

Application of U.S. Antitrust Laws to Wholly Foreign Conduct

The Door is Shut. Isn't it?

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“Can the Windridge Pig Farm in Australia that bought price-fixed products from a German manufacturer recover treble damages under the U.S. antitrust laws?” That was the question to which the international business community eagerly awaited an answer from the U.S. Supreme Court in June 2004.



The case was *F. Hoffman-LaRoche v. Empagran*, and the implications of the decision were wide-ranging.¹ At issue was whether the U.S. antitrust laws against price fixing not only apply to domestic U.S. commerce and to foreign conduct significantly affecting U.S. commerce, but also to wholly foreign transactions that have no obvious connection to U.S. commerce. The Supreme Court decided against the pig farmer; at least for now, but that is not the end of the story. Immediately after the court published its opinion, both plaintiffs and defen-

dants declared victory. In this article, we will take a look at the legal and factual backdrop of this vexing case.

The extraterritorial application of U.S. antitrust laws has been a hot-button issue for the international business community since the end of WWII, primarily due to the fact that the U.S. has a well-deserved reputation for being among the toughest antitrust jurisdictions in the world. In stark contrast to most other jurisdictions, U.S. antitrust enforcement relies heavily on civil litigation brought by private plaintiffs. Treble damages, class actions,

the availability of jury trials, contingency fees, and a well organized plaintiffs bar, provide a unique mix of incentives (that is, the chance for a significant payout) for private antitrust actions. The substantive U.S. antitrust laws, in international comparison, are also plaintiff-friendly. For certain hard-core offenses such as price fixing, a plaintiff only has to prove an unlawful agreement, no matter how ineffectual, to establish a *per se* violation of the antitrust laws. In addition, the U.S. Department of Justice aggressively pursues members of hard-core cartels criminally. Antitrust offenders are being sent to jail with increasing frequency and for longer periods of time. Since 2000, over 100 years of imprisonment have been imposed on antitrust offenders, with more than 40 individuals receiving jail sentences of one year or longer. Roughly one fourth of the antitrust offenders having served or serving jail time are foreign nationals, including defendants from Germany, Austria, and Switzerland. The trend is towards harsher laws and stricter enforcement. On

¹ *F. Hoffman-La Roche v. Empagran S.A.*, 124 S.Ct. 2359 (2004).

June 22, 2004 President Bush signed into law the Antitrust Criminal Penalty Enhancement and Reform Act, which not only increases the maximum corporate fine from \$10 million to \$100 million, but also the maximum individual fine from \$350,000 to \$1 million, and the maximum jail term from three to ten years.

The plaintiffs in the *Empagran* case are foreign buyers of vitamin products from Ecuador, Ukraine, Australia, and other jurisdictions. The case arose from the aftermath of the prosecution of the "Vitamins, Inc." cartel, the "most pervasive and harmful criminal conspiracy ever uncovered." (Joel I. Klein, Assistant Attorney General, 5/20/1999). For a period of ten years, from 1989-99, a cartel of F. Hoffman-La Roche (Switzerland), BASF (Germany), Rhone-Poulenc (France), Esai (Japan), and others, successfully allocated markets and fixed

prices for up to sixteen vitamin products in markets worldwide. According to some estimates, the total volume of commerce affected was \$34 billion, resulting in overcharges of 20-35% in the U.S. and 30-40% in Europe and the rest of the world. No antitrust conspiracy has ever been sanctioned more harshly than the Vitamins cartel. The U.S. and the EU alone imposed fines of over \$900 million and EURO 850 million, respectively. In terms of private litigation, class actions and settlements of U.S. buyers against the conspirators are valued at \$2 – 3.5 billion. In addition, there are class actions pending in U.S. federal courts brought by foreign buyers against foreign sellers of vitamins. That is the *Empagran* situation, where the question comes to a head: Should a foreign buyer, purchasing

goods at inflated prices from a member of an international cartel in a transaction outside U.S. commerce, be able to sue for treble damages in a U.S. court?

The Supreme Court's reasoning can be outlined as follows. First, the statute that should have provided a clear answer, the Foreign Trade Antitrust Improvement Act of 1982, was too confusing to be of any help. Second, there was no precedent on point. The court then turned to policy arguments, most significantly deterrence and comity.

(i) Deterrence – The most compelling argument for the plaintiffs is that the antitrust laws should ensure that "crime doesn't pay." As long as the expected gains from a cartel exceed the expected costs, firms have an incentive to conspire against their customers. In the Vitamins



cartel, the plaintiffs and their supporters argue, crime did pay. The total world-wide punishment is estimated at \$5 – 6 billion (including fines and damages from private litigation). The total estimated gains from the cartel are in the \$9 – 13 billion range, which leaves cartel profits after detection, litigation, and the payment of damages and fines of \$3 – 8 billion. In other words, even though the worst case came to pass for its members, the cartel was still a profitable enterprise. Thus, or so the argument goes, the present level of deterrence is ineffectual, and only by allowing wholly foreign claims to be brought in the U.S. can the formation of cartels be prevented effectively.

(ii) Comity – While the Supreme Court considered the deterrence argument, it focused primarily on the defendants’ submission that opening the doors of U.S. courts to suits for treble damages by foreign cartel victims would interfere with other nations’ sovereign

determination of their own antitrust policies, a view that was strongly supported by Germany, the United Kingdom, France, Canada, and the United States (as “friends of the court”). The Supreme Court agreed that the broad extraterritorial application of U.S. antitrust laws would effectively override any national laws that provide less attractive remedies to victims of international cartels. For example, a German buyer, wishing to sue its German supplier (a member of an international cartel) for treble damages but unable to do so under German law, could bring a suit in the U.S.

Justice Breyer, writing for the court, therefore urged restraint:

Congress might have hoped that America’s antitrust laws ... would commend themselves to other nations as well. But if America’s antitrust policies could not win their own way in the international marketplace for

such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat. (Empagran, at 2369).

At this point, the reader will rightfully demand an explanation of what should be “vexing” about this case. Obviously, the Supreme Court sided with the defendants and vacated the judgment of the Court of Appeals. How can the plaintiffs possibly claim victory? The plaintiffs claim victory on the basis of what must be one of most surprising last paragraphs of any Supreme Court antitrust decision. At the bottom of the second to last page of the *Empagran* opinion, the court introduces an entirely new concept, distinct from any previous policy consideration:

We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct’s domestic effects did not help to bring about that foreign injury. [Plaintiffs] argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct’s domestic effects were linked to that foreign harm. ... The Court of Appeals ... did not address this argument ... and, for that reason, neither shall we. ... The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim. (Empagran, at 2372).





Put differently, the doors to the U.S. courts are closed only to foreign plaintiffs that suffered *independent* foreign injury. But if higher prices abroad (foreign injury) are dependent on maintaining higher prices in the U.S. (domestic harm), then foreign plaintiffs might very well have a claim in U.S. courts. On that basis, the Supreme Court remanded the case back to the Court of Appeals where the plaintiffs will get a second shot.

What makes the *Empagran* decision a first-rate puzzle is that of all cartels "*Vitamins, Inc.*" is probably *the* textbook case for dependent effects, a truly global cartel that could never have worked profitably in the rest of the world without allocating and sustaining higher prices in the U.S. market. Vitamin products are commodities that can be shipped at minimal costs around the world. If prices in the U.S. had

been lower than in Europe, European buyers would have shifted their purchasing to the U.S. and the cartel would have collapsed. And so the decision of the Supreme Court (no U.S. claims for foreign plaintiffs that suffered independent foreign harm), is strangely divorced from the facts that gave rise to the *Empagran* litigation (harm abroad is economically dependent on harm in the U.S.). In a manner of speaking, the Supreme Court did not decide "the real *Empagran* case." Rather, it decided a stylized hypothetical, in which a global conspiracy leads to entirely independent economic effects in different territories. This is not to say that such conspiracies cannot possibly exist, but it is difficult to imagine one, for why would a German supplier of any product want to conspire with a U.S. supplier of the same product if higher prices in Germany were truly independent of higher prices in the U.S.? Either prices are dependent, and then there is an incentive to collude, or they are not, and then colluding is gratuitous.

The bottom line is that, after years of litigation, there is no bottom line. Following the remand, the Court of Appeals has decided to hear the plaintiffs' claims based on "dependent harm," and so the case will go forward. It is not unreasonable to expect that the Court(s) of Appeals will extend the Supreme Court's reasoning from "independent" harm to some or even

most of the "dependent" harm cases, which would shut the door to most foreign victims of international cartels. But that is little more than informed speculation at this point. The international business community will have to live with continued uncertainty for years to come.

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