



DEPARTMENT OF JUSTICE

THE 1995 ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS: AN INTRODUCTION

Address by

DIANE P. WOOD

Deputy Assistant Attorney General

Antitrust Division

U.S. Department of Justice

ABA Antitrust Section

Spring Meeting

Washington, D.C.

April 5, 1995

Good afternoon. It gives me great pleasure this afternoon to announce the release of the final version of the joint U.S. Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations. As most of you know, this April 1995 edition of the Guidelines is actually the third in the international series, which began with the 1977 Antitrust Guide for International Operations, prepared under the leadership of Donald I. Baker and Douglas Rosenthal, and continued with the 1988 Antitrust Enforcement Guidelines for International Operations, prepared under the leadership of Charles F. ("Rick") Rule and Deborah Garza.

The 1995 Guidelines would not have been possible without the hard work of many people, whom I would like to acknowledge this afternoon. From the Antitrust Division, first among these is Ann Jones, Special Litigation Counsel to Assistant Attorney General Anne K. Bingaman, without whom these guidelines would still be a draft sitting in someone's computer. Many others were also indispensable, including Chuck Stark, Chief of the Foreign Commerce Section, Ed Hand, Assistant Chief of the Foreign Commerce Section, Neil Roberts, the recently retired (and sorely missed) ex-Chief of the Legal Policy Section, Claudia Dulmage, from the Legal Policy Section, Russ Pittman, Chief of the Competition Policy Section, Greg Werden, from the Economic Litigation Section, and Bob Nicholson, from the Appellate Section. From the Federal Trade Commission, we were fortunate to have a fine team, including most importantly Terry Winslow, Associate Director for Policy and Evaluation in the Bureau of Competition, and John Parisi, Counsel for European Union Affairs in the Bureau of Competition. We were equally fortunate to be able to benefit from the expertise of many commentators outside the U.S. Government -- both private parties and foreign governments -- who offered their comments throughout the drafting process and who contributed helpful and thoughtful ideas after we published our comment draft in October of 1994. I would like to take this occasion to give particular thanks to Jim Rill and the distinguished task force that he chaired from the Antitrust Section and International Law and Practice Section, which included Paul Victor, Joe Winterscheid, Bob Weinbaum, Jan McDavid, Tad Lipsky, Tom Kauper, Barry Hawk, Jim Halverson, Joe Griffin, Eleanor Fox, Harvey Applebaum, and Mike Byowitz.

I. Purpose and Scope of the Guidelines

Each version of the international guidelines has reflected the purpose and scope that were appropriate to the time at which it was issued. The Preface to the 1977 Guide explained that it was a response to the private sector's concern that "uncertainty about the application of U.S. antitrust laws had deterred useful international trade and investment." Members of the President's Export Council had suggested a number of recurring problems, which became the

first set of hypothetical cases in these Guidelines. The introductory section of the 1977 Guide was quite brief -- a little more than eight pages -- and the remainder of the Guide's 63 pages was devoted to the fourteen Illustrative Cases. The cases themselves contained both jurisdictional and substantive analysis. The topics included territorial allocations by a single multinational enterprise, a U.S. firm's foreign acquisition, various kinds of joint activities among firms, intellectual property examples, vertical relationships, and problems of dealing with foreign governments.

Eleven years later, the 1988 Guidelines both retained the hypothetical case format of the 1977 Guide, and expanded dramatically the substantive discussion of antitrust doctrine. Nearly half of the 1988 document addresses the relevant laws that the Department of Justice enforces, and various aspects of the Department's enforcement policy. The general statements of enforcement policy in areas such as monopolization, mergers, joint ventures, vertical nonprice restraints, and intellectual property licensing arrangements fulfilled an important dual function: both general guidance not unique to the international context, and information about U.S. antitrust law likely to be useful to foreign readers. In one place, the 1988 Guidelines summarized the important changes in antitrust law and economics that had occurred over the preceding ten to fifteen years. In terms of their specifically international content, the 1988 Guidelines carried forward most of the key policies of the 1977 Guide, including the Department's commitment to principles of international comity, its recognition of certain special defenses, and (as modified by 1982 legislation) its position on most international jurisdictional issues. It departed from the 1977 position on the question of export jurisdiction, but the Department reinstated its traditional view on export commerce in a 1992 announcement issued during the Bush Administration.

The Guidelines that we are issuing today take the next step forward, through their recognition that the U.S. economy as a whole has become thoroughly internationalized. As the 1995 Economic Report of the President notes, the United States today remains the world's largest exporter and importer.¹ Through the achievements of the Uruguay Round of Multilateral Trade Negotiations, the North American Free Trade Agreement, and the promise of further progress in regions including the Americas and the Asia-Pacific area, the U.S. economy is more open than ever before to imports. By the same token, since 1987 U.S. exports have grown at a rate of

¹ Economic Report of the President, February 1995, at 251.

almost 10 percent per year in real terms.² It is no exaggeration to say that all of our enforcement activities are potentially international.

Several consequences flow from the pervasive nature of our international enforcement. First and foremost, both the Department and the Federal Trade Commission concluded that the time had long since passed for separate policy statements from the two agencies on enforcement issues. Following the path-breaking work of former Assistant Attorney General James Rill with the 1992 Horizontal Merger Guidelines, and the later work of the two agencies on two consecutive sets of Health Care Guidelines, we set out to create a unified set of international enforcement guidelines. With these Guidelines, the United States will be speaking with one voice on matters of international enforcement policy, which is plainly as it should be.

Second, we concluded that the international guidelines were not the optimal place for matters of general antitrust doctrine, even though we also recognized that the discussion in the 1988 Guidelines had proven to be useful to many readers. As I will stress throughout this speech, we do not have two versions of antitrust law, one for international transactions and one for domestic: to the extent the law applies at all, it applies in a nondiscriminatory fashion. In a number of important areas, the Department and the Commission have (or will have very soon) current joint guidelines that discuss enforcement policy: the 1992 Horizontal Merger Guidelines and the Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust of 1994, and the Guidelines for the Licensing of Intellectual Property. In other areas, such as vertical distribution restraints, vertical mergers, and joint ventures, officials of both agencies have discussed current policy in speeches and at programs like this. If we were to duplicate these discussions in the international guidelines, we would either add nothing to what is already there, or run the risk of creating unintentional inconsistencies or conveying the erroneous impression that the rules are different for international cases. None of these consequences is desirable. Thus, somewhat paradoxically, precisely because international transactions account for such an important part of our economy, and thus so much of the two agencies' work, we thought it best to keep the focus of the international guidelines on those aspects of enforcement policy that are uniquely "international."

Three fundamental principles underlie the 1995 International Guidelines. *First*, the Department of Justice and the Federal Trade Commission are committed to enforcing the U.S. antitrust laws to the fullest extent of the jurisdiction that the Congress has conferred on the

²Id. at 253.

agencies. Given the importance of the international economy in the United States, we would be irresponsible to do anything less. *Second*, as I have already said, the Agencies are committed to the principle of nondiscrimination: we do not discriminate on the grounds of nationality of parties, and we do not discriminate based on the location of relevant events. *Third*, the Agencies are committed to the principles of international comity, both as it relates to their own enforcement actions, and as it relates to the possibility of cooperating with foreign antitrust authorities. As the recent instances of our successful cooperation with a number of other countries' antitrust agencies have demonstrated, often the best possible way to protect competition within the United States and to take account of the transnational character of a case is to work hand-in-hand with our counterparts.

Underlying our emphasis on cooperation is a critical fact about antitrust law in the 1990s, which we do not discuss in so many words in the Guidelines, but which contributes importantly to our enforcement practices: antitrust itself has taken root in many of our most important trading partners. The competition law of the European Union is nearly forty years old, and it has become the model that most countries in Europe are adopting for their internal use. The European Commission's expertise and commitment to strong enforcement is well known and admired around the world. At the national level, sophisticated antitrust laws and impressive enforcement records exist in many countries, including notably Canada, France, Germany, Australia, and the great majority of our other OECD partners. Countries that have passed competition laws more recently, such as Mexico and Poland, have already begun to establish a new culture of competition in their societies.

The commitment of other countries to antitrust rules and enforcement practices that are compatible, even if not identical, with those of the United States opens up exciting possibilities for cooperative efforts that we are just beginning to explore. Our experience using the Mutual Legal Assistance Treaty between the United States and Canada for cooperative criminal antitrust enforcement has demonstrated beyond any doubt that our two countries can work together effectively to protect competition in North American markets. Theoretical disputes about subtle differences in the scope of our laws, or about concepts of jurisdiction, subside in the face of our strong common interest in stopping illegal cartel behavior and our legal ability to work together toward that end. Although we have not yet reached the same position vis a vis most other countries in the world, the new Guidelines reflect our commitment to move in this direction.

II. Key Provisions of the 1995 Guidelines

A. General Principles for International Enforcement

The Guidelines begin, in the introductory paragraph to section 2, with a brief statement of the enforcement philosophy that informs all international cases. Each of the four sentences in that short paragraph makes an important point, which I would like to take this opportunity to highlight:

First, Section 2 notes that "foreign commerce cases can involve almost any provision of the antitrust laws." As I noted above, it is this fact that led to the comprehensive discussion of the entire scope of antitrust enforcement policy in the 1988 Guidelines, and it is this fact that led us to adopt the alternative format of treating each substantive area either in separate guidelines where warranted, or through more informal guidance in speeches and other official statements. A brief summary of the laws enforced by the Agencies that are likely to have the greatest significance for international transactions is set forth in sections 2.1 through 2.8. This summary should be enough to point the non-specialist in the right direction. In addition, we remind readers that specific guidance is available through the Department's Business Review procedure or the Commission's Advisory Opinion procedure.

Second, we state unequivocally that the "Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties." Many of the commentators on the draft version of these Guidelines pointed out the importance of the non-discrimination principle, which also appeared there. We agree. For the record, this policy has also been consistent over the many years of U.S. international enforcement guidelines.³ Contacts with the United States may be relevant for the application of subject matter or personal jurisdiction standards, but the standards themselves operate in a non-discriminatory fashion.

Third, we state for the record that the Agencies do not employ their statutory authority to further non-antitrust goals. This sentence was added for the sake of emphasis to the final version of the Guidelines. As Assistant Attorney General Anne K. Bingaman has stressed repeatedly, our responsibility is to enforce the antitrust laws, and that is what we do. Speculation or assumptions that antitrust enforcement can somehow incorporate non-antitrust goals are either misguided or wrong. Only when we believe that a substantive antitrust violation has occurred -- either in domestic or foreign commerce -- do we act.

³See 1977 Guide at 9; 1988 Guidelines at 8.

Finally, we make it clear that once you're in the door -- that is, once jurisdictional requirements, comity, and doctrines of foreign governmental involvement have been considered and satisfied -- the same substantive rules apply to all cases. This obviously does not mean the same results will be reached. Some foreign conduct will be beyond our jurisdiction, and thus will not be addressed in a U.S. enforcement proceeding. For non-*per se* offenses, efficiency justifications that are appropriate to international markets may exist that would simply not arise in domestic cases. But the framework for analysis will not shift just because a case has international elements.

B. Importance of International Cooperation

As I have already noted, this is a key theme in the 1995 Guidelines. One way in which the Agencies make this point prominently is through the addition of a new section in the Guidelines, section 2.9, that discusses the relevant international agreements that are already in place. These agreements, as we note, further the twin goals of promoting enforcement cooperation between the United States and foreign governments and of reducing any tensions that may arise in particular proceedings. For present purposes, I would like to distinguish among these agreements in two ways: first, some are bilateral and others are multilateral; and second, some are "first generation" or "soft" agreements that do not supersede national law in any way, and others are "second generation" or "hard" agreements with independent legal effect.

Bilaterals vs. Multilaterals. The bilateral Memoranda of Understanding with Canada, Germany, and Australia, and our (hopefully) soon-to-be-reinstated agreement with the European Union, all reflect the particular circumstances that obtained between the United States and the country or entity in question. In some instances, avoidance of disputes about enforcement activities of one country that affect the important interests of the other is the primary focus of the agreement; in others, making cooperation more effective plays a greater role. All of them, however, establish a general framework within which both purposes can be served, and all contain provisions for notifications, consultations, and cooperation in antitrust matters. The regular bilateral consultations to which we refer in the Guidelines have also been valuable ways for us to share experiences with other countries and to learn more about antitrust developments in their systems.

Other bilaterals afford the possibility of shoulder-to-shoulder cooperation in antitrust enforcement. To date, only the Mutual Legal Assistance Treaty, or MLAT, with Canada to which I have already referred has been used in this way. The United States also has MLATs in

force with over a dozen other countries, and many more are in the process of ratification or negotiation. These MLATs are treaties of general application pursuant to which the United States and the other country agree to assist one another in criminal law enforcement matters. Although antitrust cooperation is not possible under some of them, most do not exclude it, and most do not require strict "dual criminality" by their terms.

The Guidelines also refer to the new International Antitrust Enforcement Assistance Act of 1994, or IAEEA, which was just signed into law on November 2, 1994, by President Clinton.⁴ This statute, as we have explained elsewhere, will permit the Department of Justice and the Federal Trade Commission to enter into antitrust mutual assistance agreements with foreign governments or antitrust authorities. Those agreements will permit both investigative assistance and the sharing of confidential information between agencies, all under strict safeguards designed to protect any information that is transmitted. Although I cannot predict yet with whom and when we will have such agreements, we firmly believe that they will facilitate more effective antitrust enforcement for all sides.

At the multilateral level, the Guidelines recognize that we work in many different fora. Prominent among them is the Organization for Economic Co-operation and Development, or OECD, where the United States, through both agencies, plays an active role on the Competition Law and Policy Committee. The OECD pioneered the idea of cooperation and coordination among antitrust authorities, through its recommendations to member countries. The 1986 Recommendation has regularized the process of notification among OECD countries, while the regular meetings of the CLP have fostered a natural convergence of substantive antitrust policy. Another important multilateral forum, which is likely to grow in significance in the years to come, is the NAFTA working group established under the competition chapter.

Soft vs. Hard Agreements. Most of the agreements described in the Guidelines are of the first-generation, or "soft" variety. This means that they do not in any way override applicable national laws on either side; they do not permit the sharing of confidential information that cannot otherwise be disseminated pursuant to national laws; and they do not bind each party in the international law sense of the term. The principal exception at this time is the MLATs under which antitrust enforcement can be facilitated. When IAEEA agreements begin to enter into force, they will join the MLATs as a second example of "hard" or second-generation agreements.

⁴Pub. L. No. 103-438, 108 Stat. 4597 (1994).

C. Highlights of the Guidelines

These Guidelines run a concise 32 pages, as compared with their lengthier predecessors, and there is thus little need for me to rehearse their entire contents for you. In the time I have remaining, however, I would like to touch on several highlights. Some of the points I have singled out are important because they have changed from the October 1994 draft to the final version; others are simply important points worth mentioning.

1. Jurisdiction. Section 3.1 of the Guidelines addresses the key issue of jurisdiction in international cases. Some people wondered why we treated *Hartford Fire* jurisdiction, 1982 Act jurisdiction, and merger jurisdiction separately, and they made the point that the different tests involved would not often yield different results, so why be confusing? We considered this point very seriously, but in the end we concluded that the distinctions we have drawn are required in each case by the governing law. As I said before, we are not writing law in the Guidelines; we are telling the public how we interpret and enforce the laws that we are obliged to follow. In an effort to clarify the appropriate jurisdictional test for each area, however, we did some significant redrafting in sections 3.11, 3.12, and 3.14.

2. Illustrative Example C. Those who read the October draft will note that Example E from that draft now appears in a modified form as Illustrative Example C. The changes were all designed to clarify the factual assumptions, so that the confusion that Example E had engendered would be eliminated. Variant (1) presents the case where there is no agreement relating to the U.S. market, even though there are certain indirect consequences of the cartel that affect the U.S. market. We conclude in the analysis that jurisdiction would fail under either *Hartford Fire* or the FTAIA. Variant (2) changes the facts so that it is clear that there is an agreement applicable to the U.S. market. Even though that agreement provides for lower prices, there is no question about the jurisdictional analysis: the effects are direct and intended on the U.S. imports. Although these Guidelines are not intended to provide substantive analysis, we note in passing that cartels are not permitted to justify their behavior on the ground that the chosen prices are "reasonable."

3. Export jurisdiction. Section 3.122 discusses jurisdiction under subsection (B) of the FTAIA -- the case where there are direct, substantial, and reasonably foreseeable effects on the export commerce of U.S. exporters. Like the October 1994 draft, the final version is fully consistent with the U.S. Department of Justice Press Release dated April 3, 1992, announcing the repeal of "footnote 159" of the 1988 Guidelines. Although some have voiced criticism of the

1992 policy statement, and its continuation in the 1995 Guidelines, the fact is that this is the law in the United States. When the necessary effects restraining U.S. exports are present, and when the U.S. courts can obtain jurisdiction over persons or corporations engaged in conduct that would constitute an antitrust violation, the Agencies will take appropriate action. In addition, and importantly in light of our emphasis on international cooperation, the Guidelines note that if the conduct is unlawful under the importing country's antitrust laws as well, the Agencies are prepared to work with that country's authorities, if they are better situated to remedy the conduct, and if they are prepared to take action pursuant to their own laws that will address the U.S. concerns.

4. Mergers. The basic jurisdictional test for the Clayton Act is slightly different from the FTAIA's test in the Sherman Act, since the Clayton Act refers to firms that are engaged in commerce or in any activity affecting commerce, and the definition of the term commerce in the Clayton Act encompasses foreign commerce. The Guidelines reflect these differences in Section 3.14 and Illustrative Example H. Many mergers involving firms engaged in foreign commerce do not pose particular enforcement problems, since it will be plain that they must file pre-merger notification forms under the Hart-Scott-Rodino Act, they have U.S. operations, assets, or subsidiaries, and they have every incentive to provide the U.S. Agencies with the information necessary to secure a favorable decision on the filing. We saw no need to include an example on such a clear case. Illustrative Example H presents the difficult case of two foreign firms that account for a substantial percentage of U.S. sales of a product through direct imports, where those firms do not have productive assets or subsidiaries in the country. Literally speaking, subject matter jurisdiction would exist on these facts, although the example also acknowledges the potential difficulty in obtaining effective relief. This would depend on the facts of the particular case, and in some cases on the ability of the responsible Agency to coordinate its enforcement action with a foreign counterpart.

5. Comity. The Agencies reiterate in Section 3.2 that they consider international comity in enforcing the antitrust laws. This section was also revised to take into account various comments that we received. Some of the comments expressed uncertainty about the meaning of the two "new" factors in the illustrative list of eight comity factors; others inferred from the discussion of the conflict factor that other factors might be less important. In response to the first comment, we re-worded factor (7). It now refers to "the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected." That language is adapted from the U.S./EU Agreement. Factor (8) now reads "the effectiveness of foreign enforcement as compared to U.S. enforcement

action." Even though there are now eight factors listed, we have always stressed that these are not exhaustive lists. The point in all cases is to take into account the legitimate interests of foreign governments in our enforcement decisions. It is impossible to pre-assign weights to different factors, or to know which ones will be dispositive in given situations. In order to address the mis-impression that we were giving particular weight to the conflict factor, we have expanded the discussion of other factors, and we have noted that comity is a flexible enough concept for enforcement purposes that actions falling short of direct conflicts are nonetheless relevant. Illustrative Examples I and J give some flavor of the way in which coordination among different countries' authorities occurs.

6. Foreign Sovereign Compulsion. I mention this not because there were particular changes between October and now, but because the approach taken in Section 3.32 does represent a change from the 1988 Guidelines. On the one hand, we recognize, as the Department did in 1988, that there are two rationales underlying this defense to liability: first, comity, and second, fairness to the defendant. On the other hand, since sovereign compulsion is an actual defense, rather than a discretionary factor to take into account, strict criteria must be met before the Agencies will regard it as satisfied. Those criteria are (1) compulsion in the sense that failure to comply would give rise to the imposition of penal or other severe sanctions is present, (2) the foreign government has compelled conduct that can be accomplished entirely within its own territory, and (3) the order must come from the foreign government acting in its governmental (rather than commercial) capacity. Failure to satisfy this defense obviously does not mean automatic liability. It simply means either that the Agencies would consider the foreign government's participation under the more flexible comity standards. In addition, of course, the conduct may survive antitrust scrutiny on its merits.

7. International Trade. Section 3.4 takes up the subject of antitrust enforcement and international trade regulation. This is plainly an important topic, given the ever-closer relationship between trade law and antitrust law. For the purposes of these guidelines, however, we confined our discussion to the most common issues that arise: the intersection between antitrust law and suspension agreements entered into with the approval of the Department of Commerce, and voluntary restraint agreements. The doctrines of implied immunity from the antitrust laws and the foreign sovereign compulsion defense are respectively the two recurring bodies of law to which companies turn when they find themselves at the intersection of antitrust and trade law.

8. Procedural doctrines. Although the treatment of personal jurisdiction and procedural rules in section 4 is necessarily cursory, the inclusion of these points in the Guidelines serves to underscore the practical importance of procedure to international enforcement policy. Personal jurisdiction, the various methods for obtaining documents and witness interviews outside the United States, and the special Hart-Scott foreign commerce rules all affect the day-to-day international enforcement at both Agencies. We note in the Guidelines that the mere existence of a foreign blocking statute does not, without more, excuse noncompliance with a request for information from one of the Agencies. The effects of particular statutes and the methods for obtaining satisfactory compliance with the U.S. Agencies' requests will vary from case to case.

III. Conclusion

In today's world economy, it is difficult to imagine an effective international antitrust enforcement policy that does not somehow take into account events, transactions, and parties that are located beyond the borders of the enforcing country. U.S. law has done so for many years, and the internationalization of the U.S. economy places a premium on the Agencies' use of the jurisdiction that Congress has given them. At the same time, the growth of antitrust around the world has created unprecedented opportunities for cooperative enforcement and the achievement of competitive international markets without any conflicts of jurisdiction. We see strong enforcement of U.S. law and the development of effective cooperative methods as complementary, interdependent policies. Using them, the Department of Justice and the Federal Trade Commission will be able to protect the competitive process in the United States economy as we move toward the 21st century, and our counterparts abroad will be able to achieve the same goals in their markets. Competition, not collusion, will be the rule around the world, and consumers everywhere will be the beneficiaries.