



ANTITRUST AND COMPETITION LAW UPDATE

July 5, 2005

Empagran S.A. v. F. Hoffman-Laroche, Ltd.: DC Circuit Restricts Reach of US Antitrust Laws Over Injuries Sustained in Foreign Commerce

On June 28, 2005, the US Court of Appeals for the District of Columbia issued an important opinion on the extraterritorial reach of the US antitrust laws in *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*¹ The court held, on remand from the Supreme Court, that plaintiffs injured outside US commerce cannot bring antitrust suits in US courts unless the US effects of the anticompetitive conduct at issue are the *proximate cause* of their injuries. The decision construes narrowly the circumstances under which plaintiffs may be able to sue in US courts for injuries suffered in foreign commerce.

Background

Empagran was a class action brought by plaintiffs that had purchased vitamins overseas. They alleged that vitamin manufacturers had participated in a global price-fixing conspiracy that raised prices both for the vitamins they purchased overseas and for the vitamins that others purchased in US commerce. The critical issue in *Empagran* was whether the Foreign Trade and Antitrust Improvement Acts of 1982 (FTAIA) barred the purchasers from bringing antitrust claims in US 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 US commerce; and
- (2) The effect on US commerce gave rise to “a” claim under the Sherman Act.

Last year, in a closely watched decision, *F. Hoffman-Laroche, Ltd. v. Empagran S.A.*, 542 US 155 (2004), the Supreme Court held that the FTAIA barred the purchasers from bringing their claims in US courts if their injuries were “independent” of the conspiracy’s effects in US commerce. The Court did not, however, finally resolve the case. The purchasers had argued to the Court that their injuries were “linked” to the US effects of the conspiracy because manufacturers needed to keep prices high in the United States to prevent US vitamin purchasers from profitably reselling vitamins in foreign countries (and thereby undermining the success of the conspiracy in those countries). The purchasers argued that their injuries were therefore not “independent” of the conspiracy’s effects in US commerce. The Supreme Court remanded the case to the DC

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¹ Wilmer Cutler Pickering Hale and Dorr LLP represented one of the appellees before the court.

Circuit to determine the validity of this argument (and if the argument had been properly preserved in the lower courts).

Following the Supreme Court's *Empagran* decision, there was great uncertainty about the scope and practical effects of the potential opening left for plaintiffs purchasing outside the United States to sue in US courts for injuries that were not "independent" of the conspiracy's US effects. In particular, the Court had failed to define what "independent" meant. The question became whether the courts would define the term "independent" so as to give rise to US jurisdiction whenever a purchaser in foreign commerce could allege that its injuries were in some way caused by the conspiracy's effects in US commerce.

The DC Circuit Opinion

On remand, the DC Circuit held that the purchasers' injuries were not sufficiently linked to the alleged conspiracy's effect on US commerce to support US jurisdiction over their antitrust claims. The court first observed that antitrust injuries sustained in foreign commerce may be redressed in US Courts in only limited circumstances. To obtain relief, plaintiffs must show that their injuries bear a "direct causal relationship" to the US effects of the alleged anticompetitive conduct. In other words, the US effects of anticompetitive conduct must be the "proximate cause" of the plaintiffs' injury rather than simply a "but-for" cause thereof. The court noted that this interpretation of the FTAIA accords with the principles of "prescriptive comity"—i.e., "the respect sovereign nations afford each other by limiting the reach of their laws"—that the Supreme Court endorsed in its *Empagran* opinion.

The DC Circuit then held that the US courts lacked jurisdiction over the purchasers' claims because the US effects of the manufacturers' conspiracy were not the *proximate cause* of the purchasers' alleged injuries. The court observed that the *direct* cause (and thus the proximate cause) of the purchasers' injuries was in fact the *foreign* effects of the global

conspiracy—i.e., the artificially inflated prices of vitamins sold in foreign countries. The court recognized that the fixing of vitamin prices in the United States may have facilitated the manufacturers' fixing of vitamin prices in foreign countries, and that the manufacturers may have foreseen or intended this result. It concluded, however, that the artificially inflated vitamin prices in the United States were only an *indirect* cause—not a "proximate cause"—of the purchasers' injury in overseas markets. There was no "direct tie" between the US effects and the injuries that the purchasers sustained. Accordingly, the effects of the conspiracy on US commerce did not "give rise to" the purchasers' claims as required by the FTAIA, and the purchasers were barred from suing in US courts.

Implications of the Decision

The DC Circuit's decision on remand suggests that courts of appeal may construe the term "independent" so as to bar under the FTAIA claims for injuries suffered in foreign commerce that are not directly tied to effects in US commerce. The DC Circuit's decision, along with the Second Circuit's decision in *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004), indicate that the appellate courts are taking very seriously the comity concerns that the Supreme Court articulated in its *Empagran* opinion, and that they will be reluctant to extend US jurisdiction over antitrust claims to transactions taking place strictly in foreign commerce.

It bears noting, however, that the DC Circuit's decision in *Empagran* is not the last word in the long-running debate about what exactly the FTAIA means. At least one district court decision, *In re Monosodium Glutamate Antitrust Litigation*, 2005 WL 1080790 (D. Minn. May 2, 2005), held that plaintiffs purchasing fungible goods overseas had sufficiently alleged a direct tie between their injuries and the US effects of a global price-fixing conspiracy so as to overcome the FTAIA's jurisdictional limitations. Furthermore, the plaintiffs in *Empagran* will probably seek rehearing from an en banc

panel of the DC Circuit or file a petition for certiorari with the Supreme Court. We expect that the DC Circuit's "proximate cause" standard is likely to prove influential in future cases involving the FTAIA, but the *denouement* of the whole FTAIA saga may not yet have been written.

Leon Greenfield and David Olsky authored this update.

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