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FTC, DOJ Propose Update to International Enforcement Guidelines: 14 Important Questions

Authored by Ethan E. Litwin

November 2016

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On November 1, 2016, the two federal antitrust agencies, the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) jointly issued a proposed update to the Agencies' 1995 Antitrust Guidelines for International Enforcement and Cooperation. Much has changed since 1995. Today, international cartel cases account for a much more significant percentage of DOJ's criminal enforcement than they did a generation ago. Likewise, international mergers were rarer in the years preceding the dot.com boom. The number and sophistication of antitrust enforcers and regulators outside of the United States has also grown exponentially since the 1990s, and convergence on a wide range of procedural and substantive issues has occurred thanks to the efforts of participants in the International Competition Network and other international organizations.

The Proposed Guidelines address a wide range of international issues. Following a brief exposition on the provisions of various U.S. antitrust and trade statutes that are most likely to have significance for businesses engaged in international activities, the Guidelines are divided into three substantive sections: (1) the scope of the extraterritorial application of U.S. antitrust law; (2) the Agencies' analysis of international comity concerns and the role of foreign governments' involvement in the underlying conduct when determining whether to open an investigation or bring an enforcement action; and, (3) an overview of the Agencies' tools for conducting investigations abroad, including a detailed analysis of the Agencies' cooperation efforts with their foreign counterparts. The Guidelines also contain a detailed discussion of confidentiality issues that arise in the context of any such cooperation.

Although the Proposed Guidelines are a draft, the very brief comment period suggests that the Agencies view them as in near-final form. If so, we note that the Proposed Guidelines take an aggressively expansionist view of U.S. antitrust law by, among other things:

- Adopting the questionable Ninth Circuit rule that the substantive provisions of the FTAIA replace the *Hartford Fire* "substantial and intended" effect test.
- Trivializing the "substantiality" prong of the "direct effects exception" to the FTAIA both by claiming that it does not "require the effects to be quantified" and by claiming it may be satisfied by proof that effect "was not insignificant."
- Providing that U.S. antitrust law reaches wholly foreign commerce, even where the sale of a component overseas represents "a small fraction of the cost of the finished product" manufactured overseas for sale into the United States where "pricing is closely tied to input costs."
- Suggesting that U.S. antitrust law reaches sales by foreign manufacturers to foreign distributors, even where the manufacturer may not intend that its products be sold into the United States.
- Stating that the Agencies' determination of conflict of laws in a comity analysis is entitled to judicial deference.
- Neglecting to address how the Agencies will balance fines for purely foreign conduct where the same underlying sales form the basis for fines in multiple jurisdictions.

As the Proposed Guidelines are in draft form, in lieu of formal summary, the following are answers to frequently asked questions about the issues covered by the Proposed Guidelines and international antitrust investigations generally.

Are the Guidelines legal precedent?

No. The Guidelines are, technically, a non-binding statement of the Agencies' practices, procedures and viewpoints on certain issues encountered in their global investigations and enforcement actions. Although the 1995 Guidelines were not often cited by the courts, other guidelines issued by the Agencies (such as the *Horizontal Merger Guidelines*) are frequently cited by the courts as persuasive authority.

Does U.S. antitrust law apply extraterritorially?

Yes. The prohibitions of agreements in restraint of trade and monopolization contained in Sections 1-2 of the Sherman Antitrust Act (1890) expressly apply to "trade or commerce . . . with foreign nations." Similarly, each of the substantive provisions of the Clayton Antitrust Act (1914), including Section 7's prohibition of mergers or acquisitions that substantially lessen competition cover "trade or commerce . . . with foreign nations." The FTC Act (1914) similarly defines "commerce" to include "trade or commerce with foreign nations." The Proposed Guidelines also cite several other statutes that are relevant to the conduct of international antitrust or trade investigations and any subsequent enforcement actions.

Are there limits to the extraterritorial application of U.S. antitrust law?

Yes. In 1982, Congress passed the Foreign Trade and Antitrust Improvements Act (FTAIA), which formally became Section 6a of the Sherman Act, clarifying the interpretation of "trade or commerce … with foreign nations" as used in both the Sherman Act and the Clayton Act. The Proposed Guidelines confirm that, although the FTAIA does not formally apply to the FTC Act, the FTC interprets the substantive provisions of the FTC Act as if the FTAIA did apply to that statute.

How does the FTAIA restrict extraterritorial application of U.S. antitrust law?

The FTAIA was originally conceived as limiting the subject matter jurisdiction of U.S. courts to hear antitrust claims regarding the foreign or export activities of U.S. companies. Since its passage, however, courts have come to interpret the provisions of the FTAIA as limiting a wide range of antitrust claims. For example, foreign purchasers who bring antitrust claims concerning purchases they made outside of the United States may not be heard by U.S. courts. *See F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 162-63 (2004). The FTAIA has also been cited by one federal appellate court as authority to bar antitrust claims concerning sales made by a foreign seller to the foreign subsidiary of a U.S. company.

The view that the provisions of the FTAIA act as a limit on the merits of a plaintiff's Sherman Act claims, rather than as a jurisdictional bar to a plaintiff's claim is endorsed in the Proposed Guidelines. The practical effect of this view is that parties may not move to dismiss under Rule 12 for lack of subject matter jurisdiction prior to discovery on the grounds that the challenged conduct is exempted from antitrust enforcement by the FTAIA. Under the Agencies' interpretation, parties must now proceed through at least some discovery before moving on summary judgment to exclude certain categories of sales from plaintiff's claims. Indeed, the Agencies may go even further, proposing that whether the challenged conduct falls within the direct effects exception to the FTAIA (as discussed below) "is a

question for the fact-finder" and, by implication, cannot be resolved as a matter of law. This latter view finds no basis in federal law.

What are the provisions of the FTAIA and what do they mean?

The primary provision of the FTAIA initially exempts from the application of U.S. antitrust law "conduct involving trade or commerce . . . with foreign nations." Excluded from this blanket exemption, however, is "conduct involving . . . import trade or import commerce" (the "import commerce exclusion"). Accordingly, import commerce remains subject to U.S. antitrust law. Further, even if foreign conduct does not involve import commerce, the FTAIA does not bar application of U.S. antitrust law to such "conduct that has a direct, substantial and reasonably foreseeable effect" on domestic commerce (the "direct effects exception").

What constitutes conduct involving import commerce?

First, as the Agencies note in the Proposed Guidelines, it is important to note that the challenged conduct itself must involve import commerce. The import commerce exclusion does not reach purely foreign conduct just because a company may be otherwise involved in importing activities. Although not addressed in the Proposed Guidelines, the range of conduct deemed to constitute "importing" is not settled in current case law. While it is largely settled that where a foreign company sells a product directly to a U.S.-based buyer, the seller ships the product directly to and invoices the buyer in the United States, and the buyer pays the seller from the United States, that sale constitutes "conduct involving import commerce." But where those activities are split (*e.g.*, product sold to a foreign subsidiary but invoiced to a U.S.-based parent), courts remain divided over whether the buyer may pursue antitrust claims relating to those sales. The Agencies' statement in the Proposed Guidelines that companies cannot escape antitrust liability "by outsourcing the delivery of its products to the United States" does not reflect the current state of the law. For example, it is an open question whether sales by a foreign company to a foreign distributor, which then resells the product into the United States, may form the basis for an antitrust claim against the manufacturer. At least one federal appellate court has held that the challenge conduct does not constitute import commerce where the customer purchased the relevant products overseas and brought them into the United States itself. Finally, the Proposed Guidelines provide that even where conduct was not "directed specifically or exclusively at import commerce," such conduct may still "involve" import commerce for the purposes of the FTAIA. By so providing, the Proposed Guidelines adopt the view of the Ninth Circuit Court of Appeals that the substantive tests of the FTAIA exempt the Agencies from any requirement to meet the Supreme Court's *Hartford Fire* standard to show a substantial or intended effect in the United States.

What conduct is covered by the direct effects exception?

If foreign conduct does not fall within the import commerce exclusion (above), it may nonetheless still be subject to U.S. antitrust law if it is deemed to directly affect U.S. domestic commerce. In civil actions, either brought by the government or by private parties, the plaintiff must show that the challenged conduct both (i) had a direct, substantial, and reasonably foreseeable effect on domestic commerce and (ii) the plaintiff's injury arose from that effect on domestic commerce. In criminal cases, the DOJ does not have to satisfy the second "give rise to" element of the test. Regarding the first element, most courts agree that an effect is "direct" if it was proximately caused by the challenged conduct. This effect is deemed to have been "reasonably foreseeable" if, objectively, a reasonable person would have known that the challenged conduct would have caused the domestic effect. Finally, although no court has interpreted the "substantiality" prong of the first element, the Agencies deny that they must either satisfy a pecuniary threshold or otherwise quantify the domestic effect to satisfy their evidentiary burdens. The Agencies' interpretation violates the

maxim that no part of a statute should be interpreted to be meaningless and, in any event, presents as settled a much debated area of law. Pending litigation in the *Auto Parts* and *Capacitors* cases may shed greater light on the meaning and application of the substantiality requirement.

In the hypothetical examples provided in the Proposed Guidelines, the Agencies seek to lessen their burden of proof and to settle disputes the Agencies have had with the defense bar on a number of issues arising under the FTAIA. For example, the Agencies propose that so long as "the effect on import commerce was not insignificant . . . it is substantial." Along the same lines, the Agencies provide that even where a price-fixed component part sold outside of the United States, for incorporation into a finished product for sale into the United States, and where such component may account for "a small fraction of the cost of the finished product", a price increase on such a component may nonetheless "have a meaningful effect on import commerce" where the price of the finished product "is closely tied to imput costs." Such theories attempt to evade the "substantiality" and "foreseeability" prongs of the FTAIA.

Will the Agencies decline to investigate or initiate an enforcement action for comity reasons?

In certain limited cases, the Agencies confirm in the Proposed Guidelines that they will decline to investigate or initiate an enforcement action where doing so would affect the "significant interests of [a] foreign sovereign." Among the factors considered by the Agencies in making a comity analysis are (1) whether the targets of the investigation intended to or did in fact affect U.S. commerce, (2) the significance and foreseeability of any such anticompetitive effects in the U.S., (3) the existence of a "true conflict of laws" with the laws of the foreign jurisdiction, (4) the extent to which the conduct in question will be adequately addressed through a foreign enforcement action, and (5) the effectiveness of any such foreign enforcement action. Consistent with federal law, the Agencies further note that a conflict of law does not exist where it is possible for the parties in question to comply with both the foreign law and U.S. antitrust law, even if the laws in question may be inconsistent. Further, the Agencies state that a conflict does not arise where the parties in question can decline legally to comply with a foreign law or policy to avoid violating U.S. antitrust law.

The Proposed Guidelines repeat the Agencies' position that their opinion on whether to decline to investigate or enforce the antitrust laws due to comity interests is entitled to judicial deference. This position misstates federal law. The Agencies' lone citation in support of its position is a footnote of dicta in a 25 year-old district court decision that is not even on point. Federal courts have in fact rejected similar arguments, most notably the DOJ's position that its determination of whether challenged conduct should be deemed to be an act of state (and therefore immune to legal challenge) should be binding on the courts. As in the act of state context, courts should give careful consideration to the Agencies' views on comity, but give them substantial weight only in appropriate cases, namely where the Agencies ask the court to decline jurisdiction.

How do the Agencies analyze the role that a foreign government may have played in the challenged conduct?

The Proposed Guidelines identify four legal doctrines that can successfully defend against the Agencies' efforts to enforce the antitrust laws: (1) foreign sovereign immunity; (2) foreign sovereign compulsion; (3) act of state; and, (4) petitioning of sovereigns. In general, the Proposed Guidelines' discussion of each of these doctrines largely comports with federal law. It is notable, therefore, that the Agencies have taken an extremely narrow view of the doctrine of sovereign compulsion, requiring that the parties show that "refusal to comply with the foreign government's command would give rise to the imposition of penal and other severe sanctions." This high standard is inconsistent with federal

law, which requires that a defendant establish only that: (1) the foreign law or policy compelled the defendant into violating American antitrust law; (2) the foreign law or policy was fundamental to the challenged conduct and not "merely peripheral"; and, (3) the conduct compelled by the foreign government occurred entirely within the foreign sovereign's own territory.

The Proposed Guidelines also extend sovereign-related defenses in other ways. For example, while federal law does not compel the Agencies to do so, the Proposed Guidelines confirm the Agency practice of extending *Noerr-Pennington* immunity to the petitioning of foreign governments, even if those petitions constitute exclusionary or otherwise anticompetitive conduct.

Do the Agencies have jurisdiction to conduct investigations outside of the territory of the United States?

Yes, in some cases. Where the recipient of a subpoena or civil investigative demand (CID) has "possession, custody or control" over documents or information located outside of the territorial boundaries of the United States, the Agencies may compel their production. The question of control, however, is not straightforward where the court has jurisdiction over one corporate entity and the sought-after documents and information are in the custody of a related entity overseas. These questions may turn on complex analyses of corporate structure and foreign law. In the merger review setting, the Agencies similarly take the position that a Second Request issued pursuant to the HSR Act compels disclosure of all responsive documents and information in the parties' possession, custody or control, regardless of where they are located. Finally, it is important to note that where parties actively cooperate with the Agencies, whether pursuant to the formal obligations of DOJ's Leniency Program or informally in the context of a civil investigation, the Agencies expect all cooperating parties to produce documents and information held outside of the United States.

Is information gathered by the Agencies in the course of an investigation given confidentiality protections?

Yes. Several statutes require the Agencies to treat as confidential certain information obtained in the course of an investigation. In particular, the HSR Act prohibits the Agencies from disclosing information obtained in the course of a merger investigation conducted pursuant to the Act, including the fact that the parties have notified the proposed transaction and all confidential business information provided in the filing or in response to a request to produce information or documents. The FTC Act further restricts disclosure of information provided to the Agency, whether pursuant to compulsory process or voluntarily, in the course of an investigation. Special protection is afforded to information deemed to constitute a trade secret or that contains commercial or financial information. The Antitrust Civil Process Act prohibits the DOJ in most circumstances from disclosing documents or testimony obtained pursuant to a CID without the consent of the producing party. The Federal Rules of Civil Procedure and the FTC Rules contain further procedures for protecting commercial, competitive, or otherwise confidential information in judicial or administrative proceedings. Finally, information produced to the Agencies pursuant to the HSR Act, the FTC Act and other statutes is exempt from disclosure pursuant to the Freedom of Information Act (FOIA).

Do the Agencies cooperate with their foreign counterparts?

Yes. Where the Agencies cannot compel disclosure overseas from a non-cooperating party, the Agencies can, under some circumstances, rely on formal and informal means of cooperating with foreign competition authorities to collect material relevant to their investigations. The Agencies rely on formal bilateral agreements, Memoranda of

Understanding (MOUs) and other types of formal agreements that facilitate the sharing of investigatory material between agencies. In criminal investigations, DOJ may rely on Mutual Legal Assistance Treaties (MLATs) to gather evidence located outside of the United States. The Agencies also frequently collaborate informally with their foreign counterparts on common investigations. In many cases, the Agencies may request that parties waive certain confidentiality protections so that the Agencies may cooperate in a more substantial way with their foreign counterparts. In the absence of such a waiver, the Agencies may be restricted to disclosing only information that is either public or other limited non-public information (such as the existence of an investigation, the Agencies' views on the merits, market definition, theories of harm, and remedies). It is the Agencies' practice to reach an understanding that the foreign agency will maintain confidentiality of any non-public information before any disclosures are made. The Agencies have published a joint model waiver of confidentiality for use in civil cases, which is available on their respective websites.

Is Agency cooperation different in the criminal context?

Yes. Grand jury secrecy laws prohibit the government's disclosure of grand jury materials. Unlike in the civil context, grand jury secrecy cannot be waived by the parties. However, there is no prohibition against the parties' voluntarily disclosing materials produced to the grand jury to a foreign agency.

Will the Agencies protect information sourced from a foreign agency as confidential?

Yes. The Agencies will protect all such information to full extent permissible under U.S. law.

Conclusion

The Proposed Guidelines are a long-overdue update and make for interesting reading. While the Agencies have largely correctly summarized the relevant law in this area, they have in some discrete areas go far beyond established precedent, reflecting the Agencies' aggressiveness in pushing the envelope of international enforcement. The Proposed Guidelines also fail to address some areas of significant concern, such as the potential for the assessment of multiple and duplicative remedies when the same underlying conduct is subject to investigation by multiple agencies across the globe. While the Agencies' silence may reflect their tacit approval of duplicative remedies, the Agencies would be well-served by including some guidance on this critical issue in the final version of the Guidelines.

Finally, we note that these Proposed Guidelines have been issued at a curious time in the Agencies' history, at a time when the FTC has only three Commissioners and the DOJ is led by an Acting Assistant Attorney General. It may be advisable for the Agencies to delay finalizing the Proposed Guidelines until such time as commentary from the bar may be properly considered by a full complement of Agency leadership.

The period to comment on the Proposed Guidelines closes on December 1, 2016.

This update was authored by:

Ethan E. Litwin
Partner
New York
+1 212 698 3669
ethan.litwin@dechert.com