



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

¹ 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 international enforcement policy and related investigational approaches and tools. Much has changed from 1995 to now, however, and thus they also incorporate important developments in law and practice in an increasingly globalized economy with an ever-increasing number of competition authorities worldwide. And they help provide transparency and predictability for the antitrust and business communities – one of my top priorities for antitrust enforcement.⁶

On the release of the 1995 Guidelines, Judge Diane Wood, then Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice, identified three key principles.⁷ First, that the DOJ and FTC would enforce the U.S. antitrust laws to the fullest extent of the jurisdiction that Congress conferred; second, a commitment to nondiscrimination; and, third, a commitment to international comity.⁸ The 2017 Guidelines build and expand on these principles, particularly in the Guidelines' treatment of extraterritoriality and the Agencies' international case and policy cooperation.⁹ The new Guidelines are evolutionary, not revolutionary, but contain important changes, clarifications, and new focuses.

https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf. The "Guidelines" or "2017 Guidelines."

⁵ DOJ and FTC, collectively, are referred to as the "Agencies" throughout this paper.

⁶ See, e.g., "A Discussion with FTC Commissioner Maureen K. Ohlhausen," Antitrust Health Care Chronicle, Nov. 2013, at 3, <https://www.ftc.gov/public-statements/2013/11/discussion-ftc-commissioner-maureen-k-ohlhausen>.

⁷ Diane Wood, "The 1995 Antitrust Enforcement Guidelines for International Operations: An Introduction," Address by Diane Wood before the ABA Antitrust Section, Apr. 5, 1995, at 3-4, <https://www.justice.gov/atr/speech/introduction-1995-guidelines-international-operations>.

⁸ *Id.*

⁹ Guidelines at 47; 37-51.

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 to investigate or bring enforcement actions against foreign conduct. A discussion of the Agencies' consideration of comity and other laws and doctrines pertaining to foreign government involvement, such as foreign sovereign compulsion and the act of state doctrine, follows. The Guidelines conclude with a new chapter on the Agencies' international cooperation that addresses our investigative tools and enforcement cooperation with foreign agencies. To make the Guidelines more user-friendly, the text contains illustrative examples that address the types of issues commonly experienced in practice.

Harm to U.S. Commerce and Consumers

Among the changes in the new Guidelines is a focus on enforcing U.S. antitrust laws against harm or threatened harm to U.S. commerce and consumers.¹² In focusing on such harm to U.S. commerce and consumers, the Guidelines set out a balanced approach to extraterritoriality that frames its discussions of the application of U.S. antitrust law to conduct involving foreign commerce and extraterritorial remedies.

We first encounter this approach in the introduction to the chapter addressing the Agencies' application of U.S. antitrust law to conduct involving foreign commerce. Here the Guidelines clearly state that: “[i]n making investigative and enforcement decisions, the Agencies

¹² Guidelines at 16, 28, 29, 47.

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.* at 20-21; 22-25, Illustrative Examples A, B, C, and D.

¹⁶ Guidelines at 16, 28, 29, 47.

¹⁷ Guidelines at 47.

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

Ensuring a remedy’s link to harm or threatened harm to U.S. commerce and consumers is particularly relevant in matters involving global conduct or worldwide geographic markets, as was raised in the FTC’s Google/MMI case.²⁰ I disagreed with the decision to bring the Google/MMI case and dissented,²¹ and I have discussed my concerns regarding the decision in subsequent speeches.²²

In addition to concerns about the merits of the case, some commentators have raised concerns that the Commission did not appropriately limit the extraterritorial scope of its remedy

¹⁸ See Opinion of the Commission, *In the Matter of Polypore International, Inc.*, FTC File No. 081-0131, <https://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf>.

¹⁹ See *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208, 1218-19 (11th Cir. 2012), *cert. denied* 133 S.Ct. 2853 (2013); *In the Matter of Polypore International, Inc.*, FTC File No. 081-0131, case summary and files <https://www.ftc.gov/enforcement/cases-proceedings/081-0131/polypore-international-inc-matter> and <https://www.ftc.gov/enforcement/cases-proceedings/081-0131/polypore-international-inc>.

²⁰ *In re Google Inc.*, FTC File No. 121-0120, Statement of the Federal Trade Commission, Jan. 3, 2013, <https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>.

²¹ Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Jan. 3, 2013, <https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf>.

²² See, e.g., Commissioner Maureen K. Ohlhausen, Antitrust Enforcement In China – What Next?, Second Annual GCR Live Conference, Sept. 16, 2014, https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf.

to only that needed to effectively redress harm or threatened harm to U.S. commerce and consumers.

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.

In today's interdependent world, the Guidelines' provision on extraterritorial remedies limits overly broad extraterritorial reach, while recognizing and allowing for effective enforcement. Such an approach helps avoid potential duplication and conflicting remedies, including through the recognition of comity. The Guidelines provide a statement of self-restraint and offer an approach worthy of consideration by other jurisdictions.

²³ Decision and Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Jan. 3, 2013, at 8, <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>.

Comity and Cooperation

This leads to Judge Wood’s reference to the principle of international comity both as it relates to the Agencies’ enforcement actions and to how the agencies interact with antitrust authorities in other countries.²⁴ The updated Guidelines address both facets of comity. They recognize that in the 22 intervening years between the two sets of guidelines a significant number of jurisdictions have adopted and enforce antitrust laws compatible with those of the United States.²⁵ Convergence toward sound, economically-based competition law has increased and policy and enforcement cooperation has become more common. The FTC has made working with other jurisdictions to advance consumer-welfare oriented antitrust laws and cooperation among jurisdictions on these principles an important part of its mission. I personally have devoted much of my time on the Commission to these efforts and will continue to do so.

Enforcement Cooperation

Reflecting the increasing importance of cooperation to agencies and parties, as well as the role that parties can play in promoting deeper forms of cooperation, the 2017 Guidelines include a new chapter detailing the Agencies policies and practices regarding case cooperation.²⁶ It addresses the Agencies’ investigative tools, confidentiality safeguards and waivers of confidentiality,²⁷ the legal bases for cooperation, and remedies, as well as special considerations in criminal investigations.

²⁴ As identified in both sets of Guidelines, comity “reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” 1995 Guidelines at Section 3.2; 2017 Guidelines at 27.

²⁵ Guidelines at 28-29.

²⁶ Guidelines, Section 5, at 37-51.

²⁷ See *id.* at 44. See also FTC, “International Waivers of Confidentiality in FTC Antitrust Investigations,” <https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust> for further information on the Agencies’ joint model waiver of confidentiality.

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 diverse ends, such as labor or industrial policy.

The Guidelines stress that the Agencies have championed and will continue to promote policy engagement that focuses on substantive law, enforcement and due process standards that advance consumer welfare based on sound economics, procedural fairness, transparency, and non-discriminatory treatment of parties.³² The Guidelines make clear that these values apply to our own investigations and enforcement actions and are at the core of our international engagement.³³

The FTC engages at the most senior levels of the agency to promote convergence toward best practices in antitrust enforcement and policy based on these principles.³⁴ This includes work in multilateral fora, such as the ICN, as well as through work to develop strong bilateral relationships. For example, the FTC led the project that resulted in the ICN Guidance on Investigative Process, a comprehensive agency-led effort to provide direction and assistance on investigative principles and practices that promote procedural fairness and effective

³² Guidelines at 2-3, 37.

³³ *Id.*

³⁴ See, e.g., Randolph Tritell and Elizabeth Kraus, “The Federal Trade Commission’s International Antitrust Program,” Sept. 2017, <https://www.ftc.gov/intlantitrust2017>; Commissioner Maureen K. Ohlhausen, Nurturing Competition Regimes: Evaluation and Evolution, Competition Policy in Transition, China Competition Policy Forum, Beijing, China, July 31, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/nurturing-competition-regimes-evaluation-and-evolution/130731compolicychina.pdf; Commissioner Maureen K. Ohlhausen, Taking Notes: Observations on the First Five Years of the Chinese Anti-Monopoly Law, Competition Committee Meeting, United States Council for International Business, Washington, D.C., May 9, 2013, https://www.ftc.gov/sites/default/files/documents/public_statements/taking-notes-observations-first-five-years-chinese-anti-monopoly-law/130509uscib.pdf; FTC Press Release, “Officials from U.S. and Japan Participate in 35th Bilateral Meeting in Washington to Discuss Antitrust Enforcement,” July 14, 2016, <https://www.ftc.gov/news-events/press-releases/2016/07/officials-us-japan-participate-35th-bilateral-meeting-washington>; Paul O’Brien, “Promoting procedural fairness through the ICN,” *Competition Matters*, Apr. 16, 2014, <https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/promoting-procedural-fairness-through-icn>.

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.

highlights how we have expanded our efforts and committed greater resources to building relationships and working with foreign authorities on policy engagement and the implementation of substantive antitrust and procedural fairness best practices. Like our other guidelines, the Agencies issued the Antitrust Guidelines for International Enforcement and Cooperation to provide transparency and predictability to the antitrust and business communities. This is a noble goal for all of our agencies to consider, and I urge other jurisdictions to consider drafting their own guidance on key areas of analysis and practice to provide greater insights and transparency to an increasingly interconnected global antitrust and business community.