

Foreign Headaches

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In two important cases decided in June, the U.S. Supreme Court has addressed some of the tricky jurisdictional dimensions in international antitrust disputes. The good news is that the high court has overcome its studied indifference to these vital issues. The bad news is that only one of the justices--Stephen Breyer--has taken a sensible and coherent view of the matter.

F. Hoffman-LaRoche v. Empagran construed the Foreign Trade Antitrust Improvements Act of 1982. Enacted during a fit of industrial-policy enthusiasm and anti-Japanese hysteria, it legalizes U.S. export cartels--that is, price agreements and output restrictions that would earn their practitioners prison time if targeted at American consumers. The act, however, denies this cartel exemption to conspiracies that have a "direct, substantial, and reasonably foreseeable effect" on U.S. consumers. *Empagran* asked whether foreign entities could sue in U.S. courts for harms suffered abroad, so long as the defendants had also similarly harmed Americans through a worldwide scheme.

Writing for a unanimous court, Breyer answered that question--which had split the circuits--in the negative. Opening the U.S. courts to these sorts of disputes, he reasoned, would turn them into havens for litigating other countries' problems. U.S. courts might unwisely provide a forum for litigants who would otherwise come up empty-handed at home. Enterprising American judges could exacerbate international tensions by condemning practices that foreign countries have decided to tolerate, or even promote. Breyer pointed to amicus briefs by Canada, Japan and Germany, which insisted that their efforts to combat international cartels--by offering leniency to corporate turncoats who report hard-to-detect cartel arrangements--would be compromised if the volunteers were to face prosecution in the United States. While antitrust lawyers will long argue over the technical aspects of *Empagran*, its basic message is clear: Let foreign countries take care of their antitrust problems, and we shall take care of ours, each nation responding to global cartels as it sees fit.

Alas, it took the justices only one week to muddy that plain, salutary message. In *Intel Corp. v. Advanced Micro Devices* [AMD], the court construed a federal comity provision that allows U.S. courts to order, at the request of "any interested party," the production of documents "for use in a foreign or international tribunal." Here, the "tribunal" was the European Commission, before whom AMD had filed a complaint alleging that Intel had committed various antitrust violations, including loyalty discounts and price discrimination. Most likely, AMD--a U.S. company--chose a European forum to proceed against another U.S. company because the European law on the abuse of a dominant-market position is more favorable to complainants than the analogous prohibition in the Sherman Act. AMD then turned to American courts to compel the disclosure of documents that would be discoverable neither here nor in Europe.

It takes willful blindness to ignore the enormous potential for abuse and international friction. The European Commission insists that it does not constitute a tribunal at all but is rather a prosecutorial body, akin to the U.S. Department of Justice. Even the most literal-minded justice could have deflected the dispute by accepting that contention. That approach would have avoided a collision course with the commission, which insisted that the “assistance” of U.S. courts would gravely compromise its responsibilities and its policies, including its leniency program. Unfortunately, Justice Ruth Bader Ginsburg’s majority opinion in *Intel* roundly rejected these protestations. The commission, she averred, was simply wrong in demoting its institutional status. And the commission’s fears of interference could be met by U.S. district courts using their discretion on a case-by-case basis to ferret out discovery fishing expeditions.

Courting Trouble

But as Breyer observed in his *Intel* dissent, why invite international friction by helping foreign authorities over their own objections? We should adopt a per se rule against discovery requests that exceed the parties’ procedural rights under foreign law and, in analogous circumstances, under U.S. law. This tracked the principle of *Empagran*: Just as U.S. courts should refrain from needlessly adjudicating the world’s antitrust disputes, so the commission should not become a haven for international litigants, taking advantage of broad U.S. discovery rules only to later litigate in Brussels.

Sadly, the fact that no other justice joined Breyer’s *Intel* dissent—even while agreeing with his analogous reasoning in *Empagran*--suggests that *Empagran*’s promise of comity and compartmentalization may prove nearly empty. The bar to U.S. jurisdiction applies only when the foreign injury is “independent”--that is, unconnected to any damage here. Since the effects of multinational transactions cannot easily be broken into domestic and foreign components, lower courts may follow *Empagran*’s logic only in a narrow set of cases.

This could be most unfortunate. International mega-mergers and other global transactions will often present vexing jurisdictional and diplomatic conflicts. Many hard cases lack a clean jurisdictional solution. That is all the more reason to compartmentalize antitrust enforcement along national lines whenever possible.

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