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Client Advisory

U.S. Supreme Court Limits Application of U.S. Antitrust Laws to Foreign Corporations

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Introduction

In the much-anticipated decision in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, No. 03-724, 2004 U.S. Lexis 4174, the U.S. Supreme Court ruled on June 14 that U.S. antitrust laws do not apply to conduct that results in purely foreign harms. The 8-0 decision significantly limits the reach of these laws with respect to foreign defendants.

In an opinion authored by Justice Breyer, the Court relied heavily on principles of comity (respect for the rights of other nations) and legislative intent to determine that the law does not extend jurisdiction to claims made by a foreign purchaser based on an independent foreign harm. This decision resolves a split among the lower courts over whether the antitrust laws apply when the foreign injury was independent of any domestic adverse impact. The Court left the door open, however, if plaintiffs can show that the domestic effects of a conspiracy "helped to bring about . . . foreign injury."

The Empagran Case

The foreign plaintiffs, purchasers of vitamins in bulk, filed a class action on behalf of all purchasers. They alleged that foreign and domestic producers of vitamins conspired to raise the prices of their products in an international price-fixing scheme that was violative of U.S. antitrust laws.

The defendants consisted of fourteen multinational drug manufacturers and distributors. Having already been the focus of a Department of Justice investigation which resulted in numerous guilty pleas and the largest criminal fine to date, they faced civil damages of three times the amount of harm inflicted.

The Foreign Trade Antitrust Improvements Act ("FTAIA") was passed in 1982 to clarify the reach of the U.S. antitrust laws. The FTAIA provides that the Sherman Act shall not be applied to export activities or foreign commercial ventures unless there is a "direct, substantial, and reasonably foreseeable effect" on domestic trade or commerce, import trade, or on American exporters. So domestic and foreign producers who engaged in price-fixing had only to worry about the laws of their home countries so long as the American domestic market was not adversely impacted.

The District Court dismissed the claims in *Empagran*, declaring the FTAIA exceptions inapplicable. On appeal, to the chagrin of many, the Court of Appeals for the District of Columbia ruled that the exceptions could be applied even when the foreign injury was independent of any domestic harm, thus greatly expanding the reach of U.S. antitrust law. Many of the United States' largest trading partners, including Canada, Germany, and Japan, as well as the Bush administration, filed briefs urging the Supreme Court to overturn the Court of Appeals. The foreign governments warned that

their efforts to regulate their own markets would be undermined by such an expansion of U.S. jurisdiction. Likewise, the U.S. Chamber of Commerce argued that the U.S. courts should not be used as a world forum to litigate foreign antitrust suits. This proved to be an important point for the Court, which noted that the "application of [U.S. antitrust laws] creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 2004 U.S. Lexis 4174, at *17.

Reversing the Court of Appeals, the Supreme Court held that when a negative foreign effect occurs independent of an adverse domestic effect, U.S. law will not apply. Relying on the principle of comity, it showed a reluctance to supplant the legislative determinations of foreign governments. The Court also cited legislative history to disprove plaintiffs' broad interpretation of the FTAIA.

The Supreme Court left one potentially important issue unresolved. The Court did not decide whether U.S. law would apply if the domestic effects of the conspiracy "helped to bring about . . . foreign injury," that is, where the domestic injury and foreign injury are *not* independent. In *Empagran*, the plaintiff buyers contend that "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the seller could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." The Supreme Court said that the plaintiffs are free to pursue that argument in the lower court. In other words, the Court did not clarify whether U.S. antitrust law applies where the foreign injuries suffered by foreign plaintiffs were dependent upon a price fixing conspiracy's effects within the United States.

In an Order filed on June 21, the Court of Appeals has directed the parties in *Empagran* to submit briefs as to whether (1) the plaintiffs adequately preserved in the prior proceedings their "alternative theory" that the foreign injury was not independent of the domestic effects, and (2) whether the Court of Appeals should remand the case to the district court for it to decide in the first instance "(1) whether the domestic effects of the appellees' anticompetitive conduct were in fact linked to the foreign injury the appellants claim to have suffered, and (ii) whether the nature of that link is legally sufficient to trigger application of the FTAIA's domestic-injury exception?"

Implications

- U.S. and foreign companies will no longer have to face the threat of treble damages and the aggressive American plaintiffs' lawyers in antitrust cases where the alleged injury to foreign victims is independent of any domestic injury.

- In cases where the market is international, American plaintiffs' lawyers will now plead in their complaints that the injury to foreign plaintiffs is linked to the domestic effects of the alleged violation. They will then work with their hired economists to develop evidence and arguments to support that allegation. The defense lawyers and their experts will seek to show the opposite. The lower courts will have to grapple with the meaning of this part of the

Supreme Court's opinion, in particular what evidence will be sufficient to trigger application of the FTAIA.

- This decision has not lessened the need for corporations selling in foreign markets to implement effective antitrust compliance programs in order to minimize the risk of unlawful conduct, since in many cases the U.S. antitrust laws will still apply.

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