

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 Appeal from an Order of the United States District
Court for the Northern District of Illinois

Case No. 09-cv-6610

***AMICUS CURIAE* BRIEF OF THE MINISTRY OF
ECONOMY, TRADE AND INDUSTRY OF JAPAN IN
SUPPORT OF APPELLEES**

William C. Meyers
Julie F. Stewart
Goldberg Kohn Ltd.
55 E. Monroe Street
Suite 3300
Chicago, IL 60603

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the Ministry of Economy, Trade and Industry of Japan states that it is a governmental entity of the Government of Japan and thus no entity has any ownership interest in it. The law firm of Goldberg Kohn, Ltd. is the only law firm that has appeared or is expected to appear for *Amici Curiae* in this case. Goldberg Kohn, Ltd. has not previously represented a party to this action. Goldberg Kohn, Ltd. currently represents another *amicus* in this action, Professor Akira Negishi.

Respectfully submitted,

s/William C. Meyers
William C. Meyers
Goldberg Kohn, Ltd.
Attorney for *Amicus Curiae*
55 E. Monroe Street
Suite 3300
Chicago, IL 60603
(312) 201-4000
wcm@goldbergkohn.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
CORPORATE DISCLOSURE STATEMENT	i
AMICUS CURIAE RULE 29 STATEMENT	iv
INTERESTS OF THE AMICUS CURIAE.....	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. The Position of the Ministry of Economy, Trade and Industry of Japan on Extraterritorial Application of Domestic Competition Laws	3
II. Excessive Extraterritorial Application of Competition Laws Would Create a Serious Risk of Interference with a Foreign Nation’s Ability to Independently Regulate its own Commercial Affairs	4
III. Private Plaintiffs Are Differently Situated from the United States Government.....	5
CONCLUSION.....	7

TABLE OF AUTHORITIES

Cases

<i>Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992</i> 118 BGHZ 312 (Ger.)	7
<i>F. Hoffmann-LaRoche v. Empagran, S.A.</i> 542 U.S. 155, 164-165 (2004)	6, 7
<i>Ore. State Union No-so-kon I v. Mansei Ko-gyo Co.</i> 51 Minsu 2573 (Sup. Ct., July 11, 1997)	7

Other Authorities

Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (“the Antimonopoly Act”) Act No. 54	7
Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees, <i>Empagran, S.A. et al., v. F. Hoffman- La Roche Ltd.</i> 417 F.3d 1267 (D.C. Cir. 2005), 2005 WL 3873712	4
Brief of the Government of Japan as Amicus Curiae, <i>F. Hoffman-La Roche Ltd. v. Empagran, S.A</i> 542 U.S. 155 (2004), 2004 WL 226390	4, 6
Brief of the United States and the Federal Trade Commission as Amici Curiae in support of neither party <i>Motorola Mobility LLC v. AU Optronics Corp., et al.</i> No. 14-8003 (7 th Cir. Sep. 5, 2014).....	8

AMICUS CURIAE RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29, *Amici* states the following:

The *Amici Curiae* filing this brief is the Ministry of Economy, Trade and Industry of Japan. The Ministry of Economy, Trade and Industry of Japan does not represent and is not employed by any party in this action.

The law firm of Goldberg Kohn, Ltd. assisted the *Amicus Curiae* in the preparation of this brief only by conforming it to comply with the stylistic requirements of the Federal Rules of Appellate Procedure and those of this Court. Goldberg Kohn, Ltd. played no role in authoring or assisting in authoring this brief aside from conforming the brief to The Federal Rule of Appellate Procedure and the rules of this Court. No party or any party's counsel authored or assisted in authoring any part of this brief. Additionally, no monetary contribution to the preparation or submission of the brief was made by any person other than the *Amici Curiae*.

INTERESTS OF THE AMICUS CURIAE

Appellees in this case include Japanese companies that are alleged to have participated in an international cartel to fix prices for thin film transistor liquid crystal display (TFT-LCD) panels in various national markets. The Ministry of Economy, Trade and Industry of Japan has significant economic, political, and legal interests in ensuring that companies based in Japan comply with the Japanese legal system, and that Japanese companies running businesses elsewhere comply with “reasonable” jurisdictional requirements of other nations. In other words, the Ministry of Economy, Trade and Industry of Japan has a significant interest in ensuring that Japanese companies are not forced to comply with “unreasonable” legal requirements of other nations while operating within foreign countries.

The Ministry of Economy, Trade and Industry of Japan also has a particularly significant interest in making certain that Japanese companies are not subject to the unreasonable and excessive extraterritorial reach of United States competition laws, especially by private foreign plaintiffs, including foreign subsidiaries of US companies, which purchase products solely in non-US markets, but claim treble damages in private lawsuits filed in United States courts under US competition law.

SUMMARY OF THE ARGUMENT

The Government of Japan has strongly opposed the argument regarding extraterritorial jurisdiction, which undermines the underlying principles of international law by unreasonably interfering with the sovereignty of each country, and the Government of Japan has submitted two amicus briefs to US courts in the *Empagran* case from this point of view and has expressed its concerns about the extraterritorial application of US competition laws in civil claims where non-US companies that were not substantially affected in the US utilize US courts and US competition laws. See Brief of the Government of Japan as Amicus Curiae, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), 2004 WL 226390. Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees, *Empagran, S.A. et al., v. F. Hoffman-La Roche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), 2005 WL 3873712.

The Ministry of Economy, Trade and Industry of Japan, as a part of the Government of Japan, has the same opinion with the opinion of the Government of Japan described above and expects the U.S. Court of Appeals for the Seventh Circuit to consider this case cautiously based on the opinions expressed in the amicus briefs of the Government of Japan and the contents of this amicus brief of the Ministry of Economy, Trade and Industry of Japan.

ARGUMENT

I. The Position of the Ministry of Economy, Trade and Industry of Japan on Extraterritorial Application of Domestic Competition Laws

In today's global economy, as corporate activities exceed borders and become more international, conduct taking place in one country may have grave effects on markets of other countries. Among such circumstance, the Ministry of Economy, Trade and Industry of Japan understands the necessity of the extraterritorial application of competition law of each country to the extent that anti-competitive activities affect their own market, especially in the context of constraining international cartels. In this sense, the Ministry of Economy, Trade and Industry of Japan does not deny the extraterritorial application of competition laws themselves. The Ministry of Economy, Trade and Industry of Japan is not in opposition to all extraterritorial application of countries' competition laws by the respective country's enforcement authority where anti-competitive conduct occurs outside their territories, provided that such application is reasonably limited.

The Ministry of Economy, Trade and Industry of Japan is, however, of the opinion that "excessive" extraterritorial application of competition law tends to bring about serious tension between the countries involved. In particular, not in the cases of enforcement by each country's competition authorities, but in civil lawsuits based on injuries alleged to have been incurred as a result of foreign anti-competitive activities, plaintiffs often tend to insist on the remarkably enlarged scope of extraterritorial application. Thus, the Government of Japan has expressed its concerns with the US extraterritorial application of its competition laws in civil

lawsuits in the US courts and has submitted amicus briefs several times to US courts in regard to this very issue. *See* Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, at 2, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004), 2004 WL226390.

The Ministry of Economy, Trade and Industry of Japan understands that the FTAIA was enacted to prevent unreasonable interference with foreign nations' sovereign authority. In *Empagran*, the US Supreme Court stated that

ambiguous statutes [are ordinarily construed] to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law — law that (we must assume) Congress ordinarily seeks to follow....This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony — a harmony particularly needed in today's highly interdependent commercial world.

F. Hoffmann-LaRoche v. Empagran, S.A., 542 U.S. 155, 164-165 (2004) The Ministry of Economy, Trade and Industry of Japan hopes that this case will be prudently judged in order to avoid infringement of the sovereignty of other nations in applying the FTAIA as is the case in the decision of the *Empagran* case.

II. Excessive Extraterritorial Application of Competition Laws Would Create a Serious Risk of Interference with a Foreign Nation's Ability to Independently Regulate its own Commercial Affairs

The excessive extraterritorial application of U.S. law “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.” *Id.* at 165. The Foreign Trade Antitrust Improvements Act was

intended to prevent such “unreasonable interference with the sovereign authority of other nations.” *Id.* at 164.

Japan has the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (“the Antimonopoly Act”), Act No. 54 of April 14, 1947, which is enforced by the Japan Fair Trade Commission.

The Japanese law and the laws of many (if not all) countries other than the US do not provide for treble damage awards in antitrust claims. Treble damages would be viewed as punitive damages, mixing civil and criminal liability. If Motorola’s overseas affiliates file damage claims in the jurisdictions where they purchase TFT-LCD panels they would not be permitted to seek treble damages. The Supreme Court of Japan has ruled that foreign judgments may not be enforced in Japanese courts beyond the level of actual compensatory damages. *Ore. State Union No-so-kon I v. Mansei Ko-gyo Co.*, 51 Minsu 2573 (Sup. Ct., July 11, 1997). The German Supreme Court also took a similar position. *Bundesgerichtshof [BGH] [Federal Court of Justice]* June 4, 1992, 118 BGHZ 312 (Ger.).

Thus, the Ministry of Economy, Trade and Industry of Japan concerns that the applicability of treble damages, which are not common outside US, will be expanded through excessive extraterritorial application of US competition law, and that, as a result, Japan’s ability to regulate its own commercial affairs will be interfered.

III. Private Plaintiffs Are Differently Situated from the United States Government

The Ministry of Economy, Trade and Industry of Japan’s position here is not intended to affect the United States government’s ability to enforce US competition

law and prosecute enforcement actions with respect to anticompetitive conduct that has a direct, substantial, and foreseeable effect on US domestic or import commerce. The Ministry of Economy, Trade and Industry of Japan is, however, at the very least, of the opinion that giving private US attorneys, which do not bear responsibility in international diplomacy and cooperation, the right to interfere with Japanese governmental regulation of the Japanese market is troublesome.

In the amicus curiae brief dated September 5, 2014, filed by the FTC, the Department of State and the Department of Justice, the FTC and DOJ expressed that:

[f]or many years the government has criminally prosecuted foreign companies for participating in international price-fixing cartels without causing conflict with foreign jurisdictions, but some jurisdictions have occasionally expressed concern about private plaintiffs seeking treble damages under U.S. antitrust law for injuries sustained outside the United States. See US Supp. Am. Br. 11-12. This disparity may reflect the government's careful consideration of international comity and its prudence in bringing antitrust enforcement actions that may implicate another sovereign's interests. *Id.* at 10. '[P]rivate plaintiffs,' in contrast, 'often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.' Empagran, 542 U.S. at 171 (quoting Joseph P. Griffin, Extraterritoriality in U.S. and EU Antitrust Enforcement, 67 Antitrust L.J. 159, 194 (1999))

Brief of the United States and the Federal Trade Commission as Amici Curiae in support of neither party., at pp. 19-20, *Motorola Mobility LLC v. AU Optronics Corp., et al.*, No. 14-8003 (7th Cir. Sep. 5, 2014).

CONCLUSION

The Ministry of Economy, Trade and Industry of Japan expects the U.S. Court of Appeals for the Seventh Circuit to examine this case cautiously based on the opinions expressed in the amicus briefs of the Government of Japan submitted in the past and the contents of this amicus brief of the Ministry of Economy, Trade and Industry of Japan.

Respectfully submitted,

s/William C. Meyers
William C. Meyers
Goldberg Kohn, Ltd.
Attorney for *Amicus Curiae*
55 E. Monroe Street
Suite 3300
Chicago, IL 60603
(312) 201-4000
wcm@goldbergkohn.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**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 1607 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 Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:
 - this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook Size 12 Font.

Date: October 10, 2014

/s/William C. Meyers
William C. Meyers
Attorney for *Amicus Curiae*
Goldberg Kohn, Ltd.
55 E. Monroe Street
Suite 3300
Chicago, IL 60603
(312) 201-4000
wcm@goldbergkohn.com

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 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 by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days of October 10, 2014, addressed to the following:

Kenneth L. Adams
R. Bruce Holcomb
Christopher T. Leonardo
Adams Holcomb LLP
1875 Eye St., NW, Suite 810
Washington, DC 20036

Eric F. Citron
Goldstein & Russell, P.C.
5225 Wisconsin Ave. NW, Suite 404
Washington, DC 20015

Jerry Murphy
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595

Kenneth A. Gallo
Joseph J. Simons
Craig A. Benson
Paul, Weiss, Rifkind, Wharton &
Garrison LLP
2001 K Street, NW
Washington, DC 20006-1047

Andrew David Shapiro
Butler Rubin Saltarelli & Boyd LLP
70 West Madison Street, Suite 1800
Chicago, IL 60602

James L. McGinnis
Michael W. Scarborough
Dylan I. Ballard
Sheppard Mullin Richter & Hampton
LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111

Daniel G. Rosenberg
Sheppard, Mullin, Richter & Hampton,
LLP
70 West Madison Street, 48th Floor
Chicago, IL 60602

Richard Del Giudice
Gozdecki Del Giudice, Americus &
Farkas LLP
One East Wacker Drive, Suite 1700
Chicago, IL 60601

Sanjay Nangia
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111

Nick S. Verwolf
Davis Wright Tremaine LLP
777 - 108th Ave. N.E., Suite 2300
Bellevue, WA 98004

Kristen J. McAhren
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807

Martin M. Toto
John H. Chung
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036

David Brownstein
Jacob Alpern
Farmer Brownstein Jaeger LLP
235 Pine Street, Suite 1300
San Francisco, CA 94104

James R. Streicker
Cotsirilos, Tighe, Streicker, Poulos
& Campbell, Ltd.
33 North Dearborn Street, Suite 600
Chicago, IL 60602

James G. Kreissman
Harrison J. Frahn IV
Elizabeth A. Gillen
Melissa D. Schmidt
Simpson Thacher & Bartlett LLP
2475 Hanover Street
Palo Alto, CA 943404

Scott C. Solberg
Sarah Elizabeth Hargadon
Eimer Stahl LLP
224 S. Michigan Ave., Suite 1100
Chicago, IL 60604

Michael R. Lazerwitz
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006

/s/William C. Meyers
William C. Meyers