

**Comments Regarding Commission Issues for Study
Submitted to the Antitrust Modernization Commission by the
Section of International Law
of the American Bar Association***

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The Section of International Law of the American Bar Association (the “Section”) welcomes the opportunity to submit comments to the Antitrust Modernization Commission (the “Commission”) regarding the antitrust issues that are appropriate for Commission study in fulfillment of its mandate under the Antitrust Modernization Commission Act of 2002 to examine whether the need exists to modernize the antitrust laws. The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

The membership of the Section includes over 12,000 lawyers, most of whom are based in the United States. The members of the Section focus on all aspects of law in the international context, and many Section members practice U.S. antitrust law and/or foreign competition law and are experienced in the interplay of U.S. law in the antitrust area with those of other jurisdictions. Thus, the comments are grounded in Section members’ experience in antitrust law and practice in the international context, and the Section hopes and intends that these comments will assist the Commission in identifying antitrust issues with international dimensions that are appropriate for Commission study.

Our suggestions are limited to the areas which have an international or foreign competition dimension, given that this is the Section’s substantive focus. At this point, we are identifying issues and are not taking a position on what the resolution of the identified issues should be.

As a threshold matter, the Section recognizes that the Commission has a broad mandate to consider all issues that may involve competition policy. On the other hand, the Commission will wish to apply its efforts and resources effectively. Therefore, the Section suggests that the Commission may wish to apply, in identifying its issues for study, the following two criteria: (1)

* The members of the Working Group who developed these comments are: Milos Barutciski, Martin Bechtold, Yee Wah Chin, Russell W. Damtoft, Tanya N. Dunne, David I. Gelfand, Ronan Harty, Eric Hochstadt, David W. Hull, Mark Katz, Conor Maguire, James A. Murray, Maria Blanca Rodriguez-Galindo, Fiona Schaeffer, Randolph Tritell, and Kathryn E. Walsh.

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whether an issue raises specific concerns; and (2) whether such concerns are appropriate for legislative or administrative resolution. As to the first criterion, the Section suggests that if there are no specific concerns raised in an area, there is no need for the Commission to devote resources in that area, and the Commission may better direct its limited resources to other efforts. As to the second criterion, the Section suggests that, even when an issue raises specific concerns implicating competition policy, the issue may be one that is not readily susceptible to resolution by legislative or administrative action, and is more amenable to resolution by the evolutionary process of the common law. In that case, although study by the Commission may help inform the development of law in the courts, it may be less than optimal if not counterproductive if the Commission's work instead encourages legislative or administrative action. While it is of course not always easy to determine in advance whether an issue satisfies both criteria, the Section suggests that the determination is possible in many instances, and that the application of the criteria may help ensure that the Commission's resources will be utilized effectively.

In these Comments, the Section recommends two issues with international dimensions for the Commission's consideration, that satisfy the two proposed screening criteria.

Proposed Issue I: To what extent should private parties – including competitors – be able to obtain discovery in the United States from U.S. entities or entities subject to U.S. jurisdiction for use in, or resulting from, foreign antitrust proceedings.

Why this issue merits Commission study:

The Supreme Court recently held that 28 U.S.C. § 1782(a) – which applies to all subject matters, including antitrust – permits a third party to seek discovery for use in European Commission (“EC”) proceedings, even where the EC did not seek the requested discovery from the party under investigation, and where the EC argued, *inter alia*, that it was not a “tribunal” subject to the statute. See *Intel v. AMD*, 124 S.Ct. 2466, 2475, 2487 (2004). The Court left the lower federal courts with broad discretion and provided minimal guidance as to what discovery assistance is appropriate in foreign antitrust proceedings. *Id.* at 2483-84. This may encourage parties to focus their discovery efforts in U.S. courts, rather than foreign antitrust proceedings, which is problematic given the lack of reciprocity, and the administrative nature, and narrower scope, of discovery in antitrust proceedings in many foreign jurisdictions. Also, U.S. courts have limited knowledge of the foreign antitrust proceedings and the merits of the discovery sought, and resolving disputes may be time consuming and expensive. *Id.* at 2474-76 (almost three years).

An important related area involves the ability of private U.S. plaintiffs to obtain through discovery leniency application submissions to the EC. The EC has appeared in several U.S. cases and argued that compelled disclosure of such submissions will have a chilling effect on parties that wish to provide valuable information about unlawful cartels. The courts have reached disparate results. Compare *In re Methionine Antitrust Litig.*, No. C-99-3491 (N.D. Cal. July 29, 2002) (discovery denied), with *In re Vitamins Antitrust Litig.*, No. 99-197, 2002 U.S. Dist. LEXIS 25815, at *31-*46 (D.D.C. Dec. 18, 2002) (discovery granted).

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Because these discovery issues raise important comity and judicial efficiency concerns in antitrust proceedings and may impede effective antitrust enforcement, the Commission should consider whether and, if so, what legislative or other action would be helpful to clarify this area.

Reference Materials Attached:

Intel v. AMD, 124 S.Ct. 2466, 2475, 2487 (2004)

In re Vitamins Antitrust Litig., No. 99-197, 2002 U.S. Dist. LEXIS 25815, at *31-*46 (D.D.C. Dec. 18, 2002)

In re Methionine Antitrust Litig., No. C-99-3491 (N.D. Cal. July 29, 2002)

Bertus Van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation*, 17 ANTITRUST 84, 86-87 n. 21 (2003)

Cynthia Day Wallace, 'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?, 37 INT'L LAW. 1055 (2003)

Additional Reference Materials (not attached) –

Cases:

Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79 (2d Cir. 2004)

In re Bayer AG, 173 F.3d 188, 191 (3d Cir. 1999)

In re Euromepa, 154 F.3d 24 (2d Cir. 1998)

In re Euromepa, 51 F.3d 1095, 1102 (2d Cir. 1995)

Articles:

John Fellas, *Obtaining Evidence Located in the U.S. for Use in Foreign Litigation: 28 U.S.C. § 1782*, 704 PLI/LIT 13 (2004)

Edward A. Klein, *Discovering America*, 26 L.A. LAW. 24 (2003)

Steven M. Saraisky, Comment, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. CHI. L. REV. 1127 (1994)

Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990)

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Proposed Issue II: Whether and how Congress should clarify the reach of the U.S. antitrust laws to non-U.S. commerce in light of the recent Supreme Court decision in *F. Hoffmann-LaRoche Ltd v. Empagran SA*, 124 S. Ct. 2359 (2004).

Why this issue merits Commission study:

In *Empagran*, the Supreme Court held that the Foreign Trade Antitrust Improvement Act (“FTAIA”) excludes from the scope of the U.S. antitrust laws claims based on transactions outside the United States, where the alleged foreign injury is independent of any domestic effects of the alleged antitrust violation. The Court, however, left open the possibility that the U.S. antitrust laws may reach non-U.S. commerce under the FTAIA where a relationship between domestic effects and foreign injury exists. Without action from Congress, it will be up to the lower courts to determine what kind of relationship, if any, is sufficient to enable non-U.S. purchasers to recover treble damages under the U.S. antitrust laws. This may result in costly litigation, conflicting decisions, and continuing uncertainty about the reach of U.S. antitrust law to foreign commerce.

In the *Empagran* case, antitrust enforcement agencies – including the DOJ, the FTC, and non-U.S. national competition authorities – expressed the view that obtaining treble damage recovery for transactions outside the U.S. will impede global antitrust enforcement efforts. The Commission should consider whether and, if so, what legislation would be helpful in this area.

Reference Materials Attached:

F. Hoffmann-LaRoche Ltd v. Empagran SA, 124 S. Ct. 2359 (2004)

David I. Gelfand, Tanya N. Dunne, & Patrick R. Bock, *Looking For Treble*, Global Competition Review, August/September 2004, at 10.

Additional Reference Materials (not attached) –

Cases:

MM Global Services, Inc. v. Dow Chemical Company, 2004-2 Trade Cas. (CCH) ¶74,514 (D. Conn. 2004)

Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002), *reh’g denied*, 535 U.S. 1012 (2002)

Kruman v. Christie’s Int’l plc, 284 F.3d 384 (2d Cir. 2002), *cert. dismissed*, 124 S. Ct. 27 (2003)

Ferromin Int’l Trade Corp. v. UCAR Int’l, Inc., 153 F. Supp. 2d 700 (E.D. Pa. 2001)

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Briefs:

Antitrust enforcement agencies' amicus briefs filed in *F. Hoffmann-LaRoche Ltd v. Empagran SA*, 124 S. Ct. 2359 (2004), available at

http://supreme.lp.findlaw.com/supreme_court/docket/2003/april.html#03-724

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