

5 Things To Know About New DOJ-FTC Int'l Antitrust Guide

By **Ethan Litwin** and **James Van Strander**, Dechert LLP

Law360, New York (January 25, 2017, 1:44 PM EST) -- The Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice jointly issued an update to the agencies' 1995 Antitrust Guidelines for International Enforcement and Cooperation on Jan. 13, 2017.[1] The update to the guidelines, among other things, reflects the agencies' views on two critical issues that affect foreign entities: (1) the scope of the extraterritorial application of U.S. antitrust law; and, (2) the circumstances under which comity concerns trump enforcement objectives. These issues have important consequences for both U.S. companies that conduct business abroad and foreign companies who do business in (or whose products find their way to) U.S. markets.



Ethan E. Litwin

Previously, on Nov. 1, 2016, the agencies had sought public comment on a set of proposed guidelines, with the comment period closing on Dec. 1, 2016.[2] This short period for public comment suggested that the agencies' proposed update was a near-complete draft and, indeed, the finalized guidelines show little change from the draft version. In this article, we address a number of frequently asked questions about the issues covered by the guidelines.[3]

1. Did the agencies revisit their position that the Foreign Trade and Antitrust Improvements Act does not limit the subject matter jurisdiction of U.S. courts?



James Van Strander

No. In 1982, Congress passed the Foreign Trade and Antitrust Improvements Act, which clarified the interpretation of "trade or commerce ... with foreign nations" as used in both the Sherman Act and the Clayton Act.[4] While 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,[5] the agencies formally endorse, in the updated guidelines, the view of several courts of appeals that the FTAIA operates, instead, as a limit on the merits of the government's Sherman Act claims.[6] The practical effect of this interpretation is that parties may not move to dismiss under Rule 12 for lack of subject matter jurisdiction prior to discovery, but rather must wait to move for summary judgment. It remains to be seen whether the U.S. Supreme Court will revisit this issue.

2. Did the agencies clarify their interpretation of the FTAIA's import commerce exclusion requirement?

No. 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”). The updated guidelines do not clarify the range of conduct that may constitute “importing activities.” Under current case law, 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., a 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 updated guidelines take an aggressive view on this hotly debated issue. First, the agencies write that companies cannot escape antitrust liability “by outsourcing the delivery of [their] products to the United States,” suggesting that foreign manufacturers may face antitrust exposure for sales made abroad to foreign distributors. Second, the agencies endorse the Ninth Circuit’s view 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. The agencies therefore endorse the Ninth Circuit’s view that there is no longer any need for the government to meet the Supreme Court’s Hartford Fire standard by demonstrating that the challenged conduct had a substantial and intended effect in the United States.[7] This interpretation (the Ninth Circuit notwithstanding) makes no sense: it is illogical that that Hartford Fire could be, in effect, abrogated by a statute enacted 14 years earlier.

3. Did the agencies revisit their position that whether foreign conduct has a “direct” effect on U.S. domestic commerce should be analyzed by a proximate cause standard?

No, although the agencies did clarify their position.

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”). The interpretation of what constitutes a “direct” effect has produced diverging views among the several courts of appeals.

Consistent with their position that the FTAIA should be interpreted as generally allowing for broad enforcement of U.S. antitrust law regarding conduct occurring overseas, the agencies refined their initial guideline by clarifying that the effect on U.S. domestic commerce is “direct” if “there is a reasonably proximate causal nexus, that is, if the effect is proximately caused by the alleged anticompetitive [foreign] conduct.” This change is largely a distinction with little difference and was likely a response to public comments submitted by the plaintiff-friendly American Antitrust Institute, which suggested adopting the definition of proximate cause that had been adopted by some appellate courts.[8] The agencies’ basic interpretation, however, did not change.

By formally endorsing the proximate cause standard, the agencies rejected the view of the Ninth Circuit that foreign conduct should not be deemed to “directly” affect U.S. commerce unless such effect follows “as an immediate consequence” of defendant’s activity.[9] Although many commentators have argued that the Ninth Circuit standard would limit foreign enforcement of U.S. antitrust law to a greater degree than the more expansive proximate cause standard, the agencies, perhaps in an effort to avoid future conflict should the Ninth Circuit interpretation win the endorsement of the Supreme Court, posited that

“any difference between these two tests is unlikely to yield different results in the vast majority of cases.”[10]

4. Did the agencies revisit their aggressive and unsupported interpretation of the substantiality prong of the FTAIA’s direct effect test?

Yes, but only to a limited degree. Importantly, the agencies continue to hold the position that the FTAIA does not require the government to meet a pecuniary threshold or otherwise quantify the domestic effect to satisfy the substantiality prong of the direct effect test.[11] The agencies, however, made several edits to the updated guidelines that confused this issue significantly. First, the agencies now note that they will “collect and analyze evidence ... to determine ... whether the effect was substantial.”[12] If the substantiality prong does not require the agencies to “quantify the domestic effect,” it is difficult to see what the agencies will do to “determine ... whether the effect was substantial.” This addition introduces a new tension in the updated guidelines, which is reinforced by a further change to the final guidelines. While the agencies originally sought to define “substantial as “not insignificant,” the agencies now observe that an effect may be “substantial” even if the domestic effect is “smaller than the conduct’s effect outside of the United States.” This guideline would appear to require the agencies to both quantify the domestic and foreign effects of the challenged foreign conduct in certain cases.

5. Should U.S. courts be bound by the agencies’ comity analysis?

Yes, according to the agencies. The updated guidelines repeat the agencies’ long-standing position that their determination of comity considerations is entitled to judicial deference, all but barring courts from carrying out an independent comity analysis where the agencies have elected to bring an enforcement action.[13]

The comity doctrine seeks to balance the competing interests of different jurisdictions. In the antitrust context, the Seventh Circuit has observed that the “rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability to independently regulate its own commercial affairs.’”[14] As the Second Circuit observed in *In re Vitamin C Antitrust Litigation*, comity “is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.”[15]

Comity principles should inform the agencies’ decision to enforce the antitrust laws where the interests of a foreign sovereign are implicated: It is appropriate for the agencies to decline to investigate or prosecute in the interests of comity between nations. But comity principles also play an independent role in a judicial setting. The comity balancing test articulated in *Timberlane*[16] recognizes both factors that consider executive branch functions (e.g., “possible effects upon foreign relations if the court exercises jurisdiction and grants relief”) and traditional judiciary branch concerns (e.g., “whether the court can make its order effective”).[17] In particular, the latter concerns should be independently determined by the courts.

This concern is reinforced by the limited comity test set forth in the updated guidelines. 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 anti-competitive effects in the U.S., (3) the existence of a “true conflict of laws,”[18] as articulated in *Hartford Fire*, 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. By comparison, the *Timberlane* test reflects

additional considerations that are omitted from the updated guidelines. These include, for example, considerations of judicial efficiency (“[w]hether the court can make its order effective”) and reciprocity (“[w]hether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances”).

Ultimately, it remains to be seen as to whether and to what extent federal courts defer to the agencies on matters of comity, as the guidelines merely set forth the agencies’ position and are not binding on the courts.

Conclusion

It comes as no surprise that the agencies view the scope of their mandate to enforce the antitrust laws broadly. A generation ago, when antitrust and competition laws outside of the U.S. were largely in their infancy, the need for robust extraterritorial antitrust enforcement was acute. But largely thanks to the agencies’ own international efforts, respect for antitrust law is quickly becoming universal across the globe. In the past 20 years, antitrust laws have been adopted by the world’s leading economies, including those that are not purely market based: the Russian Antimonopoly Act was adopted in 2006 and the Chinese Antimonopoly Law came into effect in 2008. U.S. antitrust law no longer needs to police global conduct.

While the FTAIA’s relevance to antitrust enforcement has grown far beyond the limited intentions of its drafters, the logic of the statutory language endures: The connection between the foreign conduct and the U.S. must be significant, either through direct importation of the relevant products or under circumstances where the foreign conduct was the direct cause of the foreseeable and substantial harm suffered in the U.S. Each part of the direct effects test is an important and necessary element in balancing the competing interests of nations.

For similar reasons, the question of whether to assert jurisdiction over acts taken by foreign entities overseas should be addressed *de novo* by the courts. While the agencies’ views on the question of comity should be given careful consideration by the courts, the separation of powers inherent in our system of government demands that courts conduct their own independent analysis.

In the coming years, it is reasonable to expect that international antitrust cases will give rise to conflicts over the proper scope of U.S. antitrust enforcement. Until such time as the Supreme Court revisits its interpretation of the FTAIA, however, foreign companies and U.S. companies doing business abroad will continue to find themselves squarely in the cross-hairs of U.S. antitrust enforcers.

Ethan E. Litwin is a partner in the New York office of Dechert LLP. James Van Strander is an associate in the firm's Washington, D.C., office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (Jan. 13, 2017). 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.

[2] “Justice Department and Federal Trade Commission Seek Public Comment on Proposed Updates to International Antitrust Guidelines” (Nov. 1, 2016).

[3] We previously sought to address a number of frequently asked questions about the issues covered by the proposed guidelines: “FTC/DOJ Release Proposed Update to International Enforcement Guidelines: 14 Important Questions” (Nov. 9, 2016).

[4] 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 Updated 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.

[5] Following the Supreme Court’s pronouncement in 2006 that limitations placed on statutory rights would be regarded as substantive unless specifically declared jurisdictional by Congress, see *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), numerous appellate courts have departed from the Supreme Court’s reading of the FTAIA to hold that the statute is substantive, not jurisdictional, in nature. Compare *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162, 167 (2004) (finding that the FTAIA limits the subject matter jurisdiction of federal courts in antitrust cases) with *United States v. Hsiung*, 778 F.3d 738, 751-53 (9th Cir. 2014) (FTAIA is substantive limit on Sherman Act claims); *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 404-08 (2d Cir. 2014) (same); *Minn-Chem, Inc. v. Agrium, Inc.*, 863 F.3d 645, 851-53 (7th Cir. 2012) (same); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-69 (3d Cir. 2011) (same).

[6] UPDATED GUIDELINES at § 3.2, at 21 (noting that the question of whether the challenged conduct falls within the direct effects exception to the FTAIA (as discussed below) “is a question of fact” and, by implication, cannot be resolved as a matter of law).

[7] See *Hartford Fire Co. v. California*, 509 U.S. 764 (1993).

[8] “Comments on Proposed Updates to International Antitrust Guidelines” (December 1, 2016), pp. 2-3.

[9] See *id.*, citing *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004).

[10] *Id.*

[11] See UPDATED GUIDELINES § 3.2, at 22. The Agencies’ interpretation lacks any support in the relevant case law. Neither of the cases cited in footnote 94 of the Updated Guidelines address when an effect was “substantial” within the meaning of the FTAIA’s effects exception.

[12] UPDATED GUIDELINES § 3.2, at 23.

[13] Federal courts have rejected the Agencies’ position in similar contexts. See *Banco Nacional de Cuba*

v. Sabbatino, 376 U.S. 398, 428 (1964); see also Doe v. Qi, 349 F. Supp. 2d 1258, 96-98 (N.D. Cal. 2004) (government views as to what constitutes an act of state are “not conclusive” but entitled to “respectful consideration” and given “serious weight” in appropriate cases, generally where the government argues in favor of abstention).

[14] Motorola, 775 F.3d at 824.

[15] 875 F.3d at 183 (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court of S. Dist. of Iowa, 482 U.S. 522, 555 (1987)).

[16] Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597 (9th Cir. 1976).

[17] In re Vitamin C Antitrust Litigation, 837 F.3d 175, 193 (2d Cir. 2016) (citing Timberlane, 549 F.2d at 614-15, and Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979)).

[18] A “true 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. Moreover, 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.