



Antitrust Alert: U.S. DOJ and FTC Publish Updated Antitrust Guidelines for International Enforcement with Goal to Maintain Agency Flexibility

January 2017

Following a review of public comments, the Department of Justice and Federal Trade Commission have issued the final version of the updated Antitrust Guidelines for International Enforcement and Cooperation. The final version of the International Guidelines tracks very closely the draft version published for public comment in November 2016. Public comments submitted to the Agencies raised several issues related to the enforcement and the cooperation aspects of the new Guidelines, but the Agencies made few changes in response to the comments.

The revised International Guidelines provide greater Agency flexibility on certain issues, and are consistent with somewhat more aggressive application of U.S. antitrust laws to cross-border and foreign conduct. Of course, the real test is how the new administration will choose to enforce the antitrust laws.

Overview

The revised International Guidelines are the first update to the Agencies' international enforcement guidelines since 1995. The revised International Guidelines consist of three main sections: (1) circumstances in which U.S. antitrust laws will reach conduct occurring outside the United States; (2) circumstances in which, as a matter of law or prosecutorial discretion, the U.S. agencies might refrain from applying U.S. antitrust law to conduct in international trade; and (3) how the U.S. agencies might cooperate with foreign competition authorities when conducting an investigation involving conduct outside the United States. Each of the examples from the 1995 International Guidelines either has been revised substantially or has been replaced altogether. The agencies assert that they amended the examples to "focus[] on the types of issues most commonly encountered." For a more detailed discussion of the content of these three sections, see our Commentary on the proposed International Guidelines published for public comment in November 2016.

Although the revised International Guidelines do not indicate a major change in direction, certain of the specific statements will affect companies with international operations. Whether intended or not, the general tone suggests a more aggressive enforcement stance.

Public comments

In response to the proposed version, the Agencies received eight comments, including from the International Bar Association, the U.S. Chamber of Commerce, the Antitrust Law and International Law sections of the American Bar Association, and the American Antitrust Institute. The comments pertained primarily to either the enforcement or the cooperation sections of the International Guidelines.

Enforcement concerns. Public comments were largely focused on the relationship between foreign conduct and domestic effects required for application of the Sherman Act or FTC Act to foreign conduct. One recurring issue was the Agencies'



standard for determining when conduct involving only non-import foreign commerce results in an effect in the United States such that U.S. antitrust law would apply. Commenters offered various proposals intended to clarify the Agencies' vague proposal. The Agencies' only change, however, was to add a statement that determining whether domestic effects from wholly foreign conduct "gives rise to" a claim is a question of fact.

Similarly, while commenters generally commended the Agencies for their explanation of the standard for determining when domestic injury is the "direct, substantial, and reasonably foreseeable" effect of foreign conduct, the American Antitrust Institute suggested that the Agencies change the definition of "direct" from "proximately caused" to the existence of "a reasonable proximate causal nexus." The agencies made that change.

Cooperation concerns. Public comments addressed how the Agencies should engage with foreign competition governments that do not share the fundamental principles underlying U.S. antitrust enforcement, including adherence to the rule of law, due process, protection of competition rather than competitors, and maximization of consumer welfare. The comments suggested steps that the Agencies should take to ensure convergence to best antitrust enforcement practices. The Agencies did not respond to the comments with any substantive changes to the International Guidelines.

Several comments also addressed the Agencies' commitment to comity in working with foreign competition authorities. Commenters proposed that the Agencies implement various tests to evaluate comity concerns. The Agencies did not adopt any specific test. They added an acknowledgement that some courts have undertaken a comity analysis in disputes between private parties, but they also retained a statement that the Agencies' evaluation of comity concerns is entitled to deference, implying that they believe courts should restrict analysis of comity interests to litigation between private parties.

A number of commenters also expressed concern at the Agencies' cooperation with foreign competition authorities in criminal investigations, inviting the Agencies to elaborate on their promise to "minimize overlapping and inconsistent demands placed on cooperating individuals and firms." But the Agencies declined to add anything further on this point.

A final concern raised by multiple commenters was confidentiality. Commenters requested greater detail from the Agencies regarding when confidential information would be shared with foreign competition authorities and how the waiver of confidentiality process operates. The Agencies chose not to elaborate on either topic.

Implications

The Agencies' response to public comments shows that they are committed to maintaining flexibility in their international enforcement program. Although the Agencies did not explain their reasons for refusing to adopt various proposed revisions, it appears they were hesitant to adopt any standard that might unnecessarily limit their discretion in foreign enforcement efforts. Rather, with respect to many issues, the Agencies have rested on broad statements of policy and intent. The International Guidelines rely on hypothetical examples for explanation, but often fail to make commitments that companies can rely on. In short, the International Guidelines err on the side of maintaining Agencies' flexibility and discretion in future investigations, at the cost of failing to provide solid guidance about the Agencies' likely future actions.

This links to the final version of the January 13, 2017, Guidelines for International Enforcement and Cooperation.

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