

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN HEATHER
EXECUTIVE DIRECTOR
ANTITRUST POLICY



December 1, 2016

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Re: Antitrust Guidelines for International Enforcement and Cooperation

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, welcomes the opportunity by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) and to comment on the revised Antitrust Guidelines for International Enforcement and Cooperation (International Guidelines).

Section 5 Authority

In many ways the International Guidelines are largely a statement of the legal basis by which the DOJ and the FTC enforce U.S. antitrust laws, with additional acknowledgement and discussion of related statutes that address the interface between trade and competition. The Chamber is concerned with footnote 19 associated with explanation of the FTC's statutory authority. The footnote references several dated Supreme Court cases in an effort to identify instances where the FTC's Section 5 authority in principle goes beyond the Sherman or Clayton Act. The footnote also references the most recent statement of principles the FTC issued on Section 5.

However, the most recent FTC Section 5 statement of principles is in direct conflict with the cases cited. The cases cited represent an outdated era of FTC enforcement that did not align with the current FTC statement of principles endorsing consumer welfare while expressly stating an intent to avoid using Section 5 authority to enforce non-competition factors. The reference to these cases in the International Guidelines is particularly problematic given that the United States is actively counselling foreign governments against the misuse of antitrust enforcement to address non-competition issues. The Chamber strongly recommends the footnote be revised to solely cite the recent FTC statement of Section 5 principles.

State Commercial Activity & Control

The Chamber also notes that the International Guidelines discuss Foreign Sovereign Immunity and Foreign Sovereign Compulsion. Both of these issues are increasingly important to the Chamber and its members. In particular, we recommend the International Guidelines address situations where predatory conduct by a state-owned enterprise might give rise to antitrust concerns. Further, the DOJ and the FTC should make it a top policy priority to discuss with governments of state-controlled economies the appreciable limits of recognizing Foreign Sovereign Compulsion as a legitimate defense.

As a general rule, the Chamber is not concerned with predatory pricing claims as producers are subject to market forces and low prices typically benefit consumers. For these reasons the Chamber is largely dubious when predatory pricing claims are brought. However, where commercial state-owned enterprises are involved, they are not protected by Foreign Sovereign Immunity as the International Guidelines state, and they could be in a position to defy market forces through government subsidies allowing them to produce below cost for an extended period of time. In such a hypothetical scenario, the enforcement of U.S. antitrust laws should be a clear and viable option. As such, the Chamber recommends the International Guidelines signal with clarity that state-owned commercial enterprises can be subject to predatory pricing claims under U.S. antitrust law.

State-controlled economies also represent a unique challenge to the ability of the United States to enforce its antitrust laws. The International Guidelines appropriately require companies asserting the Foreign Sovereign Compulsion defense to establish a bright line connection between the commercial actions of a company (private or state-owned) and a regulatory requirement imposed by a foreign

government that has anti-competitive effect on the United States. It is very difficult for companies that are placed between opposing legal requirements to be in compliance with both. As a matter of antitrust enforcement, this rarely occurs between countries that rely on market forces to organize their respective economies.

However, where one of the countries relies on heavy state-control over the economy, companies complying with local regulations could routinely be put in a position of violating U.S. antitrust law. In such cases, the country with the state-controlled economy can't be viewed as sharing the same competition policy end goals of the United States. This concern is not hypothetical, but real in the case of China and perhaps other countries. In response, the DOJ and the FTC should make it clear in dialogue with foreign governments that promulgating rules that cause companies to engage in anti-competitive behavior and breach U.S. antitrust laws will not be tolerated. Further, the DOJ and the FTC should work collaboratively across the administration and with the Congress on potential policy responses to ensure that Foreign Sovereign Compulsion does not become a pretext by foreign companies or foreign governments to evade U.S. antitrust laws.

Cooperation

Finally, the Chamber takes issue with what is absent from the International Guidelines. The Chamber welcomes the fact that the guidelines extend beyond enforcement and now include cooperation. Antitrust cooperation between jurisdictions is increasingly important, particularly with regard to merger review. In addition, cooperation is often welcomed by parties involved in a transaction or even in some instances where the party may be a target of an investigation.

However, the unwritten premise held within the guidelines is that cooperation is extended internationally among peer-like enforcers. Unfortunately, the world of antitrust falls well short of having well established international norms that are routinely followed. The International Guidelines should make clear that the United States looks to cooperate on enforcement with jurisdictions that share a common legal and economic approach, including full adherence to due process, and where a common interest exists between the jurisdictions. Making this clarification is important as cooperation should reinforce U.S. international competition policy objectives. Also, the International Guidelines should extend enforcement cooperation to instances where the United States has closed a case and taken no enforcement action, but a foreign jurisdiction continues to contemplate taking action.

Ms. Marshall and Ms. Kraus

December 1, 2016

Page 4

It is important that the DOJ and FTC be prepared to explain its reasons for not taking action as part of its enforcement cooperation.

In addition, the International Guidelines should also expressly set forth that the DOJ and the FTC will, in cooperation with foreign competition agencies, continue to seek to promote the adoption of global standards of procedural fairness and substantive principles of sound economics and consumer welfare. The International Guidelines should further indicate that the DOJ and the FTC will engage with a foreign jurisdiction if and when that foreign jurisdiction's investigatory and enforcement proceedings exhibit conduct that deviates from accepted global standards of due process or substantive principles.

These recommended additions on cooperation are consistent with the provisions of antitrust cooperation agreements and trade agreements with a number of foreign nations and with the indication in the introductory section of the proposed International Guidelines that the DOJ and FTC do engage in such undertakings. The Chamber further recommends that in considering appropriate circumstances and the nature of such cooperation engagement, that the DOJ and FTC pledge to routinely engage with stakeholders.

Conclusion

The Chamber requests that the International Guidelines be revised along the lines of these comments. Should you have any questions or wish to discuss these recommended edits further, the Chamber would welcome the opportunity to engage with you and our members.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Heather', written over a light blue horizontal line.

Sean Heather

Executive Director, Antitrust Policy
U.S. Chamber of Commerce