



January 16, 2006

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Attention: Public Comments

Re: Comments to the Antitrust Modernization Commission
— Extraterritorial Anticompetitive Conduct

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to respond to the request for public comment issued by the Antitrust Modernization Commission (the Commission) on May 19, 2005. These comments address only the following question relating to topic VI, International:

Should the Foreign Trade Antitrust Improvements Act (FTAIA) be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?¹

The Canadian Bar Association is a national association representing 35,000 jurists across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The general purpose of the Competition Law Section is to promote the objects of the Canadian Bar Association within the competition law field.

Recommendation

The CBA Section believes that there is a need to clarify the circumstances in which the Sherman Act applies to foreign transactions. While the Supreme Court's decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*² clarified the FTAIA to a certain extent, potential for uncertainty continues to exist. The post-*Empagran* jurisprudence in lower courts appears to be inconsistent. As the lack of clarity stems from ambiguous statutory language in the FTAIA, it would be desirable for Congress to amend the law to clarify its intent and provide clear direction to the courts as to where U.S. antitrust law may apply. The CBA Section recommends that these amendments adhere to the principle of international comity on which the Supreme Court based its decision in *Empagran*.

¹ 70 Fed. Reg. 28902-28907 (May 19, 2005).

² 124 S. Ct. 2359 (2004) [*Empagran*].

Background

The ambiguity of the language of the FTAIA was demonstrated in the *Empagran* decision. The issue raised in *Empagran* was whether foreign purchasers injured by a global price-fixing conspiracy could sue under the FTAIA for damages relating solely to foreign transactions. This issue has become increasingly common in antitrust cases, most significantly in class actions where plaintiffs seek to recover treble damages in the U.S. for conduct occurring outside the U.S. and which allegedly has adverse effects on the conditions of competition inside and outside the U.S.

The FTAIA provides as follows:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.³

In *Empagran*, the Supreme Court held that the exception in §6a(1)(A),(2) of the FTAIA does not apply to foreign transactions where the adverse foreign effect is independent of any adverse domestic effect. Therefore, the Sherman Act does not apply to a claim based solely on independent foreign harm. The Supreme Court left open, however, whether the FTAIA allows for the application of U.S. antitrust laws to foreign transactions where some relationship between adverse foreign effects and adverse domestic effects of the anticompetitive conduct can be demonstrated. Thus, while some clarification of the FTAIA came out of the *Empagran* decision, uncertainty remains on the appropriate application of U.S. antitrust laws to foreign transactions.

The Supreme Court adopted the more restrictive statutory interpretation of the FTAIA advocated by the defendants, stating that “[i]t ... makes linguistic sense to read the words ‘a claim’ as if they refer to the ‘plaintiff’s claim’ or ‘the claim at issue’.”⁴ The Supreme Court went on to say that it “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.”⁵ Therefore, the Supreme Court held that the FTAIA does not apply to foreign transactions where the adverse foreign effect is independent of any adverse domestic effect. However, where a connection exists between the foreign claim and the domestic injury, the Supreme Court did not settle how much of a link must exist for U.S. antitrust laws to apply.

In determining the application of the FTAIA, the Supreme Court based its decision on two main arguments. First, it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.”⁶ Second, it found that “the FTAIA’s language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act’s scope as applied to foreign commerce.”⁷

³ 15 U.S.C. §6a.

⁴ *Empagran*, at 2372.

⁵ *Ibid.*

⁶ *Ibid.* at 2366.

⁷ *Ibid.* at 2369.

On remand from the Supreme Court, the United States Court of Appeals for the District of Columbia (the DC Circuit Court) assessed the appellant's theory for Sherman Act liability. According to this theory, "because vitamins are fungible and readily transportable, without an adverse domestic effect (i.e., higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury."⁸ The D.C. Circuit Court held, however, that the "but-for" causation between the domestic effects and the foreign injury claim was not sufficient for anti-competitive conduct to fall within the ambit of the FTAIA exception:

To read the FTAIA broadly to permit a more flexible, less direct standard than proximate cause would open the door to just such interference with other nations' prerogative to safeguard their own citizens from anti-competitive activity within their own border.⁹

Therefore, the D.C. Circuit Court rejected the theory and concluded that it did not have subject-matter jurisdiction under the FTAIA.

The CBA Section agrees with the decision of the D.C. Circuit Court, which, in our view, accords with the principles of international comity cited by the Supreme Court. Nevertheless, the risk remains that other lower courts will reach different opinions on how to distinguish between independent foreign injury and foreign injury dependent on domestic injury, thereby fostering uncertainty about the application of U.S. antitrust law to extraterritorial anticompetitive conduct. In the CBA Section's view, it would be desirable to amend the law to provide clear direction to the courts as to where U.S. antitrust law may apply.

The CBA Section recommends that these amendments adhere to the principles of international comity on which the Supreme Court based its decision in *Empagran*. These principles were set out in a number of briefs filed by foreign governments, including Canada, which were taken into consideration by the Supreme Court. By way of example, Canada's *amicus* brief noted that "upholding U.S. jurisdiction in [*Empagran*] would conflict with and impede effective administration of Canada's immunity program."¹⁰ In particular, Canada submitted that the incentive to make a voluntary disclosure to Canadian competition authorities would significantly decrease if the immunity received by the company in return were to subject it to potential treble damages in the U.S. Moreover, key differences in U.S. antitrust law, including its *per se* treatment of certain anti-competitive agreements and the availability of treble damages contrast significantly with Canadian law, which subjects the agreements to an "undue lessening of competition" test and restricts civil damages to the amount of actual damages plus costs. Given these differences, the FTAIA, as currently worded, risks undermining Canada's competition laws by attracting Canadian plaintiffs who have been injured by anti-competitive behaviour in Canada.¹¹

⁸ *Ibid.* at 2372.

⁹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 417 F. 3d 1267 (D.C. Cir. 2005), 2005 U.S. App. LEXIS 12743 at *10.

¹⁰ Brief for the Government of Canada as *Amicus Curiae* Supporting Reversal, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* (2004) (No. 03-724) (filed February 3, 2004) at 13.

¹¹ See, for example, the Canadian *amicus* brief at 14-15:

The conflict with Canadian antitrust regulation and the intrusion on Canadian sovereignty would perhaps be most direct in the case of cartel behaviour by Canadian companies in Canada that injured Canadian nationals. ... In comparison to Canada's interests, the interests of the United States would be meager, and the effect of upholding U.S. jurisdiction would be to make the courts of the United States the *de facto* forum of choice for any plaintiff anywhere in the world who would identify some effect of the anticompetitive behaviour on U.S. commerce.

An assertion of U.S. antitrust jurisdiction would undercut Canada's immunity program, would negate the "undueness" element of the offence in Canada, and would effectively supersede Canada's policy on civil recovery. This surely would "conflict with the regulation" of competition by Canada. Accordingly, the assertion of such jurisdiction would be unreasonable under United States law.

Although amending the FTAIA to provide the needed clarification requires careful study and input, the CBA Section recommends an addition similar to that currently in place for §6a(1)(B). This provides that the law applies only to injury to export business in the U.S. To restrict the application of U.S. antitrust law to extraterritorial anti-competitive conduct, the new provision could read:

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(A), then sections 1 to 7 of this title shall apply to such conduct only for injury to U.S. domestic trade and commerce or import business in the U.S.

This would not allow the application of U.S. antitrust laws to wholly foreign transactions even if a relationship existed between the adverse foreign effects and the adverse domestic effects. Rather, it would ensure that the statute is interpreted in a manner that avoids unreasonable interference with the sovereign authority of other nations thereby adhering to the principles of international comity.

Yours very truly,

(Original signed by Tamra Thomson on behalf of Madeleine Renaud)

Madeleine Renaud
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