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More documents related to this discussion can be found at

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BIAC

The topic of extraterritorial remedies is a crucial one for businesses. The extension of remedies beyond borders creates an immediate potential for conflict and inconsistent treatment under the competition laws. Businesses should be able to rely on the principle that adherence to the laws of the jurisdictions in which they operate will protect them from legal intrusion into their commercial affairs. The unwarranted extension of competition enforcement agencies into the commercial affairs of companies in foreign jurisdictions puts this principle at risk, creating uncertainty that weighs disproportionately on business enterprises.

Particular harm to business can arise when jurisdictions seek to enforce restrictive competition rules in foreign jurisdictions that may have more permissive competition rules. This denies companies the reasonable right to rely on more the permissive rules that may exist, and denies countries the sovereign right to balance economic interests and establish rules that they believe will attract business. In short, unrestrained extraterritorial enforcement creates the risk that the most restrictive competition laws will dictate business practices on global level.

BIAC supports the proposition that antitrust authorities should have the ability to identify violations of the competition laws that produce substantial harm to their domestic consumer welfare, and to implement measures that alleviate such harm including, in some cases, remedies that have effects abroad. In an increasingly complex global antitrust enforcement landscape, however, agencies can no longer implement relief without full consideration of the implications of relief on the international market and without due regard for the rights of foreign sovereigns to regulate their own commerce, according to their own economic principles. In short, no antitrust authority should impose remedies that dictate commercial outcomes in other jurisdictions absent a full consideration of the principles of jurisdiction, enforcement authority, domestic effect and comity.

There are a number of significant hazards associated with extraterritorial remedies. BIAC believes that the large majority of these hazards can be resolved through communication, coordination, convergence and deference to the legitimate interests of foreign sovereign authorities. Most importantly, in competition cases agencies should recognize that comity must apply to situations that go beyond a true conflict in order to allow foreign sovereigns to regulate their own commerce based on their own economic standards.

Brazil

CADE's written contribution on "Extraterritorial reach of Competition remedies" considers the experience of the Administrative Council for Economic Defense – CADE and main challenges linked to the designing and coordination of remedies with an extraterritorial nature. First, it presents CADE's legal framework concerning the application of extraterritorial competition remedies based on specific provision of the Brazilian Competition Law – Law 12,529/2011. Next, it brings forward information about the process that enables the Brazilian Competition Authority to engage in international cooperation. Additionally, it presents an overview of some cases judged by CADE, which were subject to the application of extraterritorial remedies. The contribution concludes highlighting the cooperative attitude CADE has been adoption towards the coordination of remedies in cross-border mergers and the importance of this collaboration.

Chinese Taipei

The Fair Trade Act (hereinafter referred to as the “Act”) is a domestic law and its contents are mainly administrative regulations for control. The Act serves as the basis for the Fair Trade Commission (hereinafter referred to as the “FTC”) and the court for imposing administrative dispositions, convicting and sentencing.

Besides conducting investigations and imposing administrative dispositions in accordance with the Act, the FTC’s administrative actions in principle must comply with the Administrative Procedure Act and Administrative Penalty Act. Since the Administrative Penalty Act already sets forth the principle for the jurisdiction of administrative penalties imposed by administrative agencies, the Act does not separately specify whether or not extraterritorial acts of enterprises are under the jurisdiction of the FTC. In practice, the FTC takes into consideration the consequences of the applicable law and feasibility of executing competition remedies for each case, and then decides on an administrative disposition for the case.

An extraterritorial merger of enterprises does not necessarily result in a breach of duty in accordance with the Act. When faced with an extraterritorial merger case, the FTC first considers its jurisdiction in accordance with Point 3 of the Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers. As for the extraterritorial monitoring and execution of administrative penalties under the Act, according to Articles 8, 10 and 17 of the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises, the FTC may seek assistance from domestic enterprises to obtain information that may be disclosed, send letters to foreign enterprises to request data, send letters to overseas locations of the Ministry of Foreign Affairs or Ministry of Economic Affairs to assist in the collection of evidence and data overseas, and collect evidence and data through non-government organizations or industry associations for the extraterritorial monitoring and execution of competition remedies.

The FTC of Chinese Taipei has actively participated in activities related to issues of international competition law since it was established, and has also established reliable exchange and communication channels with the competent authorities of competition law in other countries. Competition law cooperation agreements signed with various countries in recent years are the result. The FTC has also worked with the competent authorities of competition law in other countries in the case of concerted actions by capacitor companies. The FTC will maintain its position as it continues to engage in exchanges with various countries to jointly maintain free and fair competition in the market.

European Union

The territorial application of EU competition rules is defined in the Treaty on the Functioning of the European Union (TFEU) and in the EU Merger Regulation (EUMR). The territorial scope of application of EU competition rules may also cover conduct occurring outside of the EU. The Court of Justice of the EU has held that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of the TFEU if that agreement is operative on the territory of the internal market.

The Woodpulp judgment (regarding price fixing) confirmed that the Commission may extend its jurisdiction to cases in which an undertaking's conduct occurs outside the EU. The decisive factor of applicability of EU law is the place where the conduct is implemented, rather than the location of the undertaking.

Concerning mergers, the Gencor judgment confirmed that the application of the EUMR to concentrations of undertakings conducting operations outside the EU is consistent with the EUMR and public international law "when it is foreseeable that a proposed concentration will have an immediate and substantial effect" in the EU.

The Commission cooperates and coordinates with competition agencies around the world when dealing with cases having an extraterritorial element, including as regards identifying appropriate remedies, in order to efficiently address harm to competition and provide legal certainty for undertakings by minimising the risk of diverging outcomes. The Commission applies the principle of international comity and cooperates on competition cases on the basis of international agreements concluded between the EU and third countries and memoranda of understanding entered into with other agencies.

Merger remedies: While remedies have to be effective in order to address the competition concerns identified, the Commission is also bound by the principle of proportionality. The territorial reach of remedies will be limited to the EU/EEA or even to the territory of individual EU/EEA countries, if such territorial limitation does not negatively impact on the effectiveness or viability of the remedy. In order to ensure the viability of the remedy, it may sometimes be necessary to extend its geographic reach beyond the EU territory.

Antitrust remedies: the guiding principle for the Commission is that the geographic scope of the remedies should reflect the scope of application of the EU competition rules, be the conduct occurring, implemented within, or producing effects in the EU/EEA. The Commission's approach is well illustrated by the 2014 Motorola and Samsung decisions, concerning standard-essential patents ("SEPs", which are patents that cover technology which is essential to use in order to comply with a technical standard). In both cases, the Commission specifically limited its remedies to conduct occurring in the EEA, and only on SEPs granted in the EEA. Where it intends to prescribe a specific remedy, the Commission is bound by the principle of proportionality. It follows from this principle that any burden imposed must not exceed what is appropriate and necessary to reach the objective of bringing the infringement effectively to an end. This means that there is an inherent link between the nature of the infringement and the remedies available to the Commission, based on the facts and circumstances of the individual case, including with respect to the territory concerned.

France

With the development of market interdependence and market players with an increasing globalised footprint, the territorial principle is now having to adjust to the reality of a globalised economy, accelerated by the explosion of the digital sector. Like its counterparts, the Autorité de la concurrence is confronted by the conduct of companies operating in international markets. But should competition authorities have to take account of this extranational dimension when they examine the efficacy of commitments proposed by companies?

The experience of the Autorité de la concurrence has shown that, in practice, it is not the authorities that come up with extraterritorial remedies – since their purpose is to address competition concerns in the country concerned – but the companies themselves, which can decide, for reasons of their own, to voluntarily extend the geographical reach of their commitments (Adidas I. and Navx II. cases).

However, the issue is not devoid of interest, as the experience of the Autorité de la concurrence in the Booking.com case demonstrates. Alongside its Swedish and Italian counterparts and under the aegis of the European Commission, the Autorité worked on an enhanced cooperation basis to develop and negotiate commitments at European level in the online hotel booking sector valid in three jurisdictions, including France (Booking.com III. case).

This unprecedented method, which clearly demonstrates the challenges facing the competition authorities, especially when dealing with digital platforms, is expected to continue regarding European cooperation, in parallel with the reflection and work being done internationally on the subject of extraterritoriality.

Germany

The enforcement activity of the Bundeskartellamt is, in principle, limited to Germany. German competition law applies to all restraints of competition that have an effect in Germany, even if the restraints are caused outside Germany. As a rule, the Bundeskartellamt does not impose remedial measures that affect other jurisdictions. However, the enforcement activity of the Bundeskartellamt might *de facto* have extraterritorial effects. Firstly, since merger remedies need to be suitable to fully address the competition issues raised by a merger, a divestment package may need to encompass assets and resources that are necessary for a viable competitor but are not located in Germany. Secondly, in order to address the competition concerns expressed by the Bundeskartellamt, companies might decide to change their practices or contractual terms not only in Germany, but in other countries as well. The Bundeskartellamt regularly cooperates with competition authorities around the world on the basis of bilateral agreements or within international networks. Cooperation among competition authorities is crucial, among other things, to avoid the risk of inconsistent and overlapping merger remedies.

Korea

As economic activities of cross-border market players are becoming common such as the expansion of free trade, the increase of cross-border transactions, and the emergence of multinational corporations, competition authorities are required to correct unfair practices conducted by global companies with market dominant positions in accordance with the competition law. In particular, the development of the ICT industry and widespread of digital economy are now presenting new challenges to the competition authorities in each country.

In response, discussions on extraterritorial application of the competition law are being held by the competition authorities and academia. Such discussions include to what extent competition authorities could impose corrective measures on acts conducted in a foreign country. This is different from an issue of the general meaning of extraterritorial application, and is related to excessive or inadequate enforcement of the competition law and conflicts of remedies among countries.

With regard to this, the KFTC imposed sanctions against the US, German and Japanese graphite electrode companies for cartel in 2002 on the basis of its impact on the Korean market, before the grounds for the extraterritorial reach of competition remedies were specified in the MRFTA. Since then, the MRFTA stipulated the provisions for the extraterritorial reach of competition remedies in 2004, making it clear that the MRFTA could apply to acts affecting the Korean markets even if the acts are conducted in foreign countries.

In this report, the grounds for the extraterritorial reach of competition remedies under the MRFTA, and major cases in the field of international cartels, M&A, and abuse of market dominant position will be introduced.

Mexico - COFECE

The Mexican Competition Law provides that Cofece can enforce measures to i) protect and/or restore competition in markets, and ii) to prevent the creation of anticompetitive market structures. These remedies are imposed on domestic and foreign individuals or corporations, when their acts have negative effects on competition in Mexican markets. This means that Cofece can exercise its powers over businesses practices concerted outside the borders of Mexico, but only when the companies' actions harm competition and affect domestic markets.

Through cooperation and coordination with other competition authorities, Cofece i) extends the scope of law enforcement and increases the effectiveness of its actions; ii) takes into consideration other jurisdictions' concerns or issues when crafting measures to protect competition in Mexico.

Mexico - IFT

The Federal Economic Competition Law (LFCE) mandates several typical procedures on antitrust and competition matters. Merger notification procedures are established in order to authorize, condition (remedies) or object transactions before they take its effects on Mexican territory.

The general principle of territoriality in the LFCE, coherently with the principles of legality and certainty of the Mexican Constitution, states that the competition law is exclusively applicable to the national territory. By extension, this rule applies in the imposition of remedies as an enforcement tool to readdress competition risks.

Although the IFT has no powers to impose extraterritorial remedies, it can impose any remedies better suited to countervail the anticompetitive effects of a conduct in the national territory, even if they may have international repercussions. The LFCE does not provide the extraterritorial imposition of the IFT's resolutions, including the imposition of remedies. However, it empowers to the IFT to impose any remedy that is "directly related to correcting a concentration's effects" even if its implementation requires or implies changes to international corporate behavior of multinational parties.

On August 2017, the IFT authorized subject to behavioral remedies the AT&T-Time Warner international merger. This merger has been resolved by several jurisdictions, but it has not been closed because it is waiting for resolution in other jurisdictions. This relevant case shows IFT's practices when imposing remedies, including the use of international technical assistance.

New Zealand

New Zealand is a small and open economy, in which many markets are supplied partly or entirely by imports. In addition, many large, cross-border businesses operating in New Zealand have few – if any – onshore assets. Given the small size of New Zealand, many markets are also characterised by a high level of concentration. The nature of New Zealand’s economy means that offshore mergers and cartels can have a significant and potentially disproportionate impact on competition in markets in New Zealand.

In cartel cases, remedies are almost always financial. The New Zealand Commerce Commission’s (“the Commission”) experience has been that once territorial jurisdiction has been established in these cases, and the courts have ordered a payment be made, the parties do not resist payment. While court-imposed penalties can be enforced in Australia, enforcement would be difficult in other jurisdictions. The territorial jurisdiction of New Zealand competition law has become clearer over the past several years, due to a series of Court decisions and a 2017 amendment to the Commerce Act 1986 (“the Act” and “the Amendment Act”).

The Amendment Act has clarified the extraterritorial scope of New Zealand competition law in an effort to rectify jurisdictional issues raised in court judgments and Commission merger clearance decisions. The net effect of the Amendment Act’s changes to jurisdiction was to clarify the common law position. In short, New Zealand competition law is concerned with conduct that affects markets in New Zealand.

It is now clear that the Act applies to: conduct in New Zealand by any person; conduct in New Zealand by the agent of a person who is not resident or carrying on business in New Zealand; conduct outside of New Zealand by a person who is resident or carrying on business in New Zealand (to the extent that the conduct affects a market in New Zealand); and conduct outside of New Zealand by the agent of a person who is resident or carrying on business in New Zealand (to the extent that the conduct affects a market in New Zealand).

In the merger context, the Commission has jurisdiction over mergers which occur in New Zealand. In addition, the Commission has jurisdiction over mergers occurring entirely overseas which result in a substantial lessening of competition in a market in New Zealand where the parties are resident in or carrying on business in New Zealand; or where the merger results in a party acquiring a controlling interest in a New Zealand body corporate. In respect of the last category of mergers, the Amendment Act has given the Commission access to suitable remedies, primarily focused on the New Zealand body corporate controlled by the offshore merger party.

On the other hand, where an overseas acquisition results in a substantial lessening of competition in a market in New Zealand but the parties are not resident in or carrying on business in New Zealand and do not acquire a controlling interest in a New Zealand body corporate, the Amendment Act has removed the jurisdiction the Commission previously had. However, it is questionable whether the Commission could practically have enforced that jurisdiction in the past.

In terms of practical investigation of extraterritorial breaches of the Act, both informal and formal cooperation between competition agencies are important. Gateway provisions provide for the sharing of compulsorily acquired information without consent, and for the

provision of investigative assistance to other competition agencies. Waivers are particularly important in relation to mergers.

In relation to cartels, New Zealand has focused on conduct with a relevant jurisdictional nexus and effect in New Zealand. To make these assessments, the Commission liaises with foreign jurisdictions through waivers, and more generally through regular dialogue with relevant agencies. Where mergers span national boundaries, co-operation between competition agencies is important to deliver a set of divestiture and related remedies (jurisdiction by jurisdiction) that work together.

Due to the proximity between New Zealand and Australia, and the closeness of the two countries' economies in terms of trade relations, there are various inter-governmental agreements and laws that specifically acknowledge these close economic ties and facilitate cooperation and extraterritorial enforcement between the two jurisdictions.

Russian Federation

The provisions of the Russian Law on Protection of Competition apply to agreements reached beyond the territory of the Russian Federation between Russian and (or) foreign entities or organizations, as well as to the actions taken thereby, if such agreements or actions have an impact on the status of competition within the territory of the Russian Federation. These provisions establish the possibility of the extraterritorial application of the Competition Law. The term “extraterritoriality” is widely used in international agreements, the rulings of international courts, and in the legal literature.

The Competition Law could formally be applied to any anticompetitive agreements (actions) reached (taken) beyond the territory of the Russian Federation, if such agreements (actions) have an impact on the status of competition within the territory of the Russian Federation. In practice, the Competition Law has thus far been applied extraterritorially first and foremost to transactions involving economic concentration.

The objective complexities in the identification of cartels formed beyond the territory of the Russian Federation (just as any other anticompetitive agreements and (or) actions), handling of the respective investigation, and collection and consolidation of evidence, just as the difficulties associated with enforcing the Competition Law, continue to present a serious obstacle to the broad-based extraterritorial application of the Competition Law.

The violation of antimonopoly legislation within Russia entails both administrative and criminal responsibility. This responsibility extends, inter alia, to foreign citizens, stateless persons and foreign legal entities committing offences within the territory of the Russian Federation.

There are successful examples wherein the actions of a foreign company, registered outside of Russia, have violated the provisions of Russian antimonopoly legislation, which in turn has resulted in the prosecution of said parties in connection with the fact that such actions have an impact on the status of competition within the territory of the Russian Federation. As such, FAS Russia investigated cases featuring application of the principle of the extraterritorial operation of antimonopoly legislation against Google, Microsoft, Apple, international container shippers, etc.

With the adoption of the “fourth antimonopoly package,” the Competition Law was supplemented with a norm envisioning that the provisions of the federal law in question do not extend to relations regulated by the uniform rules of competition on cross-border markets, control over whose observance is referred to the competence of the Eurasian Economic Commission pursuant to the respective international agreement.

Recognizing the need for the international coordination of competition-related law enforcement in an environment of deepening globalization and increasing instances of anticompetitive behavior beyond the country’s national borders, FAS Russia has taken a pragmatic view of the prospects for bilateral cooperation with foreign competition agencies and is endeavoring to elevate it to a new level.

Instead of the standard memorandum, FAS Russia is exploring the possible signing with its foreign colleagues of so-called “agreements on new level cooperation.” The provisions of such agreements expand on the clauses found in the standard memoranda of understanding and include, inter alia, clauses on the competitive behavior of the parties in the event of the conducting of investigations, on experience sharing, and on the

organization of consultations for the purposes of interdicting violations of antimonopoly legislation within the territory of the parties to the agreement. Such agreements constitute international acts, and as such, require additional, more extensive domestic reconciliation.

Singapore

Singapore is a small and open economy. An implication of a small and open economy is the vulnerability to anti-competitive activities from undertakings operating overseas. Hence, the need to provide for the extraterritorial reach of Singapore's competition law and the Competition Commission of Singapore ("CCS") to have jurisdiction over anti-competitive conduct taking place outside of Singapore was recognised by the Government when enacting the Competition Act (Cap. 50B) in October 2004.

Section 33 of the Competition Act provides for the extraterritorial effect of the three key anti-competitive prohibitions while section 69 provides for the enforcement of the Commission's decisions which includes the power to direct the infringing parties to take such actions (i) to bring the infringement of the anti-competitive prohibitions to an end, (ii) to remedy, mitigate or eliminate any adverse effects of such infringement, or (iii) to prevent the recurrence of such infringement.

Whilst CCS has yet to have any experience in imposing remedies which have an extraterritorial reach, it is legislatively empowered to do so. In the context of mergers assessments, CCS has handled two merger notifications in which commitments were offered and accepted by foreign competition authorities, and which had an impact in the relevant markets in Singapore. In both cases, CCS reviewed the foreign extraterritorial remedies and their effectiveness in addressing the domestic competition concerns identified.

While CCS has extraterritorial jurisdiction over anti-competitive conduct taking place outside of Singapore, CCS recognises that in terms of enforcement actions and remedies, Singapore will have to take into consideration the principles of territoriality, sovereignty and comity.

South Africa

The Competition Act applies to conduct that occurs outside of but has an effect in South Africa. Section 3(1) of the Competition Act embodies the concept of “effect within” South Africa, regardless of the country of origin of the conduct, as a touchstone for the application of the Competition Act. This doctrine is based on the principle that the criterion for applying competition law to a particular situation is not the geographic origin of the anticompetitive action, but the location of its anticompetitive effects. The courts in South Africa have confirmed this position.

The Competition Tribunal discussed the application of the principle of comity in the ANSAC cases (American Natural Soda Ash Corporation and Another vs Competition Commission of South Africa Case Number 49/CR/00). In terms of that principle, courts may show deference to the legislative acts of a foreign government. Thus the courts may refuse to assume jurisdiction if it will undermine the acts of another country though this has not been applied in competition law in South Africa. The principle of comity or any other international limitation are not specifically referred to in the Competition Act. This aspect was not applicable in the ANSAC cases as the application of the US Sherman Antitrust Act was ousted by the United States Export Trade Act 1918.

The Competition Commission is currently prosecuting many cartels, in forex and automotive sectors, where the conduct was committed outside of South Africa and the effect was felt in the Republic. The jurisprudence on extra-territorial application of the South African Competition Act will be developed when the Competition Tribunal and the courts hand down decisions in those cases. The principle of double jeopardy will also come into focus in those cases as some of the firms being prosecuted have been fined in foreign jurisdictions for the same conduct.

United Kingdom

This submission considers the role of extraterritorial remedies in UK merger control.

As the submission explains, the UK Courts have confirmed that the CMA is able to extend its jurisdiction in relation to remedies over conduct outside the UK in certain defined circumstances. This supports the CMA's ability to protect UK consumers in a globalised economy.

Notwithstanding these powers, the CMA may take the additional risks that can arise around the implementation of extraterritorial remedies into account, where relevant, when designing remedies. In the CMA's experience, the challenges involved in designing and implementing extraterritorial remedies can best be addressed by close co-operation between different jurisdictions' competition authorities.

United States

The Antitrust Division of the U.S. Department of Justice (the “Department”) and the U.S. Federal Trade Commission (the “Commission” or “FTC”) (collectively the “U.S. Antitrust Agencies” or “the Agencies”) are charged with enforcement of the federal antitrust laws, which apply to certain foreign conduct that affects U.S. commerce.¹ “[T]he Agencies focus on whether there is a sufficient connection between the anticompetitive conduct and the United States such that the federal antitrust laws apply and the Agencies’ enforcement would redress harm or threatened harm to U.S. commerce and consumers.”² Although U.S. courts have given the Agencies’ significant leeway in crafting a remedy once anticompetitive harm has been established,³ the Agencies have a considered policy to tailor competition remedies that reach conduct or assets in one or more foreign jurisdictions. This policy is dedicated to ensuring that the Agencies avoid extraterritorial remedies except when and as necessary to resolve harm to U.S. commerce and consumers.

The Agencies believe it important to provide transparent guidance to the business community on antitrust enforcement policies, such as remedies, including when antitrust remedies may apply extraterritorially. To that effect, the Agencies recently articulated their policy guidance on extraterritorial remedies in their 2017 Antitrust Guidelines for International Enforcement and Cooperation (“the International Guidelines”), which were issued following an open comment period and the consideration of input from stakeholders.⁴ As discussed below, the International Guidelines set important boundaries

¹ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (rev’d Jan. 13, 2017) § 3 [hereinafter INT’L GUIDELINES] (“It is well established that the federal antitrust laws apply to foreign conduct that has a substantial and intended effect in the United States.”), <http://www.atrnet.gov/php/redirectatr2.php?https://www.justice.gov/atr/internationalguidelines/download>. “In 1982, Congress reaffirmed the applicability of the antitrust laws to conduct involving foreign commerce when it passed the [Foreign Trade Antitrust Improvements Act] (FTAIA), which added Section 6a to the Sherman Act and Section 5(a)(3) to the FTC Act. These provisions clarify whether the antitrust laws reach conduct—regardless of where it takes place—that involves trade or commerce with foreign nations.” *Id.* (internal citation omitted).

² In determining whether a sufficient connection to U.S. commerce exists, the FTAIA considers whether U.S. export commerce and wholly foreign commerce has “a direct, substantial, and reasonably foreseeable effect” within the United States. 15 U.S.C. § 6a. Import trade and import commerce are subject to the Sherman Act and FTC Act. *See* INT’L GUIDELINES § 3.1.

³ *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (“[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.”); *see also* *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170-71 (2004); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944); *Local 167 of Int’l Brd. of Teamsters v. United States*, 291 U.S. 293, 299 (1934); *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012) (citing *United States v. E.I. du Pont de Nemours & Co.*); *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008) (citing *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957)).

⁴ INT’L GUIDELINES § 5.1.5. The International Guidelines provide guidance to businesses engaged in international activities on questions that concern the Agencies’ international enforcement policy, as well as the Agencies’ related investigative tools and cooperation with foreign

for extraterritorial remedies. It is notable that this discussion occurs within the International Guidelines “Cooperation” section, because cooperation has proved fundamental to avoiding conflict with foreign remedies. The Agencies frequently coordinate investigations and remedies with foreign counterparts investigating the same transaction or conduct.⁵ The International Guidelines also address the importance of non-discrimination with regard to the enforcement of the antitrust laws, and the Agencies have frequently stated that competition remedies should not be used to favor national firms or advance industrial policy goals.⁶

This paper first discusses the Agencies’ standard for drawing extraterritorial remedies as set forth in the International Guidelines. It then describes the Agencies’ guidance on remedies in other contexts that promotes transparency of the Agencies’ remedial practices and reinforces the International Guidelines’ standard on extraterritorial remedies by ensuring that remedies are tailored to curing domestic competitive harm. Section IV identifies the importance of transparency, procedural fairness and non-discrimination in individual remedy determinations, particularly those implicating extraterritoriality. Section V addresses the Agencies’ cooperation with foreign partners on remedies. The paper concludes with a series of case examples demonstrating the Agencies’ carefully circumscribed use of extraterritorial remedies and related case cooperation.

authorities. They reflect the growing importance of antitrust enforcement in a globalized economy and the Agencies’ commitment to cooperating with foreign authorities on both policy and investigative matters, benefitting from comments from practitioners, academics, economists, and other stakeholders.

⁵ *Id.*

⁶ See INT’L GUIDELINES §§ 1, 2, 5; Makan Delrahim, Assistant Att’y Gen. Antitrust Div., U.S. Dep’t of Justice, Assistant Attorney General Makan Delrahim Delivers Remarks at New York University School of Law (Oct. 27, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center>; Maureen Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Guidelines for Global Antitrust: The Three Cs: Cooperation, Comity, and Constraints (Sept. 8, 2017) [hereinafter Ohlhausen, Guidelines for Global Antitrust], <https://www.ftc.gov/public-statements/2017/09/guidelines-global-antitrust-three-cs-cooperation-comity-constraints>; Roger Alford, Deputy Assistant Att’y Gen. Antitrust Div., U.S. Dep’t of Justice, Deputy Assistant Attorney General Roger Alford Delivers Remarks at China Competition Policy Forum (Aug. 29, 2017) [hereinafter Alford, Remarks at China Competition Policy Forum], <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-china-competition-policy>.