JONES DAY

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COMMENTARY

Agencies' Proposed International Antitrust Guidelines Hint at Aggressive Enforcement

The Federal Trade Commission and the Department of Justice have published for public comment proposed Antitrust Guidelines for International Enforcement and Cooperation ("2016 Proposed Guidelines").[1] This would be the third iteration of international enforcement guidelines, following the Department of Justice's Antitrust Enforcement Guidelines for International Operations of 1988[2] and both agencies' Antitrust Enforcement Guidelines for International Operations of 1995[3] (the "1995 Guidelines").

Executive Summary

The 2016 Proposed Guidelines contain no dramatic changes. They incorporate many of the principles of the 1995 Guidelines. Of note, they have been updated to (1) reflect certain developments in caselaw, particularly with respect to cases interpreting the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")[4] and (2) incorporate recent developments in agency practice relating to international cooperation.

Although the 2016 Proposed Guidelines do not indicate a major change in direction, certain of the specific statements, both individually and cumulatively, will effect companies with international operations. Unfortunately, whether intended or not, the general tone suggests a more aggressive enforcement stance. The agencies' standard for application of the U.S. antitrust laws to conduct involving import commerce is less clear than was the case under the 1995 Guidelines. One of the Illustrative Examples in particular raises questions as to how far the agencies will go to try to enforce U.S. antitrust law with respect to conduct involving entirely foreign commerce. And any hints that the agencies might defer to a foreign competition authority or otherwise exercise prosecutorial discretion to forego enforcement of U.S. antitrust laws have pretty much disappeared, leaving the impression that the agencies will pursue enforcement to the fullest extent possible. This appears to increase the potential for duplicative U.S. and foreign enforcement. Because these developments are largely buried in the details, the 2016 Proposed Guidelines merit careful review by any company that does business in international markets.

Overview

Following an introduction and a summary of relevant statutes, the 2016 Proposed Guidelines consist of three main sections: (1) where U.S. antitrust laws will

reach conduct occurring outside the United States; (2) when as a matter of law or prosecutorial discretion the U.S. agencies might refrain from applying U.S. antitrust law to conduct in international trade; and (3) how the U.S. agencies might cooperate with one or more foreign competition authorities when conducting an investigation involving conduct outside the United States.

As with the 1995 Guidelines, the 2016 Proposed Guidelines contain a number of hypothetical examples intended to illustrate the main points. Each of the examples from the 1995 Guidelines either has been revised substantially or has been replaced altogether. The agencies assert that they amended the examples to "focus[] on the types of issues most commonly encountered."[5] Whether intended or not, the revisions to the examples are consistent with a somewhat more aggressive enforcement approach. In particular, former Example C, variant (1)—the only example in the 1995 Guidelines in which the agencies stated that entirely private conduct did not raise antitrust concerns—has disappeared, and the 2016 Proposed Guidelines do not contain a single such example identified by the agencies as not raising an antitrust concern.[6] Similarly, the 1995 Guidelines contained three examples (Illustrative Examples D, H and I) in which the agencies stated that they might work with, and potentially defer enforcement to, a foreign competition authority; in the 2016 Proposed Guidelines, each of these examples has disappeared. Although the 2016 Proposed Guidelines preserve two examples describing situations in which the defenses of foreign sovereign compulsion and petitioning of a foreign sovereign respectively are likely to be satisfied, the overall pattern of the examples is to minimize any discussion of instances in which the agencies might exercise prosecutorial discretion to forego enforcement and emphasize instead the extent to which the agencies could pursue enforcement.

The Agencies' Understanding of the Extraterritorial Reach of the U.S. Antitrust Laws

The 2016 Proposed Guidelines state the agencies' understanding of the standard for determining whether conduct involving foreign commerce is subject to U.S. antitrust law. The agencies distinguish between (1) conduct that involves U.S. import commerce; and (2) conduct that involves foreign commerce other than U.S. import commerce.

Conduct Involving Import Commerce

The 1995 Guidelines clearly articulated the agencies' understanding of the jurisdictional tests applicable to conduct involving foreign commerce. Conduct in the United States was subject to the Sherman and FTC Acts. Foreign conduct involving import commerce was analyzed under the standard set forth by the Supreme Court in *Hartford Fire*,[7] and was subject to the Sherman and FTC Acts if it "was meant to produce and did in fact produce some substantial effect" in the United States.[8] Foreign conduct involving export and purely foreign commerce was subject to the FTAIA, and thus was excluded from the reach of the Sherman and FTC Acts unless it had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.[9]

In contrast to the 1995 Guidelines, the discussion in the 2016 Proposed Guidelines is convoluted, opaque and incomplete. But once the language is parsed, it appears that the agencies' position remains unchanged from 1995.

Section 3.1 of the 2016 Proposed Guidelines states that conduct outside the United States that involves U.S. import commerce will be subject to the Sherman Act's or FTC Act's "general requirements for effects on commerce." The agencies explain their position that the "special requirements" spelled out in the FTAIA do not apply to import commerce because of the explicit "import commerce exclusion" of the FTAIA. However, the agencies make little effort to explain their understanding of the "general requirements for effects on commerce," and the brief discussion provided is poorly organized. Nevertheless, two short passages provide a glimpse of the analysis apparently employed by the agencies.

First, the importance of applying the general jurisdictional test under the Sherman and FTC Acts rather than the specialized test of the FTAIA is revealed by a sentence buried at the end of footnote 78: With respect to import commerce, "[i]n the Agencies' view . . . a separate showing of substantial and intended effects is unnecessary when some of the conduct takes place in the United States . . .."[10] In other words, in considering whether the Sherman or FTC Act reaches conduct relating to import commerce, the agencies apparently apply a two-step analysis. The first step is to determine where the conduct occurred. If a portion of the conduct occurred in the

United States, the agencies apparently consider the entire course of conduct to be subject to the reach of the Sherman or FTC Act. Only if the entire course of conduct is outside the United States would the agencies proceed to the second step.

Second, although Section 3.1 of the 2016 Proposed Guidelines omits any substantive discussion of the "general requirements for effects on commerce" under the Sherman or FTC Acts of foreign conduct involving import commerce, footnote 78 in Section 3 refers to the test of a "substantial and intended effect in the United States" that was articulated by the Supreme Court in *Hartford Fire*. By default, this standard must apply with respect to the discussion of foreign conduct involving import commerce in Section 3.1.[11] Thus, if the agencies determine that the conduct in question occurred entirely outside the United States, but involved import commerce into the United States, they apparently would consider such conduct to be subject to the reach of the U.S. antitrust laws if that conduct was intended to have, and in fact had, a substantial effect in the United States.

The 2016 Proposed Guidelines also clarify that conduct outside the United States that is not directed exclusively or specifically at imports into the United States, or that is undertaken by participants who themselves do not act as importers, may nevertheless be subject to the Sherman or FTC Act if the conduct in question "involve[s]" import commerce. To emphasize this point, Illustrative Example A states that a cartel selling goods into the U.S. would be subject to agency enforcement even if the imports in question "were a relatively small proportion or dollar amount of the price-fixed goods sold worldwide." But the 2016 Proposed Guidelines also clarify that foreign conduct by participants otherwise involved in U.S. import commerce alone is insufficient to support application of U.S. antitrust laws; rather, the *conduct itself* must involve U.S. import commerce.

Conduct Involving Non-Import Foreign Commerce

The agencies consider non-import foreign commerce to include U.S. export commerce and wholly foreign commerce. Pursuant to the FTAIA, conduct involving such commerce is beyond the reach of U.S. antitrust laws, unless the relevant conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States.

Relying on recent court rulings, the 2016 Proposed Guidelines provide new guidance with respect to their interpretation of "direct," "substantial," and "reasonably foreseeable." However, the "guidance," particularly with respect to the meaning of "direct," is ambiguous at best. The 2016 Proposed Guidelines explain that an effect is "direct" if it is proximately caused by the alleged anticompetitive conduct. The Guidelines make clear that "proximately caused" does *not* mean that the effect must be the "immediate consequence" of the alleged anticompetitive conduct. Rather, the Guidelines explain that, in the agencies' view, an effect is direct if, "in the natural or ordinary course of events, the alleged anticompetitive conduct would produce an effect on commerce." Such an interpretation would seem to make almost any conduct "direct" so long as the participants knew—or perhaps merely anticipated or should have anticipated—that the products at issue would be sold (either on a standalone basis or as components in other products) *at some point* into the United States.

Far from providing clarity, Illustrative Example C only further clouds the issue. Illustrative Example C describes a scenario in which Corporations 1 and 2 manufacture component products in country Alpha and sell them to integrators in country Beta. Corporations 1 and 2 agree to fix the price of the good they each make, and the integrators in Beta then incorporate the price-fixed good into finished electronics products that they sell around the world, including to customers in the United States. The 2016 Proposed Guidelines state that the fact that the price-fixed components were first sold to integrators in Country Beta, where they were incorporated into finished electronic products subsequently sold in or for delivery to the United States, would not render the effect on U.S. import commerce indirect. The agencies also state that they do not consider the facts that (a) the finished products were sold around the world, or (b) the participants "were unaware or indifferent to whether the finished products were sold in the United States," to preclude the agencies from considering the effect on U.S. commerce to be substantial and reasonably foreseeable. But a critical question is whether these facts would render the conduct at issue indirect. The agencies do not say. And if we are to infer that these facts would *not* render the conduct indirect, then what conduct would ever qualify as indirect? Rather than provide clarity, Illustrative Example C adds confusion, and suggests an intent to consider pursuing enforcement under circumstances that appear dubious at best.

The 2016 Proposed Guidelines are somewhat clearer with respect to "substantiality" and "foreseeability." In the agencies' view, "substantiality" does not require a minimum pecuniary threshold, nor does it require that the effect be quantified. The agencies deem "reasonable foreseeability" to be an objective test, requiring that the effect be foreseeable to a "reasonable person making a practical business judgment."

The 2016 Proposed Guidelines also add an important discussion, based on FTAIA caselaw in recent years, regarding the necessary nexus among the conduct at issue, the effect on U.S. commerce, and antitrust injury. Specifically, the agencies spell out the requirement that the conduct's effect on U.S. commerce must proximately cause the injury in question. (This precludes, for example, a plaintiff whose injury results from the impact of the conduct on foreign commerce from recovering damages under U.S. antitrust law.) But in keeping with the general pro-enforcement tone of the 2016 Proposed Guidelines, the agencies declare that this important principle does not apply to their own enforcement efforts. The agencies cite to no authority for this proposition.

This in turn leads to the unusual statement: "The Sherman Act can apply and not apply to the same conduct, depending upon the circumstances, including the plaintiff bringing the claim, the nature of the claim, and the injury underlying the claim." With respect to damages claims of different plaintiffs, this statement is clearly correct. With respect to government enforcement, however, this statement might be interpreted in a manner that could create tension with the enforcement position taken by the Department of Justice shortly after publication of the 1995 Guidelines.[12]

From 1988 to 1995 to 2016, the Guidelines have increased the focus on defining what conduct may be reached by a U.S. enforcement action and contained less and less discussion regarding how the agencies might exercise prosecutorial discretion. The illustrative examples in this section of the 2016 Proposed Guidelines are consistent with this pro-enforcement tone. Illustrative Example C, variant (1) from the 1995 Guidelines, for example, provided a clear example (indeed, the only example in this section) where the agencies stated that the actions described "do not raise antitrust concerns." This example has disappeared from the 2016 Proposed Guidelines, replaced by examples in which the agencies state or imply that the conduct described would be subject to U.S. antitrust laws.

Agency Consideration of Foreign Jurisdictions

If foreign conduct is within the reach of the U.S. antitrust laws, the agencies would also consider whether certain foreign elements would preclude or counsel against U.S. enforcement. Compared with the previous Guidelines (and in particular the 1988 Guidelines), the 2016 Proposed Guidelines articulate a narrow interpretation of factors that would preclude or counsel against enforcement, and omit significant discussion of circumstances in which the agencies might exercise discretion to forego enforcement.

Comity. The 2016 Proposed Guidelines provide that the agencies will consider international comity when enforcing the antitrust laws. In the discussion of how they will do so, however, the pro-enforcement tone of the 2016 Proposed Guidelines is pronounced: "An investigation or enforcement action by a foreign authority will not preclude an investigation or enforcement action by either the Department or the Commission." They state that, in enforcing the U.S. antitrust laws, the agencies will consider a number of relevant factors, including "the degree of conflict with a foreign jurisdiction's law or articulated policy," "the extent to which the enforcement activities of another jurisdiction . . . may be affected," and "the effectiveness of foreign enforcement as compared to U.S. enforcement."

The 2016 Proposed Guidelines then promptly minimize each of these factors. They flatly state, "conflicts of law are rare." They omit the specific reference from the 1995 Guidelines to potentially interfering with the objectives of a foreign investigation.[13] And Illustrative Example I in the 1995 Guidelines, in which the agencies stated they would "consider working cooperatively with the foreign authority or staying their own remedy pending enforcement efforts by the foreign country," has been deleted from the 2016 Proposed Guidelines.[14] Moreover, while the 1995 Guidelines suggested that the DOJ "does not believe" a court should second-guess the executive branch's evaluation of comity considerations,[15] the 2016 Proposed Guidelines simply announce that a decision (apparently by either agency) to enforce the antitrust laws "represents a determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns"

and "[t]hat determination is entitled to deference." In short, the 2016 Proposed Guidelines appear to increase the likelihood of duplicative U.S. and foreign enforcement actions.

Consideration of Foreign Government Involvement. The 2016 Proposed Guidelines discuss the agencies' evaluation of four legal doctrines that may preclude antitrust enforcement based on foreign government involvement in the alleged anticompetitive conduct: (1) foreign sovereign immunity; (2) foreign sovereign compulsion; (3) acts of state; and (4) petitioning of sovereigns. With respect to the first three doctrines in particular, the 2016 Proposed Guidelines adopt a narrow interpretation of each.

International Cooperation

The most obvious change in the 2016 Proposed Guidelines is the addition of a new section titled, "International Cooperation." This section highlights the impact of globalization and the increased likelihood of overlapping investigations as U.S. and foreign authorities investigate conduct in international commerce. The 2016 Proposed Guidelines outline the extent to which, and methods by which, the FTC and DOJ coordinate with foreign competition authorities in overlapping investigations. This section does not contain any surprises or new information. Rather, it largely summarizes positions that the agencies have shared previously in speeches, press releases and other public statements.

- **Confidentiality:** Applicable statutes and regulations require the agencies to protect the confidentiality of non-public information and materials produced in the course of investigations, whether obtained pursuant to voluntary production of information in lieu of process, compulsory process, or the procedures established in the Hart-Scott-Rodino Antitrust Improvements Act. These confidentiality requirements shape the nature and degree of cooperation that the agencies may undertake with foreign competition authorities.

  The 2016 Proposed Guidelines emphasize that, even in the absence of a waiver, the agencies may exchange with foreign competition authorities non-public information obtained by means other than compulsory process, voluntarily in lieu of compulsory process or pursuant to the HSR Act. The 2016 Proposed Guidelines include among the non-public information that the agencies may share with foreign competition authorities with respect to a specific ongoing investigation, staff views of: the merits of a case, market definition, competitive effects, substantive theories of harm, and remedies. The 2016 Proposed Guidelines confirm that the agencies insist on an understanding that the foreign competition authority will maintain the information in confidence. Typically, confidentiality obligations prevent the agencies from cooperating further absent a waiver from the companies or individuals under investigation.

- **Waiver**: The 2016 Proposed Guidelines explain that a company subject to a civil antitrust investigation in multiple jurisdictions can provide a limited waiver of confidentiality to permit the DOJ or FTC to coordinate with one or more foreign competition authorities. The 2016 Proposed Guidelines outline the basic elements of a waiver, and identify additional materials relating to the process previously released by the agencies. (See Jones Day October 2013 alert regarding the FTC's release of a model form waiver of confidentiality.) The 2016 Proposed Guidelines confirm two important points regarding waivers of confidentiality: (1) documents and information shared with a foreign competition authority will be subject to the confidentiality protections provided by that foreign competition authority's statutes and rules; and (2) the FTC and DOJ will not seek information that is subject to legal privilege under U.S. law from foreign competition authorities.

  Depending on the specific circumstances of an investigation, a limited waiver of confidentiality might serve a company's interests by permitting multiple authorities to conduct their investigations more efficiently, reducing the possibility of inconsistent results, and improving the potential coordination of any remedies. An individual judgment should be made in each relevant investigation as to whether a limited waiver would be in a company's best interests.

- **Criminal Investigations:** The 2016 Proposed Guidelines confirm that the DOJ often coordinates with foreign authorities when conducting a criminal antitrust investigation, but such coordination is limited by the grand jury rules. In contrast to confidentiality protections in a civil investigation, the prohibition on DOJ disclosure of grand jury matters cannot be waived by a witness or the

subject of the investigation (although the subjects and witnesses themselves are not subject to confidentiality restrictions). The leniency process is also unique to criminal investigations, as is the potential implementation of a border watch by a foreign jurisdiction. The 2016 Proposed Guidelines explain how the agencies coordinate with foreign authorities with respect to these particular aspects of a cross-border criminal investigation. In particular, the 2016 Proposed Guidelines note that, while the DOJ strictly maintains the confidentiality of a leniency applicant's identity and the information it provides, a leniency applicant often provides a voluntary confidentiality waiver to allow the DOJ to coordinate with other jurisdictions in which the applicant has also sought leniency.

Conclusions

While all agency efforts at providing enhanced guidance to the business community should be applauded, the 2016 Proposed Guidelines fail to take advantage of the opportunity to offer much-needed clarity with respect to the agencies' position on the extraterritorial enforcement of U.S. antitrust laws. It is hoped that the pro-enforcement tone of the revisions is not a sign of a more aggressive enforcement stance by the U.S. agencies.

Furthermore, even if the tone of the 2016 Proposed Guidelines is not intended to signal increased U.S. enforcement, there is reason to be concerned about the potential impact of the tone on the enforcement of foreign competition laws. Many foreign competition laws provide for extraterritorial enforcement if the jurisdictions in question suffer domestic effects from conduct in the United States or elsewhere. The competition laws of the European Union would apply to conduct in the United States, for example, if that conduct has an "appreciable" effect on competition in the European Union and on trade between or among EU Member States.[16] Likewise, the Anti-Monopoly Law of the People's Republic of China could apply to conduct in the United States or elsewhere that has the effect of eliminating or restricting competition in the domestic market of China.[17] Other U.S. trading partners have similar provisions in their laws. In recent years, competition authorities in a number of jurisdictions have become more aggressive, sometimes on the basis of theories that appear questionable under U.S. precedent. And in a number of high-profile instances, U.S. companies have been a target of such enforcement. There is nothing in the 2016 Proposed Guidelines to encourage foreign authorities to apply their competition laws with restraint, and the general tone may have the opposite effect.

Finally, as with so much else in Washington D.C., the results of the recent presidential election have provided a whole new perspective on the document released just one week earlier. Antitrust enforcement historically has been lighter under Republicans, who are more confident in market self-correction, than under Democrats, who are more confident that government can identify and solve market problems. There was an especially large swing in approach between President Bush and President Obama. Enforcement under President Trump is more likely to swing back towards the Republican norm, but it may not swing all the way under this populist Republican. This brings into question whether the specific proposed changes or the increased pro-enforcement tone of the 2016 Proposed Guidelines will survive the incoming administration. But unless and until reversed, the new guidelines and their aggressive stance reflect the latest government view on U.S. antitrust enforcement in international matters.

The agencies are accepting comments on the 2016 Proposed Guidelines until December 1, 2016.

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Endnotes

1 U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation, Proposed Update (Nov. 1, 2016).

2 U.S. Dep't of Justice, Antitrust Enforcement Guidelines for International Operations (Nov. 10, 1988).

3 U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (April 1995).

4 Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a.

5 Fed. Trade Comm'n, "FTC and DOJ Seek Public Comment on Proposed Revisions to International Antitrust Guidelines," Press Release (Nov. 1, 2016); Dep't of Justice, Justice Department and Federal Trade Commission Seek Public Comment on Proposed Updates to International Antitrust Guidelines, Press Release (Nov. 1, 2016), available at https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-proposed-updates.

6 The only two Illustrative Examples in the 2016 Proposed Guidelines in which the agencies state they would not take enforcement action involve some element of foreign government involvement. *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation, Proposed Update (Nov. 1, 2016) at Illustrative Examples E and F.

7 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

8 U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations § 3.1 (April 1995) (*quoting Hartford Fire*, 509 U.S. at 796).

9 *Id*. (*quoting* the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C.§ 6a.

10 "[S]uch a case would involve application, at least in part, of the U.S. antitrust law to territorial conduct." U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Enforcement and Cooperation, Proposed Update (2016) at fn. 78. In contrast, the FTAIA excludes from the reach of the Sherman and FTC Acts conduct involving export or entirely foreign trade (absent the requisite effect on domestic or import commerce), regardless of whether that conduct occurs inside or outside the United States.

11 In contrast to the 2016 Proposed Guidelines, the 1995 Guidelines provided a more straightforward statement of the applicable standard:

> Under the Sherman Act and the FTC Act, there are two principle tests for subject matter jurisdiction in foreign commerce cases. With respect to foreign import commerce, the Supreme Court has recently stated in *Hartford Fire Insurance Co. v. California* that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." . . . Second, with respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce.
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> U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995) at § 3.1. Despite the omission of this passage from the 2016 Proposed Guidelines, the agencies' position apparently remains consistent with this statement.

12 In *United States v. Nippon Paper*, Nippon Paper argued that the extraterritorial criminal reach of the Sherman Act should not extend to the full extent of the statute's civil reach. The court accepted DOJ's counterargument that extraterritorial application of the Sherman Act should be uniform regardless of whether the statute is enforced criminally or in a civil action:

> [O]ne datum sticks out like a sore thumb: in both criminal and civil cases, the claim that Section One applies extraterritorially is based on the same language in the same section of the same statute: . . .. [C]ommon sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.
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> *United States v. Nippon Paper Industries Co., Ltd*., 109 F.3d 1, 4 (1997).

13 *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995) § 3.2 at 21 ("the Agencies would consider whether their activities would interfere with or reinforce the objectives of the foreign proceeding, including any remedies contemplated or obtained by the foreign antitrust authority.").

14 Illustrative Examples D, G and H from the 1995 Guidelines also presented fact patterns in which the agencies stated that they might forego an enforcement action in favor or working with or deferring to a foreign authority; each of these examples has been dropped from the 2016 Proposed Guidelines as well.

15 The 1995 Guidelines also acknowledged that no case had decided what degree of deference courts should give to an FTC decision regarding comity. This qualification was dropped from the 2016 Proposed Guidelines.

16 Case 22/71 *Béguelin Import v GL Import Export* [1971] ECR 949, [1972] CMLR 81. The European Commission has adopted guidelines that, in contrast to the 2016 Proposed Guidelines, offer some sense of prosecutorial restraint. According to those guidelines, with respect to conduct other than hard core violations, the European Commission is unlikely to consider as "appreciable" either an effect on competition if the parties' combined share is less than 10 percent of the relevant market, or an effect on trade between EU Member States if the relevant EU-wide revenues are less than €40 million or the parties' combined share is less than 5 percent of the relevant market. *Commission Guidelines on the effect on trade concept contained in [Articles 101 and 102 of the Treaty on the Functioning of the EU]* OJ 2004 C 101/81 and *Commission Notice on agreements of minor importance which do not appreciably restrict competition under [Article 101(1) of the TFEU]*, *OJ 2001 C368/13*.

17 Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), English translation available at http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm (last visited Nov. 17, 2016). In contrast to the United States and the European Union, the enforcement authorities in China have not issued any guidance as to how they might apply such provisions in practice.