BAKER BOTTS L.L.P

Comments of James F. Rill[1] on
U.S. Department of Justice and Federal Trade Commission
Proposed Antitrust Guidelines for International Enforcement and Cooperation

December 1, 2016

The following comments are submitted in response to the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") (collectively, the "Agencies") request for public comments on the Antirust Guidelines for International Enforcement and Cooperation (the "Proposed Guidelines" or the "Guidelines") issued November 1, 2016.[2]

I. Introduction

The Agencies are to be commended for their continued commitment in providing enforcement guidelines and policy statements, and in regularly updating prior guidance documents to reflect changes to the competition law landscape. This type of guidance is valuable to both the business and legal communities, as it deepens the understanding, predictability, and efficiency of U.S. competition law enforcement. It also reflects an important representation of the stance of the U.S. agencies with respect to investigations involving foreign antitrust authorities, as the Proposed Guidelines highlight in their introduction:

> Accordingly, the Agencies have expanded their efforts and committed greater resources to building and maintaining strong relationships with foreign authorities to promote greater policy engagement. This engagement with foreign authorities has multiple goals, notably: increasing global understanding of different jurisdictions' respective antitrust laws, policies, and procedures; contributing to procedural and substantive convergence toward best practices; and facilitating enforcement cooperation internationally.[3]

The important principles espoused in this introductory paragraph have not, however, met with any further specificity or guidance in the Proposed Guidelines. In my view, this is an important omission that should be remedied by the inclusion of specific provisions in the Guidelines describing the intended engagement of the U.S. antitrust agencies where foreign antitrust investigations and proceedings implicate significant U.S. interests.

II. Policy of Engagement by U.S. Antitrust Agencies

I recommend that the Proposed Guidelines include a subsection, within the Chapter on International Cooperation (Chapter 5), describing the Agencies' intended policies and practices with respect to engagement with foreign antitrust authorities in cases where investigations or

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[1] Senior Counsel, Baker Botts L.L.P. The views expressed are my own and do not necessarily reflect the views of Baker Botts or any of its clients.

[2] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION PROPOSED UPDATE (Nov. 1, 2016), *available at* www.justice.gov/atr/page/file/907251/download [hereinafter PROPOSED GUIDELINES].

[3] *Id.* at 1-2.

further proceedings by those authorities implicate important U.S. national interests. These engagement provisions should be consistent with traditional comity principles and approaches as reflected in existing antitrust cooperation agreements and memoranda of understanding, as well as in relevant U.S. trade agreements. For example, in the 1991 U.S.-EC Cooperation Agreement, the United States and the European Commission ("EC") enumerated factors by which each other's important interests would be considered.[4] The agreement calls for notification in such circumstances and implicitly invites consultation. In a supplemental 1998 U.S.-EC agreement on positive comity, the governments further provided that one party would defer or suspend its enforcement activities aimed at activities in the other party's territory in two types of cases: (1) where the foreign activities do not directly harm the requesting party's consumers; or (2) where the foreign anticompetitive activities occur principally in and are directed towards the other party's territory.[5] Similarly, the Free Trade Agreement between the United States of America and the Republic of Korea ("KORUS") requires that one country facilitate discussion, upon request of the other, on issues related to competition law enforcement and policy.[6] The Proposed Guidelines should include a provision making it clear that the Agencies will seek engagement in situations where important U.S. interests are implicated by foreign competition agency undertakings.

Application of these provisions will ensure that engagement by U.S. authorities is consistent both with the need to seek deference to the significant interests of the United States as well as the recognition of foreign sovereign rights of enforcement. This approach is an important corollary to the principles set forth in Section 4.1 of the Proposed Guidelines, which properly recognize that "the Agencies take into account whether significant interests of any foreign sovereign would be affected."[7] Section 4.1, and the entirety of the Proposed Guidelines, however, fail to expressly address the counterpart situation of foreign proceedings implicating U.S. interests. The policies expressed in the Guidelines, therefore, should include the intention to engage with foreign antitrust authorities in connection with investigations and related proceedings by those foreign agencies that may affect significant U.S. interests. In any such case, the Agencies should clarify the approach they will undertake to engage with the

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[4] *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Arts. V, VI & VII (Sept. 23, 1991), *available at* www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0525.pdf; *see also* Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the National Institute for the Defense of Competition and the Protection of Intellectual Property (Indecopi) of the Republic of Peru, of the Other Part, Art. VI (May 26, 2016), *available at* www.justice.gov/atr/file/862671/download; Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Superintendence of Industry and Commerce of Colombia, of the Other Part, Art. IV (Sept. 5, 2014), *available at* www.justice.gov/sites/default/files/pages/attachments/2015/07/24/309025.pdf; Agreement on Antitrust Cooperation Between the United States Department of Justice and the United States Federal Trade Commission, of the One Part, and the Fiscalía Nacional Económica of Chile, of the Other Part, Art. IV (Mar. 31, 2011), *available at* www.justice.gov/sites/default/files/atr/legacy/2011/03/31/269195.pdf.

[5] *See* Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, Art. IV, *available at* www ftc.gov/policy/cooperation-agreements/us-european-commission-enhanced-positive-comity-agreement.

[6] *See* Free Trade Agreement Between the United States of America and the Republic of Korea, June 30, 2007, at Art. 16.7, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [hereinafter KORUS] ("To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations regarding representations made by the other Party.").

[7] *See* PROPOSED GUIDELINES, *supra* note 2, § 4.1.

foreign authorities to ensure that these U.S. interests are clearly and properly expressed and the bases on which they will engage.

In connection with an expression of intent to engage with foreign agencies on either procedural or substantive issues in appropriate cases, the Agencies should include in the guidelines the statement that the views of the consumer and business community will be welcomed both as to appropriate instances for and the elements of possible engagement.

Suggestions on the bases for engagement are proposed below.

III. Bases of Engagement by U.S. Antitrust Agencies

A. Procedural Transparency and Due Process

The Guidelines should clarify that Agencies will engage where foreign conduct departs from globally recognized principles of fundamental fairness and due process. This consideration should include not only due process at the investigative stage, but also should include due process throughout the adjudicatory and review stages. Fundamentally, it should require that targets and other participants are given a full and fair hearing and access to independent judicial review.

Engagement on the basis of procedural fairness is required to protect significant U.S. interests. The international competition community has long recognized the immutable importance of due process and transparency. Both the Organization for Economic Cooperation and Development ("OECD") and International Competition Network ("ICN") have recognized that legal, regulatory or other differences that may exist in an agency's competition regime are not a legitimate basis for denying the full protections of due process. As the OECD has explained, there is "a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members."[8] The ICN likewise has noted that "[t]here is a consensus that procedural fairness principles of transparency, engagement, and confidentiality are essential components of fair and informed competition investigations. Procedural fairness protections do not depend on the type of system or the country. The design of a system does not dictate whether procedural fairness is possible."[9] Moreover, an agency's adherence to accepted principles of procedural fairness promotes the likelihood that a sound, reasoned decision will be reached. By the same token, public confidence that the agency has implemented these principles will enhance the confidence that the agency has acted in a reasoned and nondiscriminatory manner.

The high degree of agency and private sector attention to the topic of due process has resulted in a clear investigatory framework for international best practices in competition law

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[8] OECD, PROCEDURAL FAIRNESS AND TRANSPARENCY KEY POINTS 5 (2012), *available at* www.oecd.org/competition/mergers/50235955.pdf.

[9] INT'L COMPETITION NETWORK, ICN ROUNDTABLE ON COMPETITION AGENCY INVESTIGATIVE PROCESS ROUNDTABLE REPORT 8 (2014), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc1023.pdf.

enforcement proceedings. Guidance on the issue has been advanced, for example, by the ICN,[10] OECD,[11] the International Chamber of Commerce,[12] and the American Bar Association.[13] Moreover, due process guarantees clearly extend beyond the investigative phase. It is widely recognized that parties should have certain core rights during, and beyond, the determination stage—*e.g.,* the right to examine the complete case file or in some equally effective way to examine the evidence reviewed by the agency, the right to present evidence and be heard, the cross-examine witnesses, and the right seek review of a sanction or remedy in court.[14]

These considerations, among others, necessitate the integration of due process and other procedural fairness principles in any discussion about cooperation between countries on competition investigations and proceedings and compel U.S. involvement where the absence of due process threatens significant U.S. interests. It is appropriate that the Guidelines include a section reiterating the Agencies' commitment to engage with their foreign counterparts when those counterparts deviate from global due process norms. This affirmative approach would assure the business and consumer community that the Agencies are committed to rational and effective engagement so as to sustain their critical role in relation to the foreign antitrust authorities.

B. Substantive Engagement

Whereas it is appropriate to recognize different substantive norms and approaches in competition law enforcement, the Agencies should nonetheless engage to provide their views as to whether the fundamental rationale of a counterpart competition agency is based on principles of sound economics and the protection of consumer welfare, and to promote outcomes that are consistent with these principles. The element of due process is related to the

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[10] INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2014), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf [hereinafter ICN GUIDANCE].

[11] OECD, RECOMMENDATION OF THE OECD COUNCIL CONCERNING INTERNATIONAL CO-OPERATION ON COMPETITION INVESTIGATIONS AND PROCEEDINGS (Sept. 26, 2014), *available at* www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf.

[12] INT'L CHAMBER OF COMMERCE, RECOMMENDED FRAMEWORK FOR INTERNATIONAL BEST PRACTICES IN COMPETITION LAW ENFORCEMENT PROCEEDINGS, Doc. No. 225/666 (Mar. 8, 2010), *available generally at* www.iccwbo.org/about-icc/policy-commissions/competition/ [hereinafter ICC FRAMEWORK].

[13] AMERICAN BAR ASS'N, SECTION OF ANTITRUST LAW, BEST PRACTICES FOR ANTITRUST PROCEDURE–REPORT OF THE ABA SECTION OF ANTITRUST LAW INTERNATIONAL TASK FORCE (May 22, 2015), *available at* www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.authcheckdam.pdf.

[14] *See* KORUS, *supra* note 6, art 16.1 (providing for procedural fairness in administrative hearings and the right of judicial review in competition law matters); *see also* OECD, COMPETITION COMMITTEE, PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE PROCEEDINGS DAF/COMP(2010)11, 10 (Oct. 5, 2011), *available at* www.oecd.org/daf/competition/48825133.pdf (Agencies should "offer the parties an opportunity to examine the evidence . . . forming the basis for the agency's conclusion that a violation of the competition laws has occurred."); OECD, JUDICIAL ENFORCEMENT OF COMPETITION LAW 10 (1996), *available at* www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf ("Courts ensure that fundamental procedural rights, including rights of privacy, the right to a fair and impartial hearing, and confidentiality of business information, are protected."); ICN GUIDANCE, *supra* note 10, ¶ 5.4 ("After formal allegations of competition violations and presentation of legal arguments are made, parties should be provided with access to the evidence relied upon as the basis for the agency's allegations and an effective opportunity to respond.'); ICC FRAMEWORK; *supra* note 12; ¶ 2.7.2 ("Defendants should be entitled to appeal any decision issued by a competition authority before a court consisting of impartial judges").

issue of substantive engagement in that due process enhances transparency of rational acts to support confidence that the agency is not acting with a purpose to promote industrial policy.

U.S. competition law has evolved significantly over the past four decades, providing a clear focus on core guiding principles including the protection of competition rather than competitors, the protection of consumer welfare, and the application of substantial economic learning.[15] While other jurisdictions may not, and indeed need not, observe these same principles in the application of their competition laws, the differential application of foreign antitrust laws to U.S. versus foreign domestic entities raises an essential consideration: whether antitrust is being applied on a level playing field. This consideration can be tested by the Agencies evaluating whether core principles discussed above are being applied in a given investigation. Where significant U.S. interests are at stake, it is appropriate for U.S. authorities to evaluate these factors in dialogue with the relevant agency and to encourage the recognition of these core principles.

Today, more than 130 jurisdictions have enacted antitrust laws. Many of these jurisdictions look to more-developed regimes for guidance in adopting new competition laws, providing public guidelines, and setting enforcement priorities. With its eleven bilateral antitrust cooperation agreements with foreign governments, as well as an additional four agency-level memoranda of understanding,[16] the United States is a leader in providing direct and indirect substantive guidance to foreign competition law agencies. The Guidelines should make clear that the Agencies will undertake consultation regarding substantive principles in cases involving significant U.S. interests.

This type of interaction provides substantial benefits to consumers and businesses alike. Substantive convergence between competition authorities that are called upon to review anticompetitive practices and mergers can expedite the review of transactions, lessen the risk of differential outcomes, bring down administrative burden and costs, and shorten the length of proceedings. Given the weight of these benefits, it is important that the Guidelines affirmatively express the Agencies' continued commitment toward substantive convergence within the international community, with a focus on promoting economic-based, and consumer welfare driven, principles of efficient antitrust enforcement.

C. Extraterritoriality

Section 5.1.5 of the Proposed Guidelines, which outlines Agency policy with regard to multi-national remedies, provides that "[a]n Agency will seek a remedy that involves conduct or assets outside the United States if it deems that doing so is necessary to ensure the remedy's effectiveness and is consistent with the Agency's international comity analysis."[17] This

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[15] *See* Alden F. Abbott, *Competition Policy and Its Convergence as Key Drivers of Economic Development*, 28 MISS. C. L. REV. 37, 38-39(2009).

[16] *See Antitrust Cooperation Agreements*, U.S. DEP'T OF JUSTICE, ANTITRUST DIV., *available at* www.justice.gov/atr/antitrust-cooperation-agreements. Only agreements with Australia, Canada, the EU and Germany were executed prior to 1995.

[17] PROPOSED GUIDELINES, *supra* note 2, § 5.1.5.

sentence is overly broad, and suggests the only limitation on the Agencies' ability to impose an extraterritorial remedy is international comity.

While I appreciate that the Agencies intend to preserve their ability to combat anticompetitive conduct to the full extent of their antitrust laws and to impose remedies necessary to do so, I suggest that the Agencies amend this section to make clear an intention to impose a remedy over foreign commerce *only where there is a direct, substantial, and reasonably foreseeable effect on domestic consumers*, and *only as to the extent of that effect*. This clarification more accurately accounts for U.S. case law,[18] and is consistent with the well-established general principal that remedies should be "tailored to fit the wrong creating the occasion for the remedy"[19] and confined to the "least drastic" alternative.[20]

As written, this section may be misread by foreign competition enforcers as support in imposing inappropriately-broad extraterritorial remedies. The suggested revision would make clear that the U.S. will take remedial action only where foreign anticompetitive conduct has an effect on U.S. consumer welfare, and would appropriately recognize the unique issues extraterritorial remedies pose in the international arena.[21]

Moreover, and as a natural corollary to this principle, the Agencies should engage with foreign competition law agencies to urge that these agencies, in imposing remedies to perceived competition harms, limit the scope of their remedies to ensure that they address only domestic harms and extend no further than necessary in doing so, particularly where the remedy may impact important U.S. interests. The use, and potential misuse, of extraterritorial remedies poses significant risks to U.S. businesses operating internationally. These risks are particularly significant where intellectual property rights ("IPR") are at issue, as a global or otherwise extraterritorial remedy aimed at IPRs is more likely to affect rights granted under U.S. law.

As a matter of sound competition policy, remedies should be confined to matters where the conduct has caused domestic consumer injury. Injury to domestic companies in their capacity as competitors, absent consumer harm, should not be a basis for imposing a remedy. In this context, a remedy to protect a domestic competitor cannot be distinguished from protectionist activity. Where remedies become aimed at protecting domestic competitors from U.S. competition, important U.S. interests often can be implicated.

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[18] *See id.*, § 3.2.

[19] *See* United States v. Microsoft Corp., 253 F.3d 34, 107 (D.C. Cir. 2001).

[20] *See, e.g.*, New York v. Microsoft Corp., 224 F. Supp. 2d 76, 100 (D.D.C. 2002), *aff'd*, 373 F.3d 1199 (D.C. Cir. 2004) ("[e]quitable relief in an antitrust case should not 'embody harsh measures when less severe ones will do'") (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 325a (2d ed. 2000)); *see also* United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961) ("If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.").

[21] *See* Christine Varney, Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency, Address Before the Institute of Competition Law New Frontiers of Antitrust Conference (Feb. 15, 2010), *available at* www.justice.gov/atr/file/518231/download, at 5 ("whether or not we are always able to choose the remedy with the least extraterritorial effect, we nonetheless have an obligation in every case to be mindful of what those extraterritorial effects might be").

Agencies that would act on behalf of domestic competitors in regard to their foreign competitiveness are directly investing themselves in the market, rather than remediating domestic harms, and are thus not entitled international deference. The Agencies should consider providing a statement in the Guidelines that, in cases where foreign agencies seek to impose remedies that implicate important U.S. interests, the Agencies will engage to consider whether remedies are appropriately tailored to avoid unnecessary extraterritorial effect.

IV. Conclusion

I appreciate the Agencies' invitation to comment on the Proposed Guidelines, and welcome any opportunity to provide further comments as may be desired.