight cartels to benefit from a partial or complete exemption of fines imposed by the College of Competition. The proper functioning of a leniency policy requires that the foreign firms seeking leniency can make an adequate assessment of the potential consequences of alleged infringements, which requires in turn that they may rely on principles of causality and jurisdiction developed in the spirit of comity. If seeking leniency and acknowledging infringement were to expose the foreign firm to the consequence of civil suits in the U.S. courts, such infringers would have little incentive to enter into amnesty programs.

IV. Conclusion.

For these reasons, the BCA respectfully submits that as discussed above, and in support of Appellees' position that the District Court's order should be affirmed, the arguments advanced in the 2004 Empagran Amicus Brief are still valid and fully applicable to this case.

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October 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I have mailed the foregoing document to participants in the case who are not CM/ECF users via US Mail on October 8, 2014:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,744 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 12-point Century font in the body and 11-point Century font in the footnotes.

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