



## A commitment to convergence

James F. Rill and Jana I. Seidl examine recent updates to international guidelines, the importance of international engagement and the contributions of the FTC's Acting Chairman Ohlhausen



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## Introduction

After two decades, the Federal Trade Commission (“FTC” or “Commission”) and the US Department of Justice (“DOJ”) (collectively, the “Agencies”) released updated joint Antitrust Guidelines for International Enforcement and Cooperation on January 13, 2017 (“2017 International Guidelines”).<sup>1</sup> These new guidelines are the result of public comments to proposed guidelines issued on November 1, 2016 (“Proposed Guidelines”); the comment period closed on December 1, 2016.<sup>2</sup> The Agencies received eight comments, including one from one of the authors of this article, and, based on these, made some significant changes to the Proposed Guidelines. The changes make clear that the US Agencies (1) recognize their role as a global leader in promoting international alignment on substantive antitrust and due process norms, and (2) may engage with foreign antitrust agencies to defend these norms, whether or not the foreign investigations and proceedings implicate important US interests. A driving force behind these changes was Acting Chairman Maureen K. Ohlhausen, who has long been an advocate of promoting critical international antitrust convergence.

## Acting Chairman Ohlhausen's history of international engagement

Acting Chairman Ohlhausen has a long-standing interest in promoting international cooperation to advance substantive antitrust and procedural due process principles. As such, she has made active engagement with foreign governments regarding appropriate antitrust enforcement, *i.e.*, in accordance with generally accepted international norms, a priority throughout her time as a Commissioner.<sup>3</sup> Especially with

respect to antitrust enforcement in Asia, Acting Chairman Ohlhausen has time and again stressed the significance of “predictability, transparency, and fairness.”<sup>4</sup> For example, in 2013, Acting Chairman Ohlhausen lauded the Chinese anti-monopoly agencies' openness to discourse on the importance of a market-based economy, in which economics plays a leading role. At the same time, she called on them to do more in areas where the Chinese competition regime still diverges from international norms: its unfortunate focus on industrial policy and the lack of transparency in its proceedings.<sup>5</sup>

The Acting Chairman also has not been shy in voicing her concerns where the US Agencies' own actions may have sent, or have the potential to send, the wrong message, giving rise to a dangerous misinterpretation of globally accepted antitrust norms. In a 2014 speech, Acting Chairman Ohlhausen explicitly noted that the US Agencies' enforcement decisions are watched closely by the international community. She pointed to the troubling fact that the FTC's decision in *Motorola Mobility*<sup>6</sup> has led some international practitioners to argue, incorrectly, that the US adheres to a strong essential-facilities doctrine.<sup>7</sup> Recently, Acting Chairman Ohlhausen has again reminded the Agencies of the US's role as a leader in advancing adherence to accepted international norms in competition law. In a dissent to the FTC's decision to file suit against Qualcomm, the Acting Chairman forcefully wrote that this was “an enforcement action based on a flawed legal theory . . . that lacks economic and evidentiary support, . . . and that, by its mere issuance, will undermine US intellectual-property rights in Asia and worldwide.”<sup>8</sup>

It is no surprise then, that the Acting Chairman's commitment to convergence, and her recognition of the importance of US involvement as a guiding force in the international arena

to promote such convergence, is reflected in the updated 2017 International Guidelines. After all, as Acting Chairman Ohlhausen has consistently advocated, “the most important thing that we . . . can do toward ensuring a good sequel for the [international] antitrust story is to pursue patient cooperation and diligent work on both sides when engaging the [international] agencies, offering them advice and support, and advocating for a competition-based enforcement approach.”<sup>9</sup>

As above noted, after receiving public comments to the Proposed Guidelines, the Agencies modified the section on international cooperation in a number of significant ways, outlined below.

## International best practices

With respect to international best practices, the 2017 International Guidelines recognize that private organizations, including the Competition Committee of the Organisation for Economic Co-operation and Development and the International Competition Network, have done a great deal to advance the goal of international convergence. These private organizations engage in important policy issues with respect to both substantive antitrust and procedural due process issues. The updated 2017 International Guidelines rightly laud these organizations’ efforts for having

resulted in the development and implementation of standards of international best-practice and consensus guidance on substantive antitrust and procedural fairness. Consistent approaches to competition law, policy and procedures across jurisdictions facilitate cooperation among competition agencies, and *increase the effectiveness and predictability of enforcement, which benefits the Agencies, consumers and the business community.*<sup>10</sup> (emphasis added)

A footnote to the quoted section lists guidance documents advanced by various private-sector organizations.<sup>11</sup> The explicit inclusion of these “best practices” for investigatory frameworks in competition-law proceedings clearly signals the US’s commitment to adhering to and promoting these principal underpinnings of effective antitrust enforcement. In short, it underscores the necessity of Acting Chairman Ohlhausen’s pillars of “predictability, transparency and fairness” in all competition-law enforcement actions.

## Convergence through engagement

Where the Proposed Guidelines were sparse before, the 2017 International Guidelines now include language specifically

addressing the purpose of and goal for international cooperation – *i.e.*, advancing convergence on globally recognized competition-law standards. Specifically, the new guidelines state:

This cooperation contributes to convergence on substantive enforcement standards that *seek to advance consumer welfare, based on sound economics, procedural fairness, transparency and non-discriminatory treatment of parties.* The Agencies’ international policy work and case cooperation are closely connected. . . . [C]onsistent approaches to competition law, policy, and procedures across jurisdictions facilitate case cooperation among competition authorities. Moreover, through case cooperation, the Agencies and cooperating authorities often raise important substantive and procedural issues as they arise in practice, which can lead to greater convergence in substantive analysis and procedures.<sup>12</sup> (emphasis added)

Although the 2017 International Guidelines could be even more explicit, the introductory section to the “International Cooperation” chapter includes, tellingly, a footnote that reads: “An Agency may continue that cooperation when either it or the foreign authority has closed its investigation. The Agencies may also engage in *general discussions* with foreign authorities on matters in which only one authority has an open investigation.”<sup>13</sup> (emphasis added). This language signals that the Agencies heed Acting Chairman Ohlhausen’s call for more substantial and concrete US guidance designed to foment crucial convergence – through direct but measured engagement – in the international competition-law arena. It leaves open the door for US Agencies to approach their foreign counterparts and counsel them where foreign proceedings depart from globally recognized principles of fundamental fairness and due process, regardless of whether the US has a concurrent enforcement action pending.

## Remedies

With respect to remedies, the originally Proposed Guidelines did not limit agency enforcement actions to correcting for harm, or threatened harm, to domestic interests. After receiving public comments, the

Agencies reconsidered and the 2017 International Guidelines unequivocally state: “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 US commerce and consumers* and is consistent with the Agency’s international comity analysis.”<sup>14</sup> (emphasis added). This inclusion is significant as it is (1) a

**It is no surprise that Ohlhausen’s commitment to convergence is reflected in the updated guidelines**

recognition of the fact that antitrust enforcers around the globe are watching and taking cues from the US Agencies' actions – whether to emulate or use for their own purposes<sup>15</sup> – and (2) it clearly advances the well-established principle that remedies should avoid unwarranted extraterritoriality and be “tailored to fit the wrong creating the occasion for the remedy.”<sup>16</sup>

Coupled with the changes embodied in the introductory section to Chapter 5 of the 2017 International Guidelines, especially the addition of the footnote regarding general discussions with foreign competition agencies, this change suggests that the Agencies will urge their international counterparts to only implement remedies that are appropriately tailored to avoid unnecessary extraterritorial effect. And the US Agencies may vigilantly engage where the remedy adopted with respect to a foreign enforcement action implicates significant US interests. As such, the 2017 International Guidelines make clear that the US Agencies will continue to defend against extraterritorial reach of competition-law remedies across the globe, as Acting Chairman Ohlhausen has done throughout her time as a Commissioner.

## Conclusion

Ultimately, the changes made to the Proposed Guidelines, resulting in the final 2017 International Guidelines, underscore that the United States, through its Agencies, will closely monitor

antitrust enforcement around the globe, will carefully craft remedies it imposes with an eye toward how these remedies may be interpreted by foreign antitrust regimes, and will engage with foreign competition agencies when important US interests are implicated. The 2017 International Antitrust Guidelines also, rightfully, elucidate that the Agencies' guiding role is not limited to situations in which significant US interests are at stake. Instead, the Agencies may engage with foreign counterparts, through general discussions, when foreign competition regimes depart from the internationally recognized best practices of economics-based and consumer welfare-driven principles of efficient antitrust enforcement. Echoing Acting Chairman Ohlhausen's words on international cooperation, the 2017 International Guidelines highlight that “[t]o continue [the US Agencies'] prominent role in shaping global competition policy,” the Agencies “must continue to focus on future engagement” with competition agencies around the globe, designed to promote a uniform move toward international norms regarding appropriate antitrust enforcement. ■

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## Footnotes

- 1 Fed. Trade Comm'n and Dept. of Justice, Antitrust Guidelines for International Enforcement and Cooperation (Jan 13, 2017) [hereinafter 2017 International Guidelines], [https://www.ftc.gov/system/files/documents/public\\_statements/1049863/international\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf).
- 2 Fed Trade Comm'n, *FTC and DOJ Seek Public Comment on Proposed Revisions to International Antitrust Guidelines* (Nov. 1, 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-doj-seek-public-comment-proposed-revisions-international>.
- 3 See Remarks of Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, at Second Annual GCR Live Conference, at 2 (Sept. 16, 2014) [hereinafter Ohlhausen 2014 GCR Conference], [https://www.ftc.gov/system/files/documents/public\\_statements/582501/140915gcrlive.pdf](https://www.ftc.gov/system/files/documents/public_statements/582501/140915gcrlive.pdf).
- 4 See *id.*
- 5 Commissioner Maureen K. Ohlhausen, *Illuminating the Story of China's Anti-monopoly Law*, Antitrust Source at 6-7 (Oct. 2013) [hereinafter Ohlhausen Antitrust Source], available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/illuminating-story-chinas-anti-monopoly-law/1310amlstory.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/illuminating-story-chinas-anti-monopoly-law/1310amlstory.pdf).

- 6 See *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120; *In re Dissenting Statement of Commissioner Maureen K. Ohlhausen – In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, at 1-3 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.
- 7 See Ohlhausen 2014 GCR Conference, *supra* note 3, at 11-12.
- 8 Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Qualcomm, Inc.* at 1 (Jan. 17, 2017), available at [https://www.ftc.gov/system/files/documents/cases/170117qualcomm\\_mko\\_dissenting\\_statement\\_17-1-17a.pdf](https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf).
- 9 Ohlhausen Antitrust Source, *supra* note 5, at 8.
- 10 2017 International Guidelines, § 1.
- 11 *Id.* at § 1, n.4.
- 12 *Id.* § 5.
- 13 *Id.* at § 5, n.138.
- 14 *Id.* at § 5.1.5.
- 15 See Ohlhausen 2014 GCR Conference, *supra* note 3, at 12-13.
- 16 See *United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001).