The Supreme Court Decision in *Empagran*

On June 14, 2004, the United States Supreme Court issued its much anticipated opinion in *Hoffmann-La Roche, Ltd. v. Empagran S.A*, 2004 WL 1300131 (2004). This closely watched case raised important questions regarding the ability of foreign purchasers to assert treble damage claims under the U.S. antitrust laws for injuries sustained in foreign commerce where the underlying anti-competitive “conduct” also caused effects in the U.S. marketplace.¹ The Court’s opinion resolved a much publicized split among the circuits, and clarified that the Foreign Trade Antitrust Improvements Act (FTAIA) precludes foreign purchasers from bringing suit in U.S. courts under the Sherman Act where their foreign injuries are “independent of any adverse domestic effect.” *Id.* at *6.

This is good news for companies facing civil antitrust treble damage actions. However, the decision is not definitive. It leaves key questions unanswered about the viability of foreign purchaser claims in an allegedly “global” market where plaintiffs can claim some interrelationship, as a matter of economics, between the foreign and domestic effects of the underlying conduct.

**Background**

The vitamins cartels which gave rise to the *Empagran* foreign purchaser case yielded almost one billion dollars in U.S. criminal fines, resulted in the imprisonment of numerous culpable executives, and spawned a wave of lawsuits by United States direct and indirect purchasers under both federal and state antitrust laws. These domestic purchaser lawsuits (the vast majority of which have now settled) involved billions of dollars in United States commerce arguably affected by the unlawful cartel activity.

Many additional billions of dollars in vitamins, however, were sold in purely foreign commerce, with no connection whatsoever to the United States. These entirely foreign transactions are the subject of the *Empagran* case, a purported class action brought on behalf of all purchasers of vitamins anywhere in the world other the United States.

**The Relevant Statutory Language**

Congress enacted the FTAIA in 1982 to clarify the extraterritorial reach of the Sherman Act. The statute provides that U.S. antitrust laws “shall not apply to

arnoldporter.com
conduct involving trade or commerce ... with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect” on domestic commerce and “(2) such effect gives rise to a claim” under the Sherman Act. 15 U.S.C. § 6a.

In the vitamins matter, it was not disputed that the cartels had the requisite effect on domestic U.S. commerce to “give rise to a claim” by U.S. purchasers. The key issue presented in Empagran—and the subject of an existing circuit split—was whether the existence of valid domestic claims by other parties (U.S. purchasers) satisfied the FTAIA in a case brought by foreign purchasers, or whether, on the other hand, the statute requires the “claim” arising from domestic effects to be the same claim that is asserted by the plaintiff in the particular lawsuit.

Prior Case Law
Two United States Courts of Appeals had previously confronted this very issue and reached different conclusions. In Den Norske Stat Oljeselskap v. HeereMac, decided by the Fifth Circuit, a Norwegian oil company sought redress under U.S. antitrust laws for an alleged conspiracy by British and Dutch companies to fix the price of barge services in the North Sea. The plaintiff operated exclusively in the North Sea and purchased all of its barge services outside the U.S. However, in an attempt to satisfy the FTAIA domestic “effect” test, the plaintiff alleged that in addition to inflating the plaintiff’s operating costs in the North Sea, the defendants’ conduct also led to inflated oil prices in the United States. Affirming a lower court’s dismissal under the FTAIA, the Fifth Circuit held that the statute “precludes subject matter jurisdiction over claims by foreign plaintiffs where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.” Norske, 241 F.3d 420, 428 (5th Cir. 2001). The plaintiff could not establish jurisdiction by pointing to the domestic effect of the defendants’ conduct, since the plaintiff’s injury arose solely from the foreign effect of that conduct. Id.

In Kruman v. Christie’s International PLC, a class of foreign plaintiffs filed suit against the world’s two largest auction houses—Christie’s and Sotheby’s—accusing them of fixing the price of services they provided their clients in connection with auctions conducted both within and outside the United States. The United States District Court for the Southern District of New York dismissed the claims of the foreign plaintiffs who sold and bought items at auctions conducted outside the United States. The Second Circuit reversed. It interpreted the “gives rise to a claim” language of the FTAIA as requiring only that the domestic effects of the alleged conduct violate U.S. antitrust laws, and need not give rise to the specific injury asserted. Kruman, 284 F.3d 384, 397-400 (2nd Cir. 2002).

The Empagran Proceedings in Lower Courts
The District Court
The Empagran plaintiffs originally asserted their claims in a class action lawsuit filed in the United States District Court for the District of Columbia. The defendants moved to dismiss their foreign purchaser claims for lack of subject matter jurisdiction under the FTAIA. Concluding that the Empagran plaintiffs had failed to allege that the “precise injuries for which they seek redress have the requisite domestic effects necessary to provide subject matter jurisdiction” under the FTAIA, the district court granted the defendants’ motion to dismiss. Empagran, 2001 WL 761360 at *3 (D.D.C. June 7, 2001).

The D.C. Circuit
The Empagran plaintiffs appealed the district court’s decision to the United States Court of Appeals for the District of Columbia Circuit. Adopting a modified version of the Second Circuit’s Kruman rationale, a divided panel of the D.C. Circuit held that “where the anticompetitive conduct has the requisite harm on United States commerce, [the] FTAIA permits
suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce." *Empagran*, 315 F.3d 338, 350 (D.C. Cir. 2002). Moreover, the D.C. Circuit held that as long as the alleged conduct results in harmful effects on United States commerce that give rise to a claim by some plaintiffs, even if not the foreign plaintiff who is before the court, that foreign plaintiff can bring suit under U.S. antitrust laws. *Id.* at 344.

Applying this standard, the D.C. Circuit noted that the domestic effects of the vitamins price fixing conspiracy had given rise to antitrust claims by parties injured in the United States as a result of transactions occurring in the United States. Thus, the D.C. Circuit concluded that U.S. courts could properly exercise subject matter jurisdiction over the *Empagran* plaintiffs’ claims, even if those plaintiffs suffered injury from purely foreign transactions that had no effects on U.S. domestic commerce. *Id.* at 341.

The D.C. Circuit panel seemed to base its decision predominantly on the policy objective of deterring anticompetitive conduct. The court reasoned that allowing foreign purchasers, such as the *Empagran* plaintiffs, to bring suit in U.S. courts would enhance deterrence of global conspiracies that harm U.S. markets—and that failing to provide for worldwide treble damages liability in a global cartel case would run the risk of inadequately deterring such conduct. *Id.* at 356.

### The Decision of the U.S. Supreme Court

The Supreme Court granted the defendants’ petition for a writ of certiorari to resolve the conflicting decisions of the Fifth Circuit in the *Norske* case and the Second Circuit and D.C. Circuit in the *Kruzan* and *Empagran* cases, respectively. The defendants argued principally that the D.C. Circuit’s ruling constituted an impermissibly expansive reading of the FTAIA, which was enacted during the early years of the Reagan administration to limit the extraterritorial reach of U.S. antitrust laws. Specifically, defendants argued that the phrase “gives rise to a claim” in the FTAIA must be read to mean the claim of the party before the court—and that the asserted claim must thus arise from effects on domestic U.S. commerce.

By a unanimous 8-0 decision, the Supreme Court adopted defendants’ interpretation of the FTAIA. The Court premised its decision on two principal grounds. First, the Court held that its tradition of “constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations” militated against interpreting the FTAIA to permit the plaintiffs’ claims. *Empagran*, 2004 WL 1300131, at *6. Second, the Court concluded that both historical antitrust precedent (as manifested by pre-FTAIA case law) and the FTAIA’s language suggest that Congress designed the statute “to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.” *Id.* at *9 (emphasis in original).

### Construing the FTAIA to Avoid Unreasonable Interference with the Sovereign Authority of Other Nations

As a threshold matter, the Court noted that it is beyond dispute that U.S. antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s independent regulation of its own internal commerce. *Id.* at *6. That interference accords with principles of prescriptive comity where it “reflect[s] a legislative effort to redress [U.S.] domestic antitrust injury that foreign anticompetitive conduct has caused.” *Id.* (emphasis in original). However, such interference in a foreign nation’s internal commerce is improper and violates comity principles where it is triggered by alleged anticompetitive conduct that “causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim.” *Id.* In such a case, there is no U.S. domestic antitrust injury that needs to be redressed by the application of U.S. antitrust laws, and hence there is no “convincing justification for the extension of the Sherman Act’s scope” to the internal commerce of another nation. *Id.* at *7.

The plaintiffs had contended that because many nations have
adopted antitrust laws similar to those of the United States, “the practical likelihood of interference with the relevant interest of other nations is minimal.” Id. at *8. The Court rejected this argument, however, noting that even if nations agree about the harmful effects of certain conduct, such as price fixing, “they disagree dramatically about appropriate remedies.” Id. The Court cited on this point amicus briefs filed by several major industrialized nations,3 which asserted “that to apply [U.S.] remedies,” including treble damages awards, to purely foreign transactions “would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.” Id. Congress, the Court opined, would not have tried to impose the U.S. antitrust regime on other nations “in an act of legal imperialism through legislative fiat” in this manner. Id. at *9.

Historical Antitrust Precedent
The Court held that as a matter of history, it “found no significant indication that at the time Congress wrote [the FTAIA] courts would have thought the Sherman Act applicable in [the] circumstances” surrounding the Empagran case. Id. at *9. The Court pointedly noted that both defendants and the United States Solicitor General had represented that there was “no case in which jurisdiction was found in a case like this—where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effects on a United States market.” Id. (citation and internal quotation marks omitted). The Court easily distinguished, as inapposite, various cases cited by the plaintiffs, and concluded that the “upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances” presented by the Empagran case. Id. at *11.

The FTAIA’s Language
With respect to the meaning of the phrase “gives rise to a claim” in the FTAIA, the Court stated that “at most [plaintiffs’] linguistic arguments might show that [their] reading is the more natural reading of the statutory language.” Id. at *12. However, the Court noted that “it also makes linguistic sense to read the words ‘a claim’ as if they refer to the plaintiff’s claim’ or ‘the claim at issue.’” Id. Based on both comity principles and pre-FTAIA cases, the Court found it “clear that that the [plaintiffs’] reading is not consistent with the FTAIA’s basic intent,” and proceeded to adopt the more restrictive statutory interpretation advocated by defendants. Id. (emphasis in original).

Policy Considerations
The Court noted plaintiffs’ (and the D.C. Circuit’s) policy arguments—namely that application of the Sherman Act to cases arising from purely foreign transactions without any effects on domestic commerce would increase deterrence and help protect Americans “against foreign-caused anticompetitive injury.” Id. The Court also noted, however, that defendants and various amici (including the U.S. Department of Justice) had made substantial counter-arguments that by increasing treble damage liability in such a dramatic fashion, the plaintiffs’ statutory construction would actually undermine deterrence by decreasing the incentive for parties engaged in anticompetitive conduct to seek leniency under the amnesty programs of the Department of Justice and foreign enforcement agencies.

At the end of the day, the Court declined to endorse either view of the deterrence issue. “But we can say that the answer to the dispute is neither clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion.” Id

Remand to the D.C. Circuit
In their briefing before the D.C. Circuit, the plaintiffs advanced, for the first time, an alternative ground for the application of the Sherman Act to their claims. They argued that, although they bought vitamins overseas, they were injured as a direct result of the increase in U.S. vitamin prices, because the cartel raised prices around the world so as
to keep foreign prices in line with U.S. prices, and thus “avoid a system of arbitrage.” *Empagran*, 315 F.3d at 341. According to plaintiffs, the domestic U.S. injury thus “gave rise” to their claims for purposes of the FTAIA even though their purchase transactions were concededly outside of U.S. commerce. Given its resolution of the case in favor of the plaintiffs on other grounds, the D.C. Circuit did not address the legal sufficiency of this argument. *Id.*

Because the D.C. Circuit had declined to rule on this legal theory, the Supreme Court declined to do so as well. *Id.* at *13. Instead, the Court made clear that its holding that the FTAIA barred plaintiffs’ claims was premised on the assumption that the alleged anticompetitive conduct “independently caused foreign injury.” *Id.* The Court then remanded the case to the D.C. Circuit for resolution of this issue, and further noted that on remand, the D.C. Circuit may as a preliminary matter consider whether the *Empagran* plaintiffs properly preserved this argument on appeal. *Id.*

**Implications of the *Empagran* Opinion**

The Supreme Court’s interpretation of the FTAIA in its *Empagran* decision provides some helpful guidance respecting potential foreign purchaser liability. The decision resolves the split among the D.C., Second, and Fifth Circuits—and makes clear that under the FTAIA, a future plaintiff seeking redress under the U.S. antitrust laws must assert a claim arising from the effects of the alleged anticompetitive conduct on U.S. commerce. Arguments that the FTAIA’s language is satisfied by the fact that some other party was injured in U.S. commerce will no longer be viable.

Because of the nature of the remand, however, a very significant open question remains unanswered: In what circumstances may the court find that the domestic effects of the alleged conduct “give rise” to the claim of a foreign plaintiff who purchases a product in a purely foreign transaction? Future plaintiffs in virtually every international cartel case (as well as in all manner of non-cartel cases) will likely attempt to circumvent the Court’s *Empagran* ruling by asserting their participation in a “global” market—and arguing that, as a matter of economics, they could not have suffered injury “but for” the U.S. effects of any alleged anti-competitive conduct.

At least for the time being, it will be left to the lower courts to resolve (i) the threshold legal issue of whether such a theory is sufficient to bring a claim under the FTAIA; (ii) if it is, what standards and evidence would apply to such a theory at the preliminary “jurisdictional” stage of the case, and (iii) how, if at all, would such standards and evidence be different as the case proceeds to the merits (assuming that jurisdiction under the FTAIA is found proper by the court as an initial matter).

1 Arnold & Porter LLP attorneys Robert Pitofsky, Bruce Montgomery, and Franklin Liss represented defendants Hoffmann-La Roche Inc. and Roche Vitamins Inc. in the *Empagran* proceedings before the Supreme Court.
2 Justice Sandra Day O’Connor took no part in the Court’s consideration of, or decision in, the *Empagran* case.
3 The Court cited briefs filed by the Federal Republic of Germany, Canada, and Japan. The United Kingdom also filed an amicus brief, supporting defendants’ position.

We hope that you find this brief summary helpful. This is only a general summary and should not be construed as providing legal advice. If you would like more information, please feel free to contact:

Robert Pitofsky
202.942.5662
Robert_Pitofsky@aporter.com

Bruce Montgomery
202.942.5679
Bruce_Montgomery@aporter.com

Franklin Liss
202.942.5969
Frank_Liss@aporter.com

The Supreme Court Decision in *Empagran*