

# Supreme Court Determines Extraterritorial Reach Of U.S. Antitrust Laws

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In its last term, the U.S. Supreme Court issued two opinions dealing with the international application of U.S. antitrust laws. On June 14, 2004, the Supreme Court issued its opinion in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, No. 03-724.<sup>1</sup> and a week later decided *Intel Corp. v. Advanced Micro Devices, Inc.*, No. 02-572.<sup>2</sup>

The *F. Hoffmann-La Roche* case had been widely followed due to its potential impact on the extra-territorial reach of the federal antitrust laws. At issue was whether a federal statute, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"),<sup>3</sup> precluded a suit under the U.S. antitrust laws by foreign corporations seeking treble damages for price-fixed vitamins purchased from foreign companies outside of the United States for use outside the United States. This private antitrust case arose out of a Justice Department criminal investigation of a cartel formed by the world's largest vitamin manufacturers to fix the price of bulk vitamins, used primarily as additives to livestock feed, breakfast cereals and other prepared foods. The U.S. criminal case resulted in nearly one billion dollars in fines, including a record 500 million dollars levied against Swiss-based *F. Hoffmann La-Roche Ltd.* In an 8-0 decision, the Supreme Court vacated the Court of Appeals (District of Columbia Circuit) opinion holding that the "domestic-injury exception" applied, and that the District Court therefore had jurisdiction over the plaintiffs' antitrust claims. The Court of Appeals had reached this conclusion even though it assumed that the foreign effect – higher prices in the countries where the plaintiffs purchased vitamins (the Ukraine, Panama, Australia and Ecuador) – was independent of the domestic effect, i.e., higher prices in the U.S.

The Supreme Court characterized the case as one involving significant foreign anticompetitive conduct with an adverse domestic effect and an independent foreign effect giving rise to the claim. Under these circumstances the Court concluded that although a party who purchased vitamins in the U.S. could bring a Sherman Act claim under the FTAIA based on domestic injury, a purchaser in a foreign country could not bring a claim based on foreign harm. First, the Court found that the Sherman Act did not apply under these

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circumstances because ambiguous statutes should be applied so as to avoid interference with the sovereignty of other nations. The Court reasoned that although the application of America's antitrust laws to foreign conduct is reasonable where the foreign anticompetitive conduct has caused domestic injury, it is not reasonable to apply those laws to foreign conduct that causes foreign harm. The Court asked:

"But why is it reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim? Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial....Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"<sup>4</sup>

The Court cited with approval amicus briefs filed by Germany, Canada, Japan and others, which argued that to permit foreign plaintiffs who had suffered independent injury to pursue private treble damage remedies would undermine the antitrust enforcement policies of these countries. The argument was that foreign firms would be less willing to cooperate in amnesty programs (which typically offered smaller penalties) if they faced the exposure of treble damage suits in the United States.

Second, the Court found that the language of the statute and its history suggest that the intent of Congress in enacting the FTAIA was to clarify and perhaps to limit, but not to expand, the scope of the Sherman Act as it related to foreign commerce. The Court observed that there was no indication at

the time Congress passed this statute that the courts would have determined the Sherman Act was applicable under these circumstances. The Court concluded that considerations of comity and history manifested that Congress did not intend the exception for conduct that has a "direct, substantial and reasonably foreseeable effect" on domestic commerce and "gives rise to a [Sherman Act] claim" to bring independently caused foreign injury within the reach of the Sherman Act.<sup>5</sup>

The Court left open the possibility that the plaintiffs and their counsel would nevertheless be able to sue for the alleged antitrust violations and recover treble damages and attorneys' fees in the U.S. Courts. Because the Court of Appeals had not addressed plaintiffs' argument that the domestic effects and foreign harm caused by defendants' illegal conduct were linked,<sup>6</sup> the Supreme Court directed the Court of Appeals to determine whether the plaintiffs had properly preserved this argument and if so to consider and decide it.

The second Supreme Court opinion last term that touched on international antitrust issues was *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>7</sup> This case involved an attempt by Advanced Micro Devices ("AMD") to obtain documents for use in pursuit of an antitrust complaint that AMD had filed with the Directorate-General for Competition (the "DG-Competition") of the Commission of the European Communities. Intel Corporation ("Intel") had produced the documents to Intergraph Corporation, the plaintiff in a private antitrust suit in Alabama in which Intel had prevailed on a summary judgment motion. The DG-Competition declined to seek judicial assistance in the United States, and AMD filed an application in the U. S. District Court in the Northern District of California, where it and Intel have their headquarters, for an order requiring Intel to produce potentially relevant documents. In its application AMD relied on a federal statute, 28 U.S.C. 1782(a), which provides that a federal district court "may order" a person "residing" or "found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal...upon application of any interested person."<sup>8</sup>

The District Court denied the application on the grounds that §1782(a) does not authorize the requested discovery. The Ninth Circuit Court of Appeals reversed and ordered the District Court to rule on the merits of the application. The Ninth Circuit rejected Intel's argument, adopted by other circuit courts, that the statute called for a threshold showing that the documents AMD sought in federal court would have been discoverable by AMD in the European Commission investigation had it been located within the European

Union, the so-called "foreign-discoverability" rule. The Supreme Court granted review of the Court of Appeals decision to resolve the conflict among the circuit courts with respect to the rule. The Court also addressed whether a complainant such as AMD, which does not have the status of a private litigant and is not a sovereign agent, may obtain discovery pursuant to the statute and whether a proceeding in a foreign tribunal must be pending or imminent before an applicant may successfully invoke §1782(a).

The Supreme Court found that the statutory phrase "any interested person" is broad enough to include complainants such as AMD and was not limited to "litigants" as Intel contended. The Court also rejected Intel's argument that the statute limits judicial assistance to pending proceedings. Finally, with respect to the foreign discoverability rule, the Supreme Court held that beyond shielding privileged material from production, nothing in the text of the statute limits district courts' production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. The Court rejected Intel's arguments that principles of comity and parity required that the court-ordered production be so limited.

In emphasizing that a district court is not required to grant a §1782(a) discovery application merely because it has authority to do so, the Court listed factors which the lower courts should consider in ruling on such a request. The Court noted that the need for discovery from participants in the foreign proceeding such as Intel is generally not as great as is the need for discovery from third parties. The Court stated that it would be appropriate for the District Court to consider whether the discovery request conceals an attempt to circumvent foreign restrictions on discovery or other policies of a foreign country. The Supreme Court left it to the District Court to determine what, if any, judicial assistance is appropriate in this case pursuant to 28 U.S.C. §1782(a).

Business interests predicted that the decision would open the door to "world-wide fishing expeditions," while Intel said that the ruling was "very narrowly focused" and would not weaken the arguments that it would make in asking the District Court to deny AMD's application.

<sup>1</sup> See 124 S. Ct. 2359 (June 14, 2004).

<sup>2</sup> See 124 S. Ct. 2466 (June 21, 2004).

<sup>3</sup> See 15 U.S.C. § 69 (2004).

<sup>4</sup> 124 S. Ct. 2359, 2367 (2004).

<sup>5</sup> Id. at 2365.

<sup>6</sup> Plaintiffs argued that but for the higher prices in the United States the defendants could not have maintained their international price fixing arrangement and plaintiffs would not have suffered their foreign injury.

<sup>7</sup> 124 S. Ct. 2466 (June 21, 2004).

<sup>8</sup> 28 U.S.C. § 1782(a) (2004).