

INTERNATIONAL ANTITRUST ISSUES

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Antitrust Modernization Commission
Hearing on International Antitrust Issues

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I appreciate the opportunity to participate in today's hearing on international antitrust issues. My remarks address the three international issues on which the Commission has solicited comment: whether to amend the Foreign Trade Antitrust Improvements Act (FTAIA); whether the United States should take steps to facilitate further coordination with foreign enforcement authorities; and whether multilateral procedures or other actions should be implemented to enhance international antitrust comity (the full questions as published in the Federal Register are set forth below).

1. Should the FTAIA be amended to clarify the circumstances in which the Sherman Act and FTC Act apply to extraterritorial anticompetitive conduct?

Although the statutory language of the FTAIA and the cases decided under it leave some question as to the scope of its applicability to extraterritorial conduct, the trend of recent court decisions is toward a coherent and sound resolution of the issues left open in the *Empagran* case.

Enacted in 1982, the FTAIA prescribes, as a condition of subject matter jurisdiction for claims involving foreign commerce other than import commerce, that the foreign conduct have a direct, substantial, and reasonably foreseeable effect on U.S. commerce. To recover, a plaintiff must show that this effect gives rise to a claim under

¹ The Commission has authorized me to deliver these remarks at this session. However, these comments are my own and not necessarily those of the Commission or any Commissioner.

the Sherman Act. In *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*,² the Supreme Court resolved a split among the Courts of Appeals by holding that the FTAIA requires plaintiffs asserting a claim based solely on foreign injury to show that the U.S. effects of the conduct gave rise to the antitrust claim. Foreign injury that is independent of domestic effects is not actionable.³ However, the decision did not address plaintiffs' alternative argument that their injury was intertwined with domestic effects, leaving open the question of the level of causation necessary to sustain jurisdiction. This gap generated substantial concern that legal uncertainty would spawn a spate of litigation with inconsistent results, raising the question whether legislative clarification would be desirable.

During the past year, however, lower courts have increasingly interpreted the Supreme Court's decision in a manner that is consistent with one another and with Congressional intent and sound policy. In the remand decision in the *Empagran* case itself, the United States Court of Appeals for the District of Columbia Circuit held that plaintiffs must show a proximate cause between the domestic effects and the foreign injury, rejecting the plaintiffs' proffered "but for" causation standard.⁴ The Supreme Court recently denied the plaintiffs' petition for certiorari.⁵ Two district courts have since followed the reasoning and standard set forth by the D.C. Circuit,⁶ in one case

² 542 U.S. 155 (2004).

³ *Id.*

⁴ *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005), *cert. denied*, ___ S.Ct. ___, No. 05-541, 2006 WL 37108 (Jan 9, 2006).

⁵ *Id.*

⁶ *In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-1328 (PAM), 2005 U.S. Dist. LEXIS 8424 (D. Minn. May 2, 2005), *on reconsideration*, 2005 WL 2810682 (D. Minn. October 26, 2005); Latino

reversing, upon reconsideration, its original denial of a motion to dismiss following the *Empagran* remand decision.⁷

Although the FTAIA has often been criticized for lack of clarity, given that the case law is evolving in a coherent and sound direction, there does not appear to be a need to seek legislative clarification at this time.

2. *Are there technical or procedural steps the United States could take to facilitate further coordination with foreign antitrust enforcement authorities?*

a. *Are there technical amendments to the International Antitrust Enforcement Assistance Act of 1994 (“IAEAA”) that could enhance coordination between the United States and foreign antitrust enforcement authorities?*

b. *Are there technical changes to the budget authority granted U.S. antitrust agencies that could further facilitate the provision of international antitrust technical assistance to foreign authorities?*

The U.S. agencies enjoy strong cooperative relationships with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination on international antitrust policy, and provision of technical assistance to new agencies around the world. Although implementation of the IAEAA continues to pose challenges, there does not appear to be a need for further legislative or other measures to enhance the agencies’ abilities in these areas at this time.

The FTC works with foreign agencies through formal bilateral agreements, informal cooperation arrangements, and in multilateral competition fora. The United States has entered into eight bilateral antitrust cooperation agreements with major trading

Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V., No. 03 Civ. 10312 (HBDF), 2005 U.S. Dist. LEXIS 19788 (S.D.N.Y. Sept. 8, 2005). *See also* Sniado v. Bank Austria AG, 378 F.3d 210, 213 (2d Cir. 2004).

⁷ In re Monosodium Glutamate Antitrust Litig., *supra*.

partners that provide a framework for close cooperation, including notification, exchange of non-confidential information, coordination on cases under parallel review, and comity. The Recommendation of the Organization for Economic Cooperation and Development (OECD) on antitrust cooperation⁸ contains similar provisions applicable to our relationships with the OECD's thirty members. The U.S. has entered into agreements providing for enhanced positive comity with the European Communities and with Canada.⁹ The agencies also cooperate with competition agencies in jurisdictions with which we have no formal agreement.

Cooperation with foreign antitrust agencies is a daily activity at the FTC, and yields tangible benefits. Our dialogue with foreign counterparts on matters that we each are reviewing has promoted consistent analyses and outcomes in countless mergers and conduct cases.¹⁰ The FTC also has participated actively in multilateral bodies such as the International Competition Network (ICN), which now includes almost every competition agency in the world, and the Competition Committee of the OECD. Through these organizations, the FTC promotes sharing experiences and best practices with a view toward narrowing differences in antitrust analysis among the world's approximately 100 antitrust authorities. A good example of the concrete results such efforts can yield is the set of ICN Recommended Practices for Merger Notification and Review Procedures.¹¹

⁸ Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130).

⁹ See <http://www.ftc.gov/bc/international/coopagree.htm>.

¹⁰ See e.g., *Johnson & Johnson / Guidant*, FTC press release, <http://www.ftc.gov/opa/2005/11/jandj.htm> (noting cooperation with the EC and Canada); *Procter & Gamble/Gillette*, FTC press release, <http://www.ftc.gov/opa/2005/09/pggillette.htm> (noting cooperation with the EC, Canada, and Mexico).

¹¹ [Http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf](http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf).

These recommendations have become an international benchmark that have led to changes in laws and regulations, reducing unnecessary costs and burdens for parties to cross-border mergers while helping agencies make their merger review procedures more efficient and effective. In March, immediately before the ABA Spring Meeting, the FTC will host a conference on merger review practices for ICN member countries.

One limitation of the cooperation agreements and mechanisms cited above is that they do not allow the exchange of confidential information. (This is of less concern in merger investigations, in which parties routinely waive confidentiality protections to enable the agencies to share information.) To provide the agencies with a mechanism to overcome this limitation, Congress enacted the International Antitrust Enforcement Assistance Act of 1994.¹² The Act authorizes the U.S. government, provided certain conditions are met, to enter into bilateral agreements that allow the parties to share confidential antitrust information and to gather evidence on behalf of foreign antitrust authorities. The U.S. has entered one such agreement, with Australia in 1999, and has conducted preliminary discussions with other jurisdictions. Although certain provisions of the IAEEA raise issues that can complicate the conclusion of agreements, the obstacles that have prevented the conclusion of further agreements are largely not attributable to the wording of the statute. Hence, there does not appear to be a need for legislative amendment of the IAEEA at this time.

The FTC has been involved with providing technical assistance to nascent antitrust agencies for the past fifteen years. Working with the Department of Justice Antitrust Division, experienced antitrust lawyers and economists conduct short and long-

¹² 15 U.S.C. §§ 6201-6212.

term training missions to develop investigational and analytical skills. In 2005, the FTC conducted twenty-eight missions to eighteen countries, and maintained a resident advisor in Indonesia. The program currently is active in India, Russia, Central America, Mexico, Azerbaijan, and the Association of South East Asian Nations (ASEAN). Recently, the FTC and DOJ concluded successful programs in the Andean Community, Southeastern Europe, and South Africa.

The program is funded primarily by the U.S. Agency for International Development and the U.S. Trade and Development Agency. Funding from these agencies has continued over time as the program has proven its value as part of U.S. foreign policy efforts to promote commercial law reform in developing nations. Given that the program currently is operating successfully around the world, it does not appear necessary to make changes to the FTC's budget authority in this area.¹³

- 3. The adoption of competition or antitrust laws by over 100 jurisdictions around the world, as well as the globalization of commerce and markets, has given rise to the potential for conflict between the United States and foreign jurisdictions with respect to enforcement actions taken and remedies sought. Are there multilateral procedures that should be implemented, or other actions taken, to enhance international antitrust comity? In commenting, please address the significance of the issue, what solutions might reduce that problem, and how such solutions could be implemented by the United States.***

The proliferation of antitrust laws and the globalization of commerce pose challenges to antitrust enforcement. The FTC addresses these challenges by promoting cooperation and convergence and applying comity principles as set forth in U.S. case law,

¹³ One way in which we assist foreign agencies is by hosting their staff at the FTC. Foreign agencies often ask the FTC to allow their staff to work on active case files with FTC staff so they can learn from our practices. The FTC is currently barred, however, by restrictions on sharing non-public information from fulfilling these requests. This would be ameliorated by passage of the US SAFE WEB Act currently before Congress.

guidelines, and agreements. The question of whether to take steps to enhance international antitrust comity is interesting and important, and the FTC looks forward to engaging in further discussion of this topic.

Comity is a well-established part of U.S. antitrust analysis. The U.S. agencies have incorporated comity into their Guidelines for International Operations.¹⁴ The United States's bilateral antitrust cooperation agreements provide for the application of comity, and list the factors that the parties should take into account in applying it to particular cases.¹⁵ In addition to "traditional" or "negative" comity, many agreements provide for "positive comity," a mechanism through which a competition agency can request the competition agency of the other party to take appropriate investigative and enforcement action with respect to anticompetitive conduct that is illegal in the requested jurisdiction and adversely affects the interests of the requesting jurisdiction. U.S. courts have applied comity principles to antitrust cases,¹⁶ including in the Supreme Court's recent *Empagran* decision. Thus, comity is a well-established part of U.S. antitrust enforcement.

The existence of over 100 antitrust laws worldwide raises at least the potential for duplicative, incompatible, and conflicting antitrust rules that not only could impose serious costs on multinational businesses but also complicate antitrust enforcement. To

¹⁴ U.S. Department of Justice and FTC Antitrust Enforcement Guidelines for International Operations § 3.2 (April 1995), <http://www.usdoj.gov/atr/public/guidelines/internat.htm>.

¹⁵ *E.g.*, US-EC agreement, Article VI, http://www.ftc.gov/bc/international/docs/agree_eurocomm.pdf; *see also* OECD Recommendation Article 8(a): "Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad." [http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C\(95\)130](http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(95)130)

¹⁶ *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597 (9th Cir. 1976).

determine whether there is, or likely will be, a real problem, it is necessary to examine experience to date and likely developments in the foreseeable future. Looking retrospectively, businesses have undoubtedly incurred costs arising from having to learn of and comply with multiple antitrust laws, including merger notification and review systems. However, there are many areas in which multinational firms must comply with a multitude of different laws. Narrowing the focus to cases in which firms have been subject to conflicting antitrust decisions, the examples are strikingly few and far between, in contrast to the large number of cases in which cooperation among agencies has produced consistent analyses and compatible outcomes.¹⁷

Although the rare cases that result in conflict are troublesome, it is not clear whether, weighed against the countless matters in which authorities reach compatible conclusions, they should be the determining factor in shaping future policy. Predicting the future is obviously harder -- it is not clear whether conflicts in enforcement outcomes will increase, or whether continued progress in convergence will ensure that such conflicts remain rare exceptions.

Proposals to enhance the use of international antitrust comity appear to be based largely on encouraging competition agencies to defer to the enforcement decisions of the jurisdiction with the greatest interest in the matter. It is possible that there could be

¹⁷ The best known, and perhaps only, examples are the FTC and European Commission (EC) decisions in the Boeing / McDonnell Douglas merger, the Department of Justice and EC decisions in the General Electric / Honeywell merger, and the U.S., EC, and Korean decisions involving Microsoft. Outcomes can also differ because authorities are examining different facts or relevant markets, but these cases do not reflect a lack of convergence or comity. Compare *Pernod Ricard/Diageo/Seagram Sprints*, Case No COMP/M.2268, EC decision of 8 May 2001, http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_45.html#m_2268, with *In the Matter of Diageo PLC and Vivendi Universal S.A.*, FTC Dkt. No. C-4032, <http://www.ftc.gov/opa/2001/12/diageo.htm>.

instances in which such deference is appropriate, whether to conserve scarce enforcement resources when a jurisdiction's interests are protected by enforcement action taken by the lead jurisdiction or where the marginal benefit from an additional enforcement action is far outweighed by total costs of an additional action. Canada has been explicit about abstaining from bringing its own case when it has concluded that its interests were protected by another jurisdiction's actions.¹⁸ Many other jurisdictions no doubt also refrain, albeit without public acknowledgement, from bringing their own cases under similar circumstances. However, articulating principles of deference is certain to raise several difficult issues. These issues include how is the lead jurisdiction determined, based on such factors as the location of the conduct, the parties, the evidence, the most affected consumers, or other criteria? Should smaller jurisdictions, in which anticompetitive effects will almost always be slight relative to the effects elsewhere presumptively defer to the action or inaction of larger jurisdictions? How should jurisdictions, including the United States, reconcile enhanced comity principles with domestic statutory obligations to protect their consumers? In the few cases of actual enforcement conflict to date, would application of comity principles likely have produced a different result?

The current multiplicity of antitrust enforcers and the concomitant potential for duplicative or conflicting enforcement raises serious questions regarding the extent to which national enforcers should consider the actions of other jurisdictions in deciding how to apply their domestic antitrust laws. However, the nature and extent of the problem as well as the merits of alternative solutions are far from clear at this point.

¹⁸ See <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1867&lg=e>, citing *GE/Instrumentarium*, *Sanofi-Synthélabo/Aventis*, and *Microsoft*.

While the FTC looks forward to participating in continued discussion of this important and timely topic, it is too soon to reach conclusions on the wisdom of particular new policies to enhance international antitrust comity.

I would like to reiterate my thanks for the opportunity to participate in this hearing. I would be pleased to try to address any questions the Commission may have.