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Antitrust and Competition Law Update

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F. Hoffman-La Roche Ltd. v. Empagran: Supreme Court Restricts Extraterritorial Reach of U.S. Antitrust Laws

On June 14, the U.S. Supreme Court issued an important opinion on the extraterritorial reach of U.S. antitrust laws in *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*¹ The opinion, written by Justice Breyer, restricts the extraterritorial application of the antitrust laws under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The Court unanimously held that purchasers in overseas markets claiming injury from price fixing (or other antitrust violations) cannot sue in U.S. courts by alleging that they were harmed by conduct that also injured consumers in the United States, at least absent allegations that injury to U.S. consumers facilitated the harm to them. The decision, however, leaves open some questions whether such antitrust claims can be redressed in U.S. courts in limited circumstances.

Background

Empagran was a class action brought by domestic and foreign vitamin purchasers, who claimed that U.S. and non-U.S. vitamin manu-

facturers and distributors had engaged in a global price-fixing conspiracy. The manufacturers and distributors moved to dismiss from the suit the purchasers that had bought vitamins outside the United States.

The core issue was whether the FTAIA permitted plaintiffs that purchased overseas to bring Sherman Act suits in U.S. courts. The FTAIA prohibits antitrust suits for transactions in foreign commerce – that is, commerce taking place entirely outside the United States – unless the plaintiff can show that:

- (1) The alleged harmful conduct had a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce; and
- (2) The effect on U.S. commerce gave rise to “a” claim under the Sherman Act.

The circuit courts were badly split on what exactly this language means. The Fifth Circuit ruled in *Den Norske Stats Oljeselskap As v.*

¹ Wilmer Cutler Pickering Hale and Dorr LLP represented one of the respondents before the Court.

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HeereMac VOF, 241 F.3d 420 (5th Cir. 2001), that a plaintiff could pursue an antitrust claim in U.S. courts only if the plaintiff's *own injury* arose from the alleged wrongdoing's effect on U.S. commerce. The Second Circuit, by contrast, held in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), that a plaintiff could pursue a claim in U.S. courts so long as *someone* (even if not the plaintiff) had a claim based on the wrongdoing's effect on U.S. commerce. In *Empagran*, the D.C. Circuit largely sided with the Second Circuit, and ruled that plaintiffs purchasing overseas could bring suit.

The Supreme Court Opinion

The Supreme Court reversed. It began its analysis by rejecting the purchasers' argument that the FTAIA applies only to export commerce. Citing the FTAIA's legislative history, the Court held that the FTAIA applies to *all* conduct involving foreign, non-import commerce – not just export commerce. Thus, all antitrust suits that claim an injury based on conduct involving foreign commerce must satisfy the FTAIA's two-part test.

Next, the Court held that the FTAIA does not grant U.S. courts jurisdiction to hear claims based on injuries in foreign markets, at least if those injuries are independent of harm to consumers in the United States. Accordingly, claims based on those foreign effects are beyond the scope of the U.S. antitrust laws. The Court based its ruling on principles of comity and the FTAIA's legislative history.

First, the Court applied a rule of statutory construction that presumes Congress did not intend unreasonably to interfere with the sovereignty of foreign nations. This rule "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." The Court rejected the D.C. Circuit's broad interpretation of the FTAIA because permitting antitrust suits based on injuries in foreign markets – at least if those injuries are not linked to harm to U.S. con-

sumers – would create a "a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."

The Court observed that, though Congress may have an interest in addressing foreign conduct when it harms U.S. commerce, it generally has no reasonable basis to supplant foreign law for injuries suffered in foreign commerce. Even if the United States and other sovereigns agree that price-fixing is illegal, U.S. antitrust remedies differ dramatically from those of foreign jurisdictions. The Court relied in particular on *amicus curiae* briefs filed by the United States and several foreign countries arguing that applying U.S. remedies to injuries in foreign commerce would undermine foreign countries' enforcement efforts against international cartels. Among other things, antitrust wrongdoers would be discouraged from cooperating with foreign authorities if they could be held liable for treble damages in U.S. courts for their admitted wrongdoing.

Second, the Court found support for its interpretation in the FTAIA's language and legislative history. It concluded that the FTAIA was intended to clarify or limit the reach of the U.S. antitrust laws to foreign commerce, not to expand it (as the foreign purchasers had argued). The Court observed that no case before 1982 specifically permitted plaintiffs to sue for injuries based solely on injuries in foreign commerce, and that a leading pre-1982 case suggested a contrary rule.

The Court also rejected the purchasers' argument that the language of the FTAIA, which permits suits when the conduct's domestic effect gives rise to "a" claim under the Sherman Act, compels a different outcome. Contrary to the Second and D.C. Circuits, the Court held that it "makes linguistic sense to read the words 'a claim' as if they refer to the 'plaintiff's claim' or 'the claim at issue,'" not to construe them as permitting a purchaser in a foreign market to sue because *someone* – though not the plaintiff – has "a claim" under the Sherman Act based on the wrongdoing.

The Court, though, left open questions about whether plaintiffs injured in foreign commerce would be barred from bringing suit in the United States in all circumstances. The Court made clear that its opinion bore directly only on situations when the adverse effect on foreign commerce is “independent” of any domestic effect. It remanded the case to the D.C. Circuit to (a) determine whether the purchasers had preserved any argument that the domestic effects of the alleged conspiracy were linked to the foreign harm; and (b) if so, to decide in the first instance whether this allegation might provide the courts with jurisdiction under the FTAIA.

Implications of *Empagran*

Empagran should put an end to most U.S. antitrust suits for injuries in foreign commerce

premised on allegations that the unlawful conduct also affected U.S. commerce. We are, in particular, likely to have fewer cases in U.S. courts brought by consumers injured overseas as a result of global antitrust conspiracies. Further, the Court’s emphasis on principles of comity and its narrow interpretation of the FTAIA suggest that courts will be skeptical of *any* private claim that is premised on injuries in foreign commerce (although the Court suggested that extraterritoriality limitations may be less stringent when the federal government brings an action).

We are, however, likely to see additional litigation about whether some plaintiffs that purchased overseas can sue in the United States if they can allege that their injuries were linked to effects on U.S. markets; and, if so, under what circumstances, the courts might allow such claims.

If you would like more information about the *Empagran* case or any other issue of antitrust or competition law, please contact us.

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