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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**Working Party No. 3 on Co-operation and Enforcement**

**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the  
United States**

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More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm](http://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm)

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## *United States*

### 1. Introduction

1. 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.<sup>1</sup> “[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.”<sup>2</sup> Although U.S. courts have given the Agencies’ significant leeway in crafting a remedy once anticompetitive harm has been established,<sup>3</sup> 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.

2. 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

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<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> *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)).

stakeholders.<sup>4</sup> As discussed below, the International Guidelines set important boundaries 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.<sup>5</sup> 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.<sup>6</sup>

3. 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.

## **2. The Agencies’ Standard for Extraterritorial Remedies: Section 5.1.5 of the Antitrust Guidelines for International Enforcement and Cooperation**

4. The U.S. Agencies require relief sufficient to eliminate identified anticompetitive harm that has the requisite connection to U.S. commerce and consumers, even if this

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<sup>4</sup> 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 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.

<sup>5</sup> Id.

<sup>6</sup> 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>.

means reaching assets or conduct in a foreign jurisdiction.<sup>7</sup> For example, in the merger context, a company may be required to divest a manufacturing plant outside of the U.S. in order to help preserve competition in the U.S. At the same time, Section 5.1.5 of the International Guidelines sets out a balanced standard for the Agencies' reliance on extraterritorial remedies that "limits overly broad extraterritorial reach, while recognizing and allowing for effective enforcement."<sup>8</sup> To this end, the International Guidelines provide that:

*The Agencies seek remedies that effectively address harm or threatened harm to U.S. commerce and consumers, while attempting to avoid conflicts with remedies contemplated by their foreign counterparts. An Agency 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.*<sup>9</sup>

5. This statement sets out a number of important guiding principles. First, the Agencies always look first to resolve anticompetitive concerns through domestic remedies.

6. Second, the Agencies will seek an extraterritorial remedy only when: (1) the extraterritorial remedy is needed to address harm or threatened harm to U.S. commerce and consumers, and (2) such a remedy is consistent with the Agency's comity analysis. Thus, the Agencies' general practice is to seek an effective remedy that is restricted to the United States, which the Agencies believe is the best approach. Only when a domestic remedy cannot effectively redress the harm or threatened harm to U.S. commerce or consumers will the Agencies consider broader remedies that have extraterritorial effect.

7. The International Guidelines explain that comity can be a consideration in the Agencies' remedy determinations. 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.'"<sup>10</sup> The U.S. Supreme Court has held that no conflict exists for purposes of international comity analysis if a person subject to regulation by two nations can comply with the laws of both.<sup>11</sup> In addition, even where there is no direct conflict, "the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether

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<sup>7</sup> See, e.g., *United States v. Nat'l Lead Co.*, 332 U.S. 319, 334-35, 337 (1947) (affirming a consent decree containing language that prevented the defendants from enforcing non-U.S. patents, among other provisions). See also *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir., 2012) (upholding the Commission's divestiture order of an ex-U.S. plant because it was needed for the buyer to compete effectively for North American customers and manage its capacity, and helped to assure supply for local U.S. customers).

<sup>8</sup> Ohlhausen, *Guidelines for Global Antitrust*, supra note 6, at 7 (Sept. 8, 2017), <https://www.ftc.gov/public-statements/2017/09/guidelines-global-antitrust-three-cs-cooperation-comity-constraints>.

<sup>9</sup> Int'l Guidelines § 5.1.5 (internal citations omitted).

<sup>10</sup> Int'l Guidelines § 4.1 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

<sup>11</sup> *Hartford Fire v. California*, 509 U.S. 764, 799 (1993); Int'l Guidelines § 3.2.

there is a conflict with foreign law.”<sup>12</sup> Comity has not been a significant factor in the Agencies’ remedy determinations involving more than one sovereign because of the high degree of international convergence in competition law and policy. Convergence has reduced the number of direct conflicts, including on remedies.

8. Third, the Agencies seek to avoid conflicts with remedies contemplated by their foreign counterparts, notably through cooperation. The International Guidelines specifically provide that the Agencies “may cooperate with other authorities, to the extent permitted under U.S. law, to facilitate obtaining effective and non-conflicting remedies.”<sup>13</sup> Cooperation “can improve substantive analyses and ensure that investigations and remedies are as consistent and predictable as possible, which improves outcomes, and reduces uncertainty and expense to firms doing business across borders.”<sup>14</sup> Divergent remedies have the potential to impair firms’ abilities to compete globally and can undermine competition enforcement efforts. In many cases, particularly those involving extraterritorial remedies, cooperation and coordination are important to an effective outcome and improve understanding of each of the cooperating authorities’ needs and proposed decisions.<sup>15</sup> Information exchange among enforcers investigating the same conduct enables the Agencies to understand each other’s decisions in a case and any impact on U.S. commerce.<sup>16</sup> Cooperation has also facilitated informal and practical approaches to limiting duplication, including by one authority’s closing of its investigation without remedies after taking another authority’s remedy into account.<sup>17</sup>

9. Consequently, if an extraterritorial remedy is contemplated in a particular case, these principles, as provided in the International Guidelines, allow the Agencies to ensure that the remedy is appropriately tailored to address the identified competitive harm to U.S. commerce and consumers without unnecessarily conflicting with the laws, policies, or remedies of foreign jurisdictions.

10. Specific examples of Agency cooperation on remedies are discussed at Part VI.

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<sup>12</sup> Int’l Guidelines § 4.1. Indeed, “the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct.” Id.

<sup>13</sup> Int’l Guidelines § 5.1.5.

<sup>14</sup> Int’l Guidelines § 5.

<sup>15</sup> See International Antitrust Enforcement: China and Beyond: Hearing Before the Subcomm. on Regulatory Reform, Commercial, and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. (2016) (statement of Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, at 5), [https://www.ftc.gov/system/files/documents/public\\_statements/953113/160607internationalantitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/953113/160607internationalantitrust.pdf).

<sup>16</sup> See Concurrences Review, Interview with Lynda K. Marshall, Chief, Int’l Section, Antitrust Div., U.S. Dep’t of Justice (Sept. 11, 2017), <https://www.eventbrite.com/e/interview-with-lynda-k-marshall-what-is-trump-antitrust-tickets-36931288478#>.

<sup>17</sup> See Int’l Guidelines § 5.1.5; 2012 U.S. submission to the OECD Competition Committee on International Cooperation, [https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/062012International\\_coop\\_U%20S.pdf](https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/062012International_coop_U%20S.pdf). See also Concurrences Review, Interview with Lynda K. Marshall, supra note 16.

### 3. Additional Agency Guidance on Remedies

11. To promote transparency, the Agencies have released guidance on their use of remedies in several other contexts. The Department and the FTC have issued certain Agency-specific guidance documents discussing remedies. The Agencies also recently provided joint guidance on remedies involving patents and other intellectual property in the Antitrust Guidelines for the Licensing of Intellectual Property.<sup>18</sup> This additional Agency guidance works in tandem with that provided in the International Guidelines, reinforcing the critical principles that competition remedies should be appropriately tailored to an identified competitive harm and that remedies should avoid extraterritorial application unless necessary to effectively redress harm or threatened harm to U.S. commerce and consumers.

#### 3.1. U.S. Department of Justice Policy Guide to Merger Remedies

12. The Department's Merger Remedies Guide ("DOJ Merger Remedies Guide") addresses merger remedies that may reach assets or conduct outside the United States. Similar to Section 5.1.5 of the International Guidelines, the DOJ Merger Remedies Guide also explains that the Department strives, "to the extent possible," to ensure that its "remedies do not conflict unnecessarily with the remedies of other jurisdictions."<sup>19</sup> The Guide states, "In many cases, the [Department] may be able to work collaboratively with other antitrust agencies to craft remedies that are effective across jurisdictions."<sup>20</sup>

#### 3.2. FTC Guidance on Merger Remedies

13. The FTC has a number of documents that describe the Commission's merger remedy processes. These include a statement on negotiating merger remedies published by the FTC's Bureau of Competition<sup>21</sup> and a series of FAQs.<sup>22</sup> In addition, the FTC has recently completed a review of its merger remedies from 2006 to 2012, and found that the majority of its orders during that period succeeded in maintaining or restoring

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<sup>18</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1049793/ip\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf) [hereinafter IP Guidelines].

<sup>19</sup> The Antitrust Division Policy Guide to Merger Remedies, at 21 (June 2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> [hereinafter Merger Remedies guide]; see also ICN Recommended Practices, Recommended Practice X.E., Interagency Coordination, at 31 (Apr. 2004), [www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf).

<sup>20</sup> Merger Remedies guide, at 21.

<sup>21</sup> Fed. Trade Comm'n, Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Jan. 2012), <https://www.ftc.gov/tips-advice/competition-guidance/merger-remedies>.

<sup>22</sup> Fed. Trade Comm'n, Frequently Asked Questions about Merger Consent Order Provisions, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq>.

competition in the markets affected by the merger.<sup>23</sup> For the majority of FTC merger remedies, “the divestiture package contains the assets and related rights and capabilities that an existing competitor has used to make or sell the relevant product. But sometimes firms competing in the relevant market also operate in other product or geographic markets not directly affected by the merger. If out-of-market assets are needed to make up a competitive business in the relevant market, then they go into the divestiture package as well.”<sup>24</sup> Thus, in certain cases, a merger remedy may require divestiture of assets located outside the United States if those assets are needed to compete effectively in U.S. markets affected by the merger.<sup>25</sup>

### 3.3. Antitrust Guidelines for the Licensing of Intellectual Property

14. In certain contexts, appropriate remedies for antitrust violations will include provisions that relate to the sale or licensing of intellectual property (“IP”). But some considerations should be kept in mind. The Agencies ordinarily will not require IP owners to create competition in their own technology.<sup>26</sup> If an IP right merely confers market power on the right’s holder, the Agencies likewise will not find that the IP owner has an obligation to license the use of that IP to others.<sup>27</sup> The Agencies “may, however, impose licensing requirements to remedy anticompetitive harm or, in the case of a merger, to prevent the substantial lessening of competition.”<sup>28</sup> It is important to note that in this situation, “[a]ny licensing remedy assessment will be specific to the facts of the particular case at issue and tailored to address the competitive harm.”<sup>29</sup> The Antitrust Guidelines for the Licensing of Intellectual Property, reinforce the International Guidelines, ensuring that remedies related to IP rights will be crafted to be limited to the United States unless extraterritorial application is necessary to remedy harm to U.S. commerce and consumers.

## 4. Process and Transparency in Remedy Determinations

15. In addition to policy transparency, the Agencies recognize the importance of transparency, procedural fairness, and non-discrimination with regard to individual remedy determinations, particularly those implicating extraterritoriality. In situations in

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<sup>23</sup> The FTC’s Merger Remedies 2006-2012: A Report of the Bureau of Competition and Economics (Jan. 2017), [https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100\\_ftc\\_merger\\_remedies\\_2006-2012.pdf](https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf).

<sup>24</sup> Dan Ducore, Fed. Trade Comm’n, Bureau of Competition, Divestitures May Include Assets Outside the Market, Competition Matters Blog (Apr. 24, 2015, 9:03 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/04/divestitures-may-include-assets-outside-market>.

<sup>25</sup> See *Polypore Intern. Inc. v. FTC*, 686 F.3d 1208, 1218-19 (11th Cir. 2012) (upholding FTC order requiring divestiture of Austrian plant needed to serve North American customers and provide insurance against supply disruptions).

<sup>26</sup> IP Guidelines § 3.1.

<sup>27</sup> *Id.* § 2.2.

<sup>28</sup> *Id.* § 3.1 & n.26.

<sup>29</sup> *Id.*

which an Agency deems an extraterritorial remedy necessary, transparency and procedural fairness ensure that the parties understand the Agency's rationale for and have the opportunity to provide input into the decision.<sup>30</sup> Among other benefits, actively engaging with parties helps the Agencies to craft appropriate resolutions that address the specific competitive harm in the jurisdiction, including by better understanding the scope of a remedy that may be under consideration in another jurisdiction.<sup>31</sup> Such engagement allows for more efficient remedies and improves the potential for cooperation and coordination of remedies, when appropriate.

16. An explanation of why a particular remedy is needed is also helpful if the remedy will apply outside the jurisdiction. Such an explanation enables foreign parties and sister agencies to understand the rationale for the application of the extraterritorial remedy and to appreciate that it is applied in a non-discriminatory manner.<sup>32</sup>

17. The Agencies ensure transparency by placing proposed remedies on the public record for comment. For example, the Department's civil antitrust consent decrees are subject to the Tunney Act, which requires the Department to publicly articulate the reasons for a proposed remedy, and to allow for public comment.<sup>33</sup> Similarly, the FTC requests public comments when considering whether to make its provisional consent agreements final. The relevant rules provide that the Commission place accepted consent agreements and explanations of their provisions on the public record for comment, generally for 30 days.<sup>34</sup>

## 5. The Agencies' Cooperation with Foreign Jurisdictions on Remedies

18. Achieving effective remedies often entails cooperation with foreign jurisdictions. Such cooperation may allow the U.S. agencies to secure relief that sufficiently protects

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<sup>30</sup> See Comm'r Maureen K. Ohlhausen, *International Antitrust Enforcement: China and Beyond*, supra note 15.

<sup>31</sup> The Agencies believe an open and transparent remedy process provides firms with comfort that they will be treated fairly. Such treatment helps to encourage the investment and innovation in a jurisdiction that advances economic growth. See e.g., Andrew Finch, Deputy Assistant Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Acting Assistant Attorney General Andrew Finch Delivers Keynote Address at Annual Conference on International Antitrust Law and Policy (Sept. 14, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-keynote-address-annual-conference>.

<sup>32</sup> The International Guidelines highlight that the Agencies do not discriminate in the enforcement of the antitrust laws based on the nationality of the parties. Int'l Guidelines §§ 1, 2, 5. The Agencies also frequently note that competition remedies should not be used to favor national firms or advance industrial policy goals. See e.g., Ohlhausen, *Guidelines for Global Antitrust*, supra note 6; Alford, *Remarks at China Competition Policy Forum*, supra note 6.

<sup>33</sup> 15 U.S.C. § 16. The Department must file a competitive impact statement that contains, among other things, "a description of the practices or events giving rise to the alleged violation of the antitrust laws"; an "explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief"; and "a description and evaluation of alternatives to such proposal actually considered by the United States."

<sup>34</sup> See 15 U.S.C. 46(f) and 16 C.F.R. §2.34.

U.S. competition and consumers without applying the remedy to conduct or assets outside the United States. When an extraterritorial remedy is necessary to address harm or threatened harm to U.S. commerce and consumers, cooperation helps to minimize the risk of conflict with obligations of foreign laws or foreign remedial orders.<sup>35</sup> Cooperation and coordination on remedies can be efficient for enforcers and the parties under investigation, especially given that over 130 jurisdictions have antitrust laws and over 80 require pre-merger notification. Cooperation may result in a remedies package that addresses competition concerns in multiple jurisdictions.<sup>36</sup> The Agencies work closely with competition enforcers in other jurisdictions on cases under common review, including to help foster convergence and consistent remedy determinations.<sup>37</sup>

## 6. U.S. Case Examples

19. To the extent that the Agencies rely on extraterritorial remedies, they do so in both merger and conduct cases, although they arise most frequently in the merger context. In all cases, the Agencies seek remedies that are appropriately tailored and that do not apply extraterritorially unless necessary to address the harm or threatened harm to U.S. commerce or consumers.

### 6.1. Merger Cases

20. In most mergers, the Agencies can obtain an effective remedy for U.S. competition and consumers without extraterritorial divestitures or other relief. This is the case even when an Agency coordinates with other jurisdictions in investigating a transaction that raises concerns in both domestic markets and markets outside the U.S. Even in these instances, however, coordination between jurisdictions can be helpful. For example, the FTC benefited from coordinating with antitrust authorities in Canada, the EU, and Mexico during the investigation of Emerson Electric Co.'s acquisition of Pentair plc, even though the potential harm to U.S. markets was resolved exclusively through the divestiture of a U.S. switchbox facility.<sup>38</sup> Similarly, in the General Electric-Alstom SA

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<sup>35</sup> Cooperation can be facilitated by bilateral and multilateral arrangements. The United States or the Agencies have bilateral cooperation agreements with eleven jurisdictions or competition agencies: Germany (1976); Australia (1982); the European Union (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); Chile (2011); Colombia (2014); and Peru (2016). The Agencies also have entered into memoranda of understanding with the Russian Federal Antimonopoly Service (2009), the three Chinese antimonopoly enforcement agencies (2011), the Indian competition authorities (2012), and the Korea Fair Trade Commission (2015), and cooperates on the basis of multilateral arrangements including the Recommendation of the OECD Council Concerning Co-Operation on Competition Investigations and Proceedings, and the ICN Framework for Merger Cooperation.

<sup>36</sup> Id.

<sup>37</sup> See Int'l Guidelines for a fuller description of the Agencies' case and policy cooperation. Ohlhausen, Guidelines for Global Antitrust, at 8 (Sept. 8, 2017), <https://www.ftc.gov/public-statements/2017/09/guidelines-global-antitrust-three-cs-cooperation-comity-constraints>.

<sup>38</sup> Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Acquisition of Industrial Valve Manufacturer Pentair plc by Emerson Electric Co. (April 28, 2017) <https://www.ftc.gov/enforcement/cases-proceedings/161-0221/emerson-electric-pentair>. See also Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture of General Electric Company's Water & Process Technologies Business Before Merger with Baker Hughes Inc. (June

merger, effective relief for U.S. markets required divestiture of only U.S. based assets; however, coordination between the Department and the EC in connection with the Department's investigation "facilitated [the Department's] investigation and helped formulate remedies that [preserved] competition in the United States and internationally."<sup>39</sup> A coordinated remedy resulted in the Department and the EC announcing separate settlements that eliminated harm to consumers in their respective jurisdictions.<sup>40</sup> There are many more cases in which the Agencies have coordinated with their foreign counterparts on mergers that affect multiple jurisdictions.<sup>41</sup>

12, 2017) (The Department cooperated closely with its counterparts in a number of jurisdictions, including the European Commission, Canada, and Australia) <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-general-electric-company-s-water-process-technologies>; Press Release, Fed. Trade Comm'n, FTC Requires China National Chemical Corporation and Syngenta AG to Divest U.S. Assets as a Condition of Merger (April 7, 2017) (FTC worked with antitrust authorities in Australia, Canada, EU, India and Mexico) <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-requires-china-national-chemical-corporation-syngenta-ag>; Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation (July 26, 2012) ("[T]he [Department's] close cooperation with the European Commission and Canadian Competition Bureau resulted in a coordinated remedy that will preserve competition in the United States and internationally."), <https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its>.

<sup>39</sup> The EC also imposed a remedy that focused on European assets. See Press Release, U.S. Dep't of Justice, Justice Department Requires General Electric to Divest Aftermarket Business in Order to Complete Alstom Purchase (Sept. 8, 2015) [hereinafter GE-Alstom Press Release], <https://www.justice.gov/opa/pr/justice-department-requires-general-electric-divest-aftermarket-business-order-complete>. See also U.S. DEP'T OF JUSTICE, COMPETITIVE IMPACT STATEMENT, *United States v. General Electric Co., Alstom S.A., & Power Sys. Mfg.*, No. 1:15-cv-01460 (D.D.C. Sept. 8, 2015), <https://www.justice.gov/atr/case/us-v-general-electric-company-alstom-sa-and-power-systems-mfg-llc>.

<sup>40</sup> See GE-Alstom Press Release, *supra* note 39.

<sup>41</sup> See Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture of General Electric Company's Water & Process Technologies Business Before Merger with Baker Hughes Inc. (June 12, 2017) (The Department cooperated closely with its counterparts in a number of jurisdictions, including the European Commission, Canada, and Australia) <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-general-electric-company-s-water-process-technologies>; Press Release, Fed. Trade Comm'n, FTC Requires China National Chemical Corporation and Syngenta AG to Divest U.S. Assets as a Condition of Merger (April 7, 2017) (FTC worked with antitrust authorities in Australia, Canada, EU, India and Mexico) <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-requires-china-national-chemical-corporation-syngenta-ag>; Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation (July 26, 2012) ("[T]he [Department's] close cooperation with the European Commission and Canadian Competition Bureau resulted in a coordinated remedy that will preserve competition in the United States and internationally."), <https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its>. In fiscal year 2016, the FTC had significant cooperation in 46 investigations -- 41 merger, and 5 non-merger investigations. This cooperation included coordination with competition agencies from Australia, Belgium, Brazil, Canada, China, the European Union, Germany, India, Ireland, Japan, Korea, Mexico, South Africa, Taiwan, and the United Kingdom. See The Federal Trade Commission's International Antitrust Program (Sept.

21. Although a merger may affect competition in several jurisdictions, the Agencies focus on preserving competition in the domestic markets that may be harmed by the proposed acquisition. On some occasions, relief secured by foreign jurisdictions means that no remedy, domestic or extraterritorial, is necessary to protect domestic competition. Though our experience in deferring to another authority's remedy is limited, we have relied on informal deference and remain interested in doing so, under the right conditions. A notable example was in connection with Cisco's acquisition of Tandberg in 2010. The Department declined to challenge the merger in part due to certain commitments that Cisco made to the European Commission (EC) to facilitate interoperability in products related to a type of videoconferencing called telepresence. Waivers of confidentiality by the parties and industry participants allowed the Department and the EC to cooperate closely in their parallel reviews of the transaction, resulting in an efficient outcome for the enforcers and the merging parties.<sup>42</sup>

22. Nevertheless, certain merger investigations resolved by consent decree have required the divestiture of assets located outside the United States to preserve competition within the United States. For example, the FTC consent decree resolving concerns regarding the merger of cement manufacturers Holcim Ltd. and Lafarge SA required, in part, divestiture of a Canadian cement plant and related U.S. terminals along with two Canadian terminals related to a U.S. cement plant. The FTC explained that the divested assets "remedy competitive concerns in northern U.S. markets [and are] part of a larger group of Holcim assets located in Canada that Holcim and Lafarge have agreed to divest to address competitive concerns raised by the [Canadian Competition Bureau ("CCB")]. Commission staff worked closely with staff from the CCB to reach outcomes that benefit consumers in the United States."<sup>43</sup> An extraterritorial remedy was also required to resolve Department's investigation of the Anheuser-Busch InBev SA/NV & Grupo Modelo S.A.B. merger. The consent decree in that matter similarly required divestiture of a facility outside of the United States, the Grupo Modelo brewery in Mexico, and a perpetual and exclusive U.S. trademark license to the seven brands of beer that Modelo then offered in the United States, as well as three brands not yet offered in the United States, but currently sold by Modelo in Mexico. This remedy allowed the acquirer "to meet current and future demand for Modelo Brand Beer in the United States," which resolved concerns that the merger would harm competition in twenty-six local U.S. markets.<sup>44</sup>

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2017), [https://www.ftc.gov/system/files/attachments/international-competition/the\\_ftcs\\_international\\_antitrust\\_program\\_sept\\_2017.pdf](https://www.ftc.gov/system/files/attachments/international-competition/the_ftcs_international_antitrust_program_sept_2017.pdf).

<sup>42</sup> See Press Release, U.S. Dep't of Justice, Justice Department will not Challenge Cisco's Acquisition of Tandberg (Mar. 29, 2010), <https://www.justice.gov/opa/pr/justice-department-will-not-challenge-cisco-s-acquisition-tandberg>.

<sup>43</sup> Press Release, Fed. Trade Comm'n, FTC Requires Cement Manufacturers Holcim and Lafarge to Divest Assets as a Condition of Merger (May 4, 2015) <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requires-cement-manufacturers-holcim-lafarge-divest-assets>. The Canadian Competition Bureau also required divestiture of the overlapping U.S. and Canadian assets. <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03919.html>

<sup>44</sup> 15 U.S.C. § 18; U.S. Dep't of Justice, Competitive impact statement, United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., No. 13-127 D.D.C. Apr. 19 2013), <https://www.justice.gov/atr/case-document/competitive-impact-statement-31>.

## 6.2. Civil Non-Merger

23. Extraterritorial remedies are less common when the underlying antitrust violation involves non-merger conduct. Indeed, none of the Department's recent civil-non merger remedies has applied outside the United States.<sup>45</sup> The FTC consent order with Invibio Inc. and its parent Victrix plc represents one example of a conduct remedy with a carefully tailored extraterritorial component. The FTC's complaint related to Invibio's worldwide sales of high performance polymer (PEEK) that was used to manufacture medical devices manufactured or sold in the U.S.<sup>46</sup> The FTC consent imposed obligations applicable to certain extraterritorial sales, but explicitly excluded sales of PEEK used solely in products not manufactured or sold in the U.S.<sup>47</sup>

24. In the limited number of civil non-merger cases in which the Agencies find that the licensing of intellectual property is necessary to remedy allegedly anticompetitive conduct, the Agencies generally rely on a domestic-only licensing remedy because the license can be tailored to permit use of the intellectual property only in the domestic markets affected by the conduct. However, in rare cases, when a broader license may be necessary to provide effective relief, the Antitrust Agencies seek a remedy that is no broader than necessary.<sup>48</sup> To the extent that multiple enforcers are reviewing similar

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<sup>45</sup> See e.g., U.S. Dep't of Justice, Final Judgment, *United States v. Charleston Area Medical Center and St. Mary's Medical Center*, No. 2:16-cv-03664 (S. D.W.V. Oct. 16, 2016) (prohibiting agreements to limit geographically the marketing of competing health services in West Virginia), <https://www.justice.gov/atr/case/us-v-charleston-area-medical-center-inc-and-st-marys-medical-center-inc>; U.S. Dep't of Justice, Final Judgment, *United States v. Oklahoma State Chiropractic Independent Physicians Assoc.*, No. 13-cv-00021 (N.D. Ok. May 21, 2013) (prohibiting a chiropractic association from jointly establishing prices and negotiating contracts on behalf of local competing chiropractors), <https://www.justice.gov/atr/case/us-v-oklahoma-state-chiropractic-independent-physicians-association-and-larry-m-bridges>; U.S. Dep't of Justice, Final Judgment, *United States v. Chiropractic Associates Ltd. of South Dakota*, No. 4:13-CV-04030 (D.S.D. Apr. 8, 2013) (same), <https://www.justice.gov/atr/case/us-v-chiropractic-associates-ltd-south-dakota>; U.S. Dep't of Justice, Final Judgment, *United States v. Apple*, No. 12-cv-02826 (S.D.N.Y. Sept. 9, 2013) (prohibiting, inter alia, certain pricing agreements and the sharing of confidential information with eBook publishers that distribute e-books in the United States to e-Book Retailers that sell e-Books to U.S. consumers), <https://www.justice.gov/atr/case-document/plaintiff-united-states-final-judgment-and-plaintiff-states-order-entering>; U.S. Dep't of Justice, Final Judgment, *United States v. National Assoc. of Realtors*, No. 05 C 5140 (N.D. Ill. Nov. 18, 2008) (requiring NAR to repeal policies that discriminated against real estate brokers that used virtual office websites (VOWs) in the United States), <https://www.justice.gov/atr/case-document/final-judgment-142>.

<sup>46</sup> Complaint, *In re Victrex*, Docket No. 4586, <https://www.ftc.gov/system/files/documents/cases/160714victrexcmt.pdf>.

<sup>47</sup> Decision and Order, *In re Victrex*, Docket No. 4589 (July 16, 2016) <https://www.ftc.gov/system/files/documents/cases/160714victrexdo.pdf>; See also Press Release, Fed. Trade Comm'n, *Supplier of High-Performance Polymer for Medical Implants Settles FTC Charges that It Monopolized Sales to World's Largest Medical Device Makers* (April 26, 2014), <https://www.ftc.gov/news-events/press-releases/2016/04/supplier-high-performance-polymer-medical-implants-settles-ftc>.

<sup>48</sup> See e.g., Decision and Order, *In re Motorola Mobility LLC and Google, Inc.*, Docket No. 4410 (July 23, 2013) (the consent cabins its application only to arrangements with willing licensees subject to the jurisdiction of the U.S. District Courts) <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>.

conduct that may implicate remedies involving intellectual property, comity considerations and cooperation may come into play.

## 7. Conclusion

25. In their mission to protect competition in the United States, the U.S. Antitrust Agencies aim to tailor antitrust remedies to the identified competitive harm to U.S. commerce and consumers. Although agency remedies may reach conduct or assets outside the United States in order to preserve competition from a merger or to remedy anticompetitive conduct that affects U.S. commerce and consumers, the Agencies seek to avoid remedies with extraterritorial effect where possible. The Agencies' International Guidelines set out a well-balanced standard for doing so, allowing for effective enforcement while limiting overly broad extraterritorial reach. Carefully tailoring remedies pursuant to the principles set forth in the International Guidelines helps the Agencies to avoid potential duplication and conflicting remedies. The Agencies believe that this approach is worthy of consideration by other authorities addressing these issues.