



United States of America
Federal Trade Commission

**Guidelines for Global Antitrust:
The Three Cs – Cooperation, Comity, and Constraints**

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Introduction

First, congratulations to the International Bar Association on its 21st annual competition conference. Over the past twenty years, this conference has developed into a preeminent forum for the discussion of antitrust policy and practice. In celebrating this twenty-year milestone, I will return to a topic addressed at the first conference in Fiesole – the U.S. antitrust agencies’ international guidelines.² The guidelines referenced were the then recently-released 1995 joint FTC-DOJ Antitrust Enforcement Guidelines for International Operations.³ Today, I’ll discuss the joint FTC-DOJ Antitrust Guidelines for International Enforcement and Cooperation released earlier this year.⁴

The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I would like to thank Haidee Schwartz, Elizabeth Kraus, and Molly Askin for their invaluable contributions to this speech.

² See, e.g., Charles T. (Chris) Compton, “Changing US View of Joint Ventures”, *International Business Lawyer*, Mar. 1998, at 130, https://www.wsgl.com/PDFSearch/Changing_US_View_of_Joint_Ventures.pdf.

³ Federal Trade Commission and Department of Justice, “Antitrust Enforcement Guidelines for International Operations,” Apr. 5, 1995, <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>. The “1995 Guidelines.”

⁴ Federal Trade Commission and Department of Justice, “Antitrust Guidelines for International Enforcement and Cooperation,” Jan. 13, 2017,

The 2017 Guidelines are firmly rooted in the fundamental principles underlying their 1995 predecessor. Like their predecessor, the 2017 Guidelines provide practical guidance on the FTC's and DOJ's⁵

Developing the 2017 Guidelines – Transparency, Predictability, and Fairness

In developing the 2017 Guidelines, we demonstrated our commitment to the principles of predictability, transparency, and fairness – not just in issuing the updated guidelines but also in seeking and incorporating public comment. The Guidelines process benefited significantly from collaborative efforts between and within the Agencies and from the public comments the Agencies solicited on the draft guidelines.¹⁰ We invited public comments not only to provide transparency, but also because we wanted those interested and potentially affected to have the opportunity to provide input. We received comments from practitioners, academics and legal associations, including a valuable contribution from the IBA.¹¹

To those of you here that read, reflected on, and worked to provide us with those comments, I want you to know the agencies appreciated and carefully reviewed them. To share a personal perspective, I spent many days asking questions and working with my staff to review carefully the comments, re-examine and analyze the relevant case law, and parse the language on a myriad of the Guidelines’ aspects. The Guidelines benefited from the thoughtful feedback from the antitrust bar, and the final Guidelines include revisions and clarifications to address points raised in the comments.

¹⁰ FTC Press Release, “FTC and DOJ Seek Public Comment on Proposed Revisions to International Antitrust Guidelines,” Nov. 1, 2016, <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-doj-seek-public-comment-proposed-revisions-international>.

¹¹ Public Comments, International Bar Association, “Ref. Proposed Antitrust Guidelines for International Enforcement and Cooperation,” Nov. 30, 2016, <https://www.justice.gov/atr/page/file/915776/download>.

What the Guidelines Cover

For those of you who have not looked at the 2017 Guidelines recently, I will briefly summarize their content. First, they provide a high-level guide to U.S. antitrust and related laws likely of greatest significance for businesses engaged in international activities. The Guidelines then move to a discussion of the Agencies' application of U.S. antitrust law to conduct involving foreign commerce, focusing on the connections to the United States sufficient for the Agencies

focus on whether there is a sufficient connection between the anticompetitive conduct and the United States such that the federal laws apply and the Agencies' enforcement would redress harm or threatened harm to U.S. commerce and consumers."¹³ The Guidelines then examine the circumstances under which a "sufficient connection" exists, focusing on the test laid out in the Foreign Trade Antitrust Improvements Act of 1982, known as the FTAIA, as interpreted by subsequent judicial decisions and reflecting the Agencies' current practice.¹⁴ This section provides extensive examples to take practitioners through the Agencies' policies and practices in this complex area.¹⁵

Remedies & Extraterritoriality

The importance of focusing enforcement of the U.S. antitrust laws against harm or threatened harm to U.S. commerce and consumers also features prominently in the Guidelines section on remedies.¹⁶ A new statement in the Guidelines identifies important limits on the Agencies' pursuit of extraterritorial remedies. The 2017 Guidelines now explicitly provide that the Agencies "will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis."¹⁷ This statement reflects the appropriate approach to remedies involving both merger divestitures and conduct remedies that the Commission, and, in my opinion, all competition agencies should follow.

¹³ Guidelines at 16.

¹⁴ Guidelines, Section 3, at 16-27.

¹⁵ *Id*

For example, in the Polypore case, after finding that the company's consummated acquisition of Microporous substantially reduced competition in several North American markets for battery separators, the Commission ordered divestiture of Microporous' business – including a plant located in Austria.¹⁸ Upon review of the order, the Eleventh Circuit confirmed the Commission's reason for including the assets outside the United States – that the buyer of the Microporous assets would need the Austrian plant to compete effectively for North American customers, manage its capacity, help assure supply for local U.S. customers, and avoid supply disruptions.¹⁹

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They have argued that the provision in the consent that Google not seek injunctions against a willing licensee for standard-essential patents that it had committed to license on FRAND terms had a far-reaching extraterritorial effect.

Though I share concerns about competition agencies imposing broad extraterritorial remedies that go beyond addressing consumer harm in their jurisdiction, I believe a close reading of the Google/MMI consent's terms shows that, in fact, it carefully circumscribes the order's geographic scope. This is because the consent covers only arrangements with willing licensees who are subject to the jurisdiction of U.S. District Courts.²³ Through this limitation, the consent cabins its application only to the aspects of the global conduct needed to effectively redress harm or threatened harm to U.S. commerce and consumers. This is an important principle for me and one I strongly supported in the new Guidelines.

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The Guidelines describe the range of practices encompassed in the Agencies' cooperation, the types of information exchanged pursuant to our case cooperation, and the protections afforded it. The Guidelines also acknowledge that the extent of coordination and cooperation with each individual agency reviewing a matter can vary, depending in large part on the intensity of their own investigation and the competitive conditions in their jurisdiction.²⁸

With regard to remedies, the Guidelines recognize that cooperation can help not just agencies but also parties by aiding efficient and effective outcomes. In addition to facilitating non-conflicting remedies, cooperation can and often does result in a single remedy package that addresses the concerns of multiple agencies, or in coordinated remedy packages, reducing compliance burdens for the parties.²⁹

Policy Cooperation

The revised Guidelines also address more prominently the Agencies' policy cooperation, expanding on the principles underlying the 1995 Guidelines. The Guidelines highlight the principle of non-discrimination, explicitly stating that the Agencies do not discriminate in the enforcement of antitrust based on the nationality of parties.³⁰

They reaffirm the Agencies' commitment to not employing their statutory authority to further non-antitrust goals,³¹ which is particularly important given the increased concerns we have heard from the U.S. and multi-national business community about some jurisdictions' use of antitrust enforcement to pursue industrial policy or other goals. This is an important and

²⁸ Guidelines at 46-47; 48-49, Illustrative Examples G & H.

²⁹ *See id.* at 48-49.

³⁰ Guidelines at 2, 4, 37.

³¹ *Id.*

timely commitment, given growing calls in some quarters to use competition law to pursue

enforcement.³⁵ I had the honor of representing the FTC at the recent ICN meeting in Portugal earlier this year and look forward to continued engagement with its work.

The FTC's efforts also includes our technical assistance program that assists newer competition authorities enhance their enforcement capacity, build sound regulatory frameworks, and improve their agency effectiveness.³⁶ Further, we have developed a strong network of bilateral relations through which we learn about sister agency's laws and enforcement and share FTC experience. The strength of these relations, developed over time, affords opportunities to engage in frank discussions about approaches to our respective competition laws, policies, and enforcement, including when they may not live up to the core principles outlined in the Guidelines.³⁷

Based on my own experience, I strongly support the Guidelines' statement that policy engagement increases the effectiveness and predictability of enforcement and facilitating cooperation among competition agencies benefits the entire global antitrust community.

Conclusion

In sum, at the very beginning of the new Guidelines, we highlight our deeply rooted belief in the value of competition and that competitive forces yield the best allocation of economic resources, the lowest prices, and highest quality and progress.³⁸ This message is particularly timely. I am pleased that this fundamental belief flows through the Guidelines and

³⁵ ICN Guidance on Investigative Process, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

³⁶ Randolph Tritell and Elizabeth Kraus, "The Federal Trade Commission's International Antitrust Program," Sept. 2017, at 10, <https://www.ftc.gov/intlantitrust2017>.

³⁷ See Commissioner Maureen K. Ohlhausen, "International Antitrust Enforcement: China and Beyond," Prepared Statement of the Federal Trade Commission Before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, June 7, 2016, https://www.ftc.gov/system/files/documents/public_statements/953113/160607internationalantitrust.pdf.

³⁸ Guidelines at 1.

