Exporting US competition law

Gordon Schnell and Adam Nyhan at Constantine Cannon LLP examine the uncertainty over how far US courts are willing to reach abroad

As European policy makers continue to wrestle with whether to allow American-styled antitrust class actions, some crafty US lawyers are taking matters into their own hands. Instead of waiting to bring class actions to Europe, they are bringing Europe (and Asia) to the class actions. They are doing so by importing foreign plaintiffs to challenge in US courts foreign companies for conduct they committed outside the US

This innovative bypass of the European system has added a significant twist to the class action debate. If successful, it could render all the class action wrangling largely moot and elevate the US courts to the role of international arbiter for global private antitrust enforcement. So far, the US courts are having none of it. They have thrown out all of these cases except in those rare instances where a strong US connection was shown. And they have made it clear that they will not meddle with the ability of foreign jurisdictions to take care of (and punish) their own.

The problem is that while the policy reasons for this reining in of US jurisdiction are quite sound, the legal basis for it is a little more wobbly. That is because with its most recent pronouncement on the subject, in *F Hoffman-La Roche Ltd v Empagran*, the Supreme Court left the door open on just how far US courts can reach in regulating foreign conduct. That opening was all that was needed to prompt a recent spate of lawsuits seeking damages for foreign consumers allegedly overcharged by foreign companies engaged in international cartels.

But despite Empagran's invitation (as read by some), it is unlikely that any of these actions will succeed. It is certainly not what Congress intended when it enacted the Foreign Trade Antitrust Improvements Act (FTAIA), the statute designed to clarify, not expand, the foreign reach of US antitrust courts. And it is clearly not what the Supreme Court had in mind with *Empagran*, even if did not come right out and say so. But it would be a mistake to become too comfortable. As long as these efforts to export US jurisdiction continue, foreign companies remain exposed to significant liability. Not to mention all of those pesky procedural trappings of the US system that so much of the world abhors.

The current limits of US jurisdiction

For well more than half a century, American courts have been extremely wary of interfering with the ability of foreign countries to regulate their own commercial affairs and protect their own citizens from anti-competitive conduct. This wariness is an offshoot of international comity, an even more aged doctrine of American law that calls for respecting the legal policy and process of foreign jurisdictions. On those few occasions when American courts or regulators seemed to overstep the jurisdictional line, America's foreign allies made their disapproval heard loud and clear. As the recent transatlantic scuffle over Microsoft between the US Department of Justice's Tom Barnett and EU Competition Commissioner Neelie Kroes plainly shows, they still do. Some have gone so far as to pass "frustration of judgments" laws that block the enforcement of US antitrust judgments and damages awards found to be inconsistent with the country's sovereignty and national interests.

It was against this backdrop that Congress passed the FTAIA in 1982. The statute was designed to promote American exports by insulating from US antitrust liability American companies operating entirely abroad or as US exporters. It also sought to define clear boundaries for US antitrust jurisdiction to encourage America's trading partners to take more effective steps to protect competition in their own markets. What the statute did not do was expand US antitrust jurisdiction to reach the kinds of foreign purchaser actions that have come into US courts since *Empagran*. To the extent the statute sought to address foreign consumers at all, it was purely in the context of their purchases in the American marketplace.

There is one major exception to the FTAIA's general ban on foreign purchaser actions. That is the so-called "domestic injury exception". It is this exception that is at the root of the recent efforts to expand the extraterritorial reach of US courts. Under this exception, the FTAIA provides for US jurisdiction if two conditions are met. First, the challenged conduct, wherever it occurs, has a direct, substantial and reasonably foreseeable effect on US commerce. And second, this US effect gives rise to the foreign injury (which in most cases is the overcharge paid by the foreign purchaser).

Empagran presented the first real opportunity for the Supreme Court to apply this two-part test to the conduct of international cartels. Instead, the High Court took a pass. It did answer the first part of the test by finding that global cartels that sell into the US clearly have the requisite effect on US commerce. But the court never reached the second part of the test.

In particular, the court failed to define what kind of link is required between the cartel's US effect and the foreign injury. That is because it limited its decision to international cartels where the effect on US commerce and foreign commerce is entirely unrelated. The problem with this decision is that there really are no such cartels. A global cartel operating in a global market will cause interrelated effects on the commerce of every country into which it sells. Otherwise, the cartel will fail through the efforts of arbitrageurs or mavericks. That is exactly what foreign purchaser plaintiffs have argued in their post-*Empagran* efforts to steal into US courts. So far, to no avail.

While the Supreme Court ultimately avoided the question, it did make it clear where it wanted the lower courts to end up. It wanted them to afford a strong deference to the laws and policies of other countries. And it wanted them to limit their jurisdiction to redress foreign injury only when that injury directly flows from or is inextricably linked to an anti-competitive effect on US commerce or the conduct of an American company. The language of the court's decision makes this intent unmistakable.

The lower courts have uniformly heeded the High Court's call for restraint. But they have done so based on a rather fuzzy view of the type of US effect that would permit foreign purchaser jurisdiction. As it now stands, US jurisdiction would be appropriate where the US effect of the international cartel directly caused the foreign injury. Mere "but for" causation or facilitation of the foreign injury just doesn't cut it. A very fine line separates this causation dichotomy,

a distinction that only a lawyer could love. Until the Supreme Court revisits the question, the post-*Empagran* onslaught will likely persist and continue to challenge the fragile divide that currently keeps foreign purchasers out of US courts.

The policy behind limited jurisdiction

Regardless of the legal foundation for rejecting these foreign purchaser actions, the policy reasons for their dismissal are clear. Expanding US jurisdiction to foreign consumers suing foreign companies for foreign purchases would undermine national sovereignty and international comity. It would also allow potential claimants to bypass their local enforcement regimes for more friendly or potentially lucrative ones. Imagine the avalanche of US lawsuits that would follow. Foreign purchasers – led by US class lawyers – would trip over each other chasing down the massive discovery and treble damages available in the US but not on their home turf.

Allowing this kind of expanded jurisdiction would also lead to inherent problems associated with adequately managing and representing the plaintiff class. Consider the potential pitfalls associated with representing a class of foreign purchasers who have varying and potentially conflicting interests based on differences in history, culture, economy, language and, ultimately, in what they view as their damage and the most appropriate way to remedy it. It would be near impossible for US lawyers to provide, and US courts to ensure, the proper management and representation of such a diverse class.

Extending the reach of US antitrust jurisdiction would also seriously undermine overall global antitrust enforcement. It would do so by interfering with the corporate leniency programmes so many countries have set up to encourage cartel participants to turn themselves in and cooperate with government investigations. Throughout the world, these programmes have been the primary vehicles for uncovering and dismantling global cartels. Opening US courts to foreign purchasers would significantly increase the scope of private liability and thus greatly diminish the incentive for cartel members to participate in these programmes. The promise of leniency from government prosecution would be worth very little when the cost of securing that leniency is exposure to treble damage liability in a US court from a worldwide class of consumers.

It is for these reasons that the two lead US enforcement agencies, the Department of Justice and Federal Trade Commission, have so strongly advocated strict extraterritorial limits on US antitrust jurisdiction. As they noted in one public filing: "If consumers from around the world suddenly could bring class action suits in US courts against international cartels… the massive increase in potential civil liability would radically tilt the scale of incentives for conspirators against seeking amnesty." It would also strain international cooperation efforts, particularly among those countries that do not want their domestic companies exposed to US treble damage liability. This would be a particularly unfortunate outcome given the great strides the global antitrust community has made in working together to break up cartels.

The deterrent effect of private liability exposure on government enforcement efforts is ultimately what caused Congress to pass the Antitrust Criminal Penalty Enhancement and Reform Act. It reduces from triple to single damages the private liability of any company that participates in the government's leniency programme. This de-trebling provision reflects the US view that strong and unhindered government enforcement is the key to detecting and discouraging international cartel activity. In other words, private enforcement should take a back seat.

Congress evinced a similar willingness to limit private enforcement efforts with its passage of the Class Action Fairness Act. This statute was principally designed to curb within the US some of the very same ills that would likely emerge internationally from permitting foreign purchaser actions in US courts – namely, forum shopping, one jurisdiction imposing its laws on another, and class actions that benefit the lawyers as much as, if not more than, the plaintiffs.

Where we go from here

So, Congress has spoken. The policy implications are clear. And American courts have acted accordingly. Is there anything that remains open on the question of how far the US courts will go in playing the role of global competition cop? Unfortunately, yes. Until the Supreme Court finally settles the question, there remains a lingering uncertainty as to where US courts ultimately will set the boundary of their intervention. The current line of restraint has been drawn quite narrowly. It is bound to become even more faint as the world grows smaller and the global economy more interconnected.

At least one post-*Empagran* court has already seemingly crossed the threshold. In *MM Global Serv v Dow Chemical*, the court permitted an Indian distributor allegedly injured in India to sue two American companies for their conduct in India. The court did so because of its finding that the plaintiff properly alleged a direct and interrelated link between the US and Indian effects of the challenged conduct. Notably, that link was based on the same kind of cross-border price effect that has been rejected in the post-*Empagran* foreign purchaser cartel actions.

MM Global did not involve an international cartel. It did not challenge the conduct of foreign companies. It was decided before the wave of recent circuit court decisions limiting US jurisdiction. And it has been heavily criticised in some US antitrust circles. But it plainly demonstrates the tenuous nature of the current bar on foreign purchaser actions.

Foreign companies can take some comfort from the increased rigour with which US courts have begun to evaluate antitrust conspiracy cases. This follows from the Supreme Court's recent introduction in *Bell Atlantic Corp v Twombly* of a new "plausibility" pleading standard. The lower courts are still debating this decision's real effect. However, it appears that at the very least, an antitrust complaint will need to contain significantly more detail than just "notice" of the basic charge and injury. Some factual specificity and support will be required. Therefore, the traditional fodder for foreign purchaser actions – mere evidence of a foreign government's investigation into possible wrongdoing – may no longer be enough.

But no matter how *Twombly* ultimately plays out in the lower courts, it is unlikely to stem the current tide of foreign purchaser actions. Without a class forum in Europe, these challenges will almost certainly continue to be brought. The potential score for a global class action is just too rich to pass up.

While the odds are good that these cases will continue to be thrown out, foreign companies remain exposed to the ultimate peril of joint and several treble damage liability for a worldwide class of consumers. That is a very heavy risk to bear. Perhaps even worse, they remain subject to the procedural peculiarities of the US system which often provide for, among other things, enormous discovery before the court even decides whether to hear the case. This could easily involve millions of documents and depositions, all of which might have to be shared with government antitrust enforcers, raising the stakes even higher.

So maybe all of this fuss about preventing American-styled class actions in Europe is a bit off point. Maybe having a class forum available in Europe is not such a bad idea after all. At least it would allow foreign countries to protect and punish their own on their own terms and in the manner they see fit, and lessen the risk that American courts will do the job for them.