



30 November 2016

Elizabeth Kraus
Deputy Director for International Antitrust
Office of International Affairs, FTC
600 Pennsylvania Avenue, NW
Washington, DC

Lynda Marshall
Assistant Chief of Foreign Commerce Section
Antitrust Division, U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC

Email: ATR.InternationalGuidelines@usdoj.gov

**Ref. Proposed Antitrust Guidelines for International Enforcement and
Cooperation**

Dear Lynda and Liz,

We have pleasure in enclosing a submission that has been prepared by the Cartels Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of the Federal Trade Commission and the United States Department of Justice. Please let us know if you have any questions or comments.

Best regards.

Yours sincerely,



Janet McDavid
Co-Chair
Antitrust Committee



Pieter Steyn
Co-Chair
Antitrust Committee

cc Mariana Tavares de Araujo
Levy & Salomão Advogados



IBA CARTELS WORKING GROUP COMMENTS ON THE UPDATED ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION

1. INTRODUCTION

This submission is made to the Antitrust Division, U.S. Department of Justice (“**DOJ**”) and the Federal Trade Commission (“**FTC**” and, together, the “**Agencies**”) on behalf of the Cartels Working Group (“**Working Group**”) of the Antitrust Committee of the International Bar Association (“**IBA**”) in relation to the Agencies’ requests for public comments on the proposed update to the Antitrust Guidelines for International Enforcement (“**Updated Guidelines**”). The prior version of the Antitrust Guidelines for International Enforcement was issued in April 1995 (the “**1995 Guidelines**”).

The IBA is the world’s leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA’s 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at <http://www.ibanet.org>.

The Working Group hopes to contribute constructively to the Agencies’ request for public comments on the Updated Guidelines.

2. EXECUTIVE SUMMARY

The Working Group applauds the Agencies' initiative in updating the 1995 Guidelines, for the first time in over twenty years.

This submission offers comments and suggestions in response to certain paragraphs or topics of the Updated Guidelines, taking into account the experience and best practices of key jurisdictions around the world. In particular, the Working Group respectfully proposes that the Agencies consider the following comments, with the purpose to enhance transparency and legal certainty of their international antitrust enforcement:

- i. Further clarify when the Agencies' will consider foreign commerce;
- ii. Take into account recent circuit law on comity;
- iii. Provide additional detail on the sharing of confidential information throughout the discussion of international cooperation; and
- iv. Add in additional, specific references to Mutual Legal Assistance Treaties when discussing foreign cooperation.

3. RESPONSE TO THE UPDATED GUIDELINES

The Working Group hereby submits the following comments to the Updated Guidelines.¹

3.1 Agencies' Application of U.S. Antitrust Law to Conduct Involving Foreign Commerce (Chapter 3)

The Working Group commends the Agencies for enhancing the discussion on the application of U.S. antitrust law to conduct involving foreign commerce. In particular, the Working Group welcomes the Agencies' expanded discussion of the reach of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA").²

3.2 Conduct Involving Non-Import Foreign Commerce

The Working Group commends the Agencies for updating its examples illustrating the FTAIA "effects exemption" and the meaning of "direct, substantial, and foreseeable." However, the Working Group would encourage the Agencies to add additional clarification to the examples in the chapter. For example, Illustrative Example C applies the FTAIA to sales of component parts. While Illustrative Example C provides a long list of factual considerations, the Working Group notes that the Example is inconclusive and may therefore cause further confusion. In addition, the use of alternative and multi-factor tests to apply the effects exemption in court would make it much harder for the court to exercise a gate-keeping function on what otherwise might be a threshold issue.

The Working Group suggests that Agencies include more clear and objective standards for its construction of "direct effects test" as in Illustrative Example C and Illustrative Example D, perhaps by directly mentioning U.S. case law or precedents from the relevant agencies.

The Working Group acknowledges and welcomes the Agencies' discussion on the "gives rise to" prong of the effects exception, including citations to recent cases that interpret and define the scope of the provision. While the Agencies cite both mandatory and persuasive law, the Agencies could consider adding an additional example on this point.

3.3 Conduct Involving U.S. Government Financing or Purchasing

The Working Group notes that the Updated Guidelines replace a clear test of when the U.S. Government "bears more than half the cost of the transaction" (3.13 of the 1995 Guidelines) with a standard that requires the Government "bears a substantial portion of

¹ Views expressed in this submission are the views of the IBA's Antitrust Committee's Cartels Working Group and references to the IBA should be attributed to the Working Group only.

² 15 U.S.C. § 6(a) (Sherman Act); *id.* § 45(a)(3) (FTC Act).

the cost of the transaction.” The Working Group would discourage this movement away from a clear standard that is straightforward to understand and apply.

3.2 Agencies’ Consideration of Foreign Jurisdiction (Chapter 4)

The Working Group appreciates the Agencies’ review of its sections on comity and the consideration of foreign government involvement.

4.1 Comity

The Working Group notes the revisions that the Agencies made to the discussion of comity. However, the Working Group suggests that the Agencies consider the Second Circuit’s recent decision in *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016), holding that a foreign state’s formal statement of its interpretation of its own law is binding and that, if the foreign state says that the alleged conduct was required under its law, then that should be sufficient for determining whether the alleged conduct was compelled and therefore should not be subject to U.S. antitrust enforcement.

3.3 International Cooperation (Chapter 5)

The Working Group welcomes the Agencies’ initiative to discuss at great length the scope of international cooperation in the Updated Guidelines.

Previous work by the International Competition Network (“ICN”) highlights that effective international cooperation depends on mutual understanding of frameworks, timetables, procedures and confidentiality rules and investigative processes between the jurisdictions.³ Therefore, the Agencies could consider including reference in this section to the importance that such mutual understanding of investigative practices and procedures are in place, so as to increase transparency and effectiveness.

The Agencies could also consider issuing a set of guidelines clarifying how to proceed when foreign statutes purport to prevent individuals or entities from disclosing documents or information for use in U.S. proceedings, given that the Updated Guidelines only mention that mere existence of such statutes does not excuse noncompliance with a request for documents or information from one of the Agencies. The Working Group believes it would be useful to clearly know situations uncovered by the possibility to deny information based on foreign statutory provisions.

5.1.2 Confidentiality

The Working Group commends the Agencies for describing the different statutes that set forth confidentiality rules. However, once it goes beyond the Hart-Scott-Rodino,

³ See ICN Merger Working Group Practical Guide to International Enforcement Cooperation in Mergers (2015), paragraph 11, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>.

Antitrust Civil Process and FTC Acts,⁴ the Updated Guidelines only make the broad observation that various other federal statutes (“[f]or example, laws governing privacy, national security information, and trade secrets . . .”⁵) also provide confidentiality. The Working Group would encourage the Agencies to provide greater detail on the circumstances in which the Agencies may disclose a person’s confidential information for specific use so as to enhance transparency and legal certainty.⁶

In particular, in view of differences and possible conflicts among information protection rules of different jurisdictions, it remains unclear how possible disclosure of information (mainly information to be shared with other authorities) would function in practice in the event of conflicts between jurisdictions, and how the Agencies will decide on what information can or cannot be publicly disclosed. For example, the Updated Guidelines provide that, “[the] Agencies are not statutorily prohibited from disclosing” certain non-public information, and provides just two examples: the fact of the investigation itself and the Agencies’ staff views. The Working Group would encourage the Agencies to clarify whether this and similar provisions refer only to confidential disclosures to other authorities.

5.1.3 Legal Bases for Cooperation

The Agencies may consider including also reference to Mutual Legal Assistance Treaties as a tool for cooperation with foreign authorities, as follows:

“Cooperation can be facilitated by formal bilateral agreements, Memoranda of Understanding (“MOUs”), and multilateral arrangements, such as the OECD Recommendation on Antitrust Enforcement Cooperation and the ICN Framework for Merger Cooperation, **and Mutual Legal Assistance Treaties (“MLAT”).**” [text in red font is newly added]

5.1.4 Types of Information Exchanged and Waivers of Confidentiality

The Working Group recognizes the Agencies’ efforts to provide clarity on the scope of the confidentiality waivers and with the purpose to enhance convergence to international best practices propose that in the second-to-last paragraph on page 37 where the Agencies discuss the circumstances in which information will be provided to foreign authorities pursuant to a waiver, the following adjustment is included:

⁴ 15 U.S.C. § 18a; *id.* §§ 41-58; *id.* §§ 1311-14.

⁵ Updated Guidelines at 32.

⁶ See ICN Merger Working Group Practical Guide to International Enforcement Cooperation in Mergers (2015), paragraph 29, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf>.

“(. . .) that it will **adequately** maintain the confidentiality of such information consistent with its laws and rules.” [text in red font is newly added].

With that reference the Agencies would indicate that minimum standards on treatment of confidential information are necessary for the information to be provided.

5.2 Special Considerations in Criminal Investigations

The Working Group recognizes the Agencies’ efforts to provide clarity on this topic. However, a number of questions remain. In particular, in the event there are witness statements, could the confidentiality of these statements be waived as well to be shared with authorities of other jurisdictions? If so, the Working Group believes it could be relevant to clarify in this item that it could be applicable not only to information provided by leniency applicants but also reach possible statements made by witnesses (such as the ones in favor of the leniency applicant), provided that the witness grants the waiver.

Given its importance, it may be useful to strengthen, expand, and give examples regarding the Updated Guidelines’ reference to the possibility of cooperation to “minimize overlapping and inconsistent demands placed on cooperating individuals and firms.”

Additionally, an increased level of detection and deterrence around the world is good news, but the Updated Guidelines should consider stressing the need for cooperation regarding sanctioning of international cartel cases to avoid over-deterrence or double-jeopardy. As a positive example, the Working Group would refer the Agencies to the cooperation between the DOJ and the United Kingdom’s Office of Fair Trading (“OFT”) in the *Marine Hose* investigation, where three British nationals were able to plead guilty in the United States, but were then escorted back to the U.K. to cooperate with the OFT and complete their sentences there.

The Working Group notes in particular that without clarifying language, there is a concerning risk of double jeopardy as various agencies are increasingly turning to criminal prosecution of individuals for cartel activities. For example, in this regard, Korea has increasingly been criminally prosecuting individuals for violations of its Monopoly Regulation and Fair Trade Law, including in the past year, foreign citizens.

5. CONCLUDING CONSIDERATIONS

The Working Group supports the Agencies' initiative in preparing and circulating the Updated Guidelines. The Working Group hopes that the Agencies will take due account of the submitted comments and that these will be helpful in updating the 1995 Guidelines, which provide important guidance to international antitrust practitioners. The Working Group remains at the Agencies' disposal for discussion of these comments.

