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An end to cooperation in competition?

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Abstract

Decades of cooperation between international antitrust authorities are now under threat following two controversial rulings by the US courts of appeal in New York and Washington D.C. William Kolasky examines the far-reaching implications of the Empagran and Kruman cases

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Decades of cooperation between international antitrust authorities are now under threat following two controversial rulings by the US courts of appeal in New York and Washington D.C. **William Kolasky** examines the far-reaching implications of the *Empagran* and *Kruman* cases

The twenty years since the enactment of the Federal Trade Antitrust Improvements Act (the FTAIA) in 1982 have seen steady progress in the cooperation of antitrust authorities worldwide. Prior to the FTAIA's passage, the US's extraterritorial application of its antitrust laws created international friction. Under the strictures of the FTAIA, US courts' authority to decide cases involving foreign conduct is limited to those in which there exists a direct and substantial effect on US commerce, and that effect gives rise to a claim under US antitrust laws. Since the FTAIA was enacted, numerous countries have enacted effective antitrust laws and international agreements to combat antitrust violations, including between the US and Australia, Brazil, Britain, Canada, the European Union, and Germany, among others. International cooperation has been particularly strong in anti-cartel enforcement. In 2003 the US, EU, Canada, and Japan for the first time jointly conducted searches and interviews in a cartel investigation. Foreign governments have also located nationals indicted in US cases and obtained key evidence for US prosecutions of cartel cases. Under this umbrella of international cooperation, US cartel enforcement has reached an all-time high, with fines totalling over \$2 billion in the last six years and jail sentences for convicted individuals averaging more than 18 months.

One of the keys to this era of partnering among nations has been the mutual respect by jurisdictions of each other's right to protect their own commerce. As US appellate judge and former Deputy Assistant Attorney General Diane Wood noted, "Enforcement... is best served when each country watches out for anticompetitive effects in its own market, but each country is also prepared to cooperate to the greatest extent legally

possible with fellow enforcers." Unfortunately, this atmosphere of worldwide cooperation is now in jeopardy as a result of two recent US appeal decisions in *Empagran v. Hoffman-LaRoche* and *Kruman v. Christie's International*.

In *Empagran*, the US court of appeals for Washington D.C. held that American courts had authority to hear antitrust claims brought by foreign plaintiffs against foreign defendants over foreign conduct. The plaintiffs in *Empagran* are foreign purchasers of selected vitamins, who charged the mostly foreign sellers and distributors of these vitamins with a global price-fixing conspiracy. The court concluded that, under the FTAIA, so long as anticompetitive conduct had a 'direct, substantial, and reasonably foreseeable effect' on US commerce, foreign plaintiffs could sue under US antitrust laws, even where the foreign plaintiffs' injuries stemmed solely from the illegal conduct's effect on foreign commerce. Similarly, in *Kruman*, the US court of appeals for New York found that US courts had authority under the FTAIA to award damages for price-fixing in an action brought by foreign buyers and sellers against two auction houses, even where the plaintiffs' injuries stemmed from purchases in auctions outside the US.

Empagran and *Kruman* created a deep division within US appeals courts on the issue of whether US courts have authority to hear antitrust claims brought by foreign plaintiffs against foreign defendants where the plaintiff's injury occurs in foreign, rather than US, commerce. In *Den Norske Stats Oljeselskap As v. Heeremac Vof*, another US court of appeals sitting in Texas held that US courts do not have authority under the FTAIA to hear such claims. *Den Norske* involved allegations of a price-fixing, territorial division, and bid-rigging conspiracy between foreign barge service providers. The plaintiff, also a foreign corporation, sued defendants in a US court, arguing that the court could hear its



claim pursuant to the FTAIA. The court rejected the plaintiff's claim, holding that the suit was not related to US commerce, as the plaintiff's injury arose from the conduct's foreign effects. The US government endorsed the court's holding, submitting an *amicus* brief in *Den Norske* arguing against the extraterritorial application of the FTAIA to foreign plaintiffs suing foreign defendants over antitrust injuries arising in foreign commerce – a position the government reiterated in an *amicus* brief filed in the court of appeals in *Empagran* in support of the defendants' petition for rehearing.

The petition for rehearing was denied by the court of appeals, but the Supreme Court has now agreed to review the lower court decision in *Empagran*, and will hear arguments and issue a decision before the end of its current term in June 2004. The Republic of Germany and US Chamber of Commerce each filed an *amicus* brief asking the Supreme Court to review the case, in which they joined the US Department of Justice and Federal Trade Commission in supporting the defendants' argument that the lower court decision in *Empagran* should be reversed.

There are two legal issues in the debate over whether foreign plaintiffs may sue under the FTAIA. First, do US courts have jurisdiction to hear claims by foreign plaintiffs against foreign defendants over foreign antitrust injuries? Second, do foreign plaintiffs have standing to bring these suits in US courts?

On jurisdiction, the split among the lower courts revolves around the language of Section 6(a) of the FTAIA, which requires that, to be heard in the US, the conduct causing a foreign antitrust injury must have a 'direct, substantial, and reasonably foreseeable effect' on US commerce, and the conduct's effect must 'give rise to a claim' under US antitrust laws. The debate centres on the meaning of the word 'a' in the second requirement – does the FTAIA mandate that the conduct give rise to 'a' claim or to the plaintiff's claim? The D.C. and New York courts take the former view; the Texas court and US government take the latter view. The D.C. court did not find plain meaning within the statutory language, but concluded that the language and legislative history, taken together, supported extending jurisdiction to a foreign

plaintiff's claim of an antitrust injury in foreign commerce, so long as the alleged conduct also affected US commerce in that it could give rise to someone's claim under US antitrust laws.

On standing, *Brunswick v. Pueblo Bowl-O-Mat* requires the plaintiff bringing an antitrust claim in a US court to show that his injury is 'of the type the [US] antitrust laws were intended to prevent.' The D.C. court found that plaintiffs had standing under *Brunswick* because the foreign injury in *Empagran* stemmed from conduct that harmed US commerce and thereby violated the Sherman Act, even though the plaintiff's injury did not stem from that harm.

The US Department of Justice and the Federal Trade Commission filed a joint *amicus* brief petitioning the court for an *en banc* rehearing, arguing that the D.C. court got it wrong on both the jurisdictional and standing issues. The agencies argued that 'the most natural reading' of the FTAIA's language is that the effect on US commerce must give rise to the plaintiff's claim, not just someone's claim. The agencies argued further that US law cannot be applied extraterritorially without a clear statement of intent to do so, which no one could argue the FTAIA contains.

The implications of *Empagran*, if affirmed by the Supreme Court, are troublesome. First, the decision invites global forum shopping. The *Den Norske*

court found that an expansive interpretation (like the one adopted in *Empagran*) would allow plaintiffs to 'flock' to US courts for redress, even where there was no connection between the plaintiff's claim and US commerce. While nearly 100 foreign jurisdictions have antitrust legislation prohibiting cartels, the US alone allows plaintiffs to recover treble damages. Moreover, only the US has a well-established class action structure. By allowing foreign plaintiffs to sue over foreign conduct in US courts, the US becomes a magnet for plaintiffs from all over the world. US court dockets should expect an influx of such global forum shoppers and the class counsel that seek to represent them.

Second, the *Empagran* decision may undermine cartel enforcement in the EU, US, and other jurisdictions around the world. The *Empagran* court bolstered its decision with the rationale that, by allowing foreign plaintiffs to sue foreign defendants over foreign conduct, defendants would be deterred from engaging in global conspiracies because they would fear the prohibitive costs of treble damage suits from plaintiffs worldwide. The US Justice Department and Federal Trade Commission disagree; they believe that foreign plaintiff suits would weaken, not bolster, the deterrence of global conspiracies because it would reduce the incentive for potential whistleblowers to come forward and seek

DoJ reconsiders treble damages

Since the *Empagran* decision, the Justice Department has sought to blunt its impact by proposing to limit private damage recovery available from a leniency applicant to actual (rather than treble) damages. Senators Mike DeWine (R-OH) and Herb Kohl (D-WI) introduced the Antitrust Enforcement Enhancements and Cooperation Incentives Bill (S. 1797) to the Senate Judiciary Committee on October 29, 2003, which proposes to limit the amount of damages recoverable from a leniency applicant to the actual damages sustained by the claimant, thus removing a private plaintiff's right of action for treble damages. In introducing the Bill, Senator DeWine noted that it would 'remove a significant disincentive to those who would be likely to seek criminal amnesty and should result in a substantial increase in the number of antitrust conspiracies being detected.'

Unfortunately, the legislation, even if enacted, would be only a partial answer. The Bill's private damage limits will apply only to companies seeking leniency from the Justice Department, not the EU. The European Commission's leniency policy specifically states that its criminal immunity cannot protect defendants from civil liability. Some nations have adopted blocking measures against enforcement of private foreign judgments. In 1980 Britain enacted the United Kingdom Protection of Trading Interests Act, under which the Secretary of State for Trade could prevent enforcement of foreign judgments for multiple damages. Australia and Canada have similar protections in place. However, without a blocking measure, leniency applicants in the EU and elsewhere will assuredly face the threat of treble damages under US law.

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amnesty under Justice Department and European Commission leniency policies. These leniency policies – which motivate whistleblowers to step forward – are the keys to the tremendous success of international cartel enforcement.

The Justice Department's policy grants amnesty to corporations who are the first to report illegal activity, so long as they curtail their participation in the illegal activity upon notice, and fully and honestly cooperate with the Justice Department's investigation. In return for the applicant's cooperation, the Justice Department will reduce criminal penalties substantially – in many cases, amnesty applicants pay no fine at all. After a 2002 overhaul of its policy, the European Commission's leniency programme is very similar to the Justice Department's programme. As a result of these programmes, amnesty applications in the US have soared to approximately three per month in 2003, and many applicants seek leniency simultaneously from both European and US authorities. The programmes are essential for uncovering illegal cartel behaviour and prosecuting violators worldwide. According to Deborah Platt Majoras, the US principal deputy assistant attorney general, the Justice Department's leniency programme has been its "most active generator of criminal investigations in recent years." But if US courts lend an ear to private treble damage claims based on foreign conduct, the potential exposure for amnesty applicants to treble damage liability could explode. While the Justice Department and the EU can offer criminal amnesty, neither can protect corporations from private damage suits. In calculating the costs of seeking leniency, foreign and domestic corporations will have to factor in potential treble damage suits from worldwide claimants. This may provide a powerful disincentive to blow the whistle on illicit activities in the future.

Finally, *Empagran* ignores conscious policy decisions that foreign governments have made not to inflict treble damages on corporate defendants or to allow private citizens to act as government enforcers. In their petition for writ of *certiorari* to the Supreme Court, the *Empagran* defendants argue that such an expansive reading of US law will lead to 'conflict and resentment' among the nations. The

Republic of Germany in an *amicus* brief agrees and warns that European nations could refuse to enforce foreign private

Unless reversed, *Empagran* will have far-reaching effects on antitrust enforcement. The decision would turn US courts into

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judgments against their nationals. There have already been numerous efforts to block the fast-expanding reach of US antitrust laws, including a British statute that allows the Secretary of State for Trade to prohibit the enforcement of foreign judgments for multiple damages. US Deputy Assistant Attorney General Makan Delrahim recently acknowledged that it would be "self-centred and ultimately self-defeating" for the US to position itself as the world's antitrust 'policeman.' The unintended result may be that, rather than cooperate with the US in prosecuting international cartels, foreign nations will work against the US to protect their own sovereignty.

international tribunals for antitrust enforcement, dispensing American-style justice worldwide. This intrusion could create international friction that could undermine the progress made towards cooperation in antitrust enforcement. It could also harm the leniency programmes established by the European Commission and the Justice Department by creating disincentives for defendants to come forward and expose cartel behaviour. ■

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Seeking leniency

The *Empagran* case will impact not just corporate decisions on whether to seek leniency, but also decisions on how best to seek leniency and to avoid treble damages claims. Corporations should be aware that written submissions made to foreign agencies for amnesty purposes may be discoverable in private actions for damages in the US. In a recent private action for treble damages arising from *Empagran*, a D.C. federal judge ordered the defendants to turn over written submissions made to foreign agencies, including the European Commission, the Canadian Department of Justice, and the Australian Competition and Consumer Commission. Many of these submissions were provided to the agencies as a condition of criminal amnesty under their leniency programmes. However, the court found that the voluntary submission of written statements waived any attorney-client privilege or work product protection that might otherwise have applied.

The Northern District of California took the opposite view in the *In re Methionine* antitrust litigation, refusing plaintiffs' discovery request for defendants' written submissions to the European Commission's leniency programme. The court found that principles of comity outweighed plaintiffs' need for discovery under the circumstances.

It is unclear which path US appellate courts will take on the issue. In light of this uncertainty, companies should consider submitting oral, rather than written, statements on potentially illicit activities. Many jurisdictions, including the US and the European Commission, allow paperless submissions, in which corporations can apply for leniency orally rather than in writing. The European Commission will accept oral leniency applications under its 2002 Leniency Notice, and will treat these applications as official Commission documents. Taking advantage of the paperless submission process, where available, will mean less potentially discoverable information in private actions for damages.