The U.S. DOJ and FTC Issue Two Updated Antitrust Guidelines: Antitrust Guidelines for International Enforcement and Cooperation & Antitrust Guidelines for the Licensing of Intellectual Property

On January 13, 2017, the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DOJ") (together the "Agencies") issued a pair of updated guidelines. After almost twenty years, the Agencies published the new Antitrust Guidelines for International Enforcement and Cooperation ("2017 International Enforcement Guidelines"). The 2017 International Enforcement Guidelines reflect a global trend toward more consistent antitrust enforcement and cooperation policies across jurisdictions. Because of this, it is more important than ever for U.S. and non-U.S. companies alike to understand the content and scope of U.S. antitrust law. On the same day, the DOJ and FTC also published the Agencies' updated Antitrust Guidelines for the Licensing of Intellectual Property ("2017 IP Guidelines"). The 2017 IP Guidelines reaffirm some of the key principals from the original guidelines while providing important updates surrounding areas such as resale price maintenance, the use of partial exclusive licenses for intellectual property ("IP"), and the identification of "innovation markets."

The 2017 International Enforcement Guidelines

What Is New?

Where the previous version of the International Enforcement Guidelines, published in 1995, clarified that the *scope* of substantive U.S. antitrust laws was not limited exclusively to domestic activities, the 2017 International Enforcement Guidelines show *how* those laws are applied to and enforced against certain activities affecting U.S. interstate commerce occurring across borders.

There are three major changes in the 2017 International Enforcement Guidelines. First, there is a new introductory chapter dedicated to explaining the international cooperation that exists among the various competition agencies. Multilateral organizations, such as the Competition Committee of the Organisation for Economic Co-operation and Development ("OECD"), the International Competition Network ("ICN"), the United Nations Conference on Trade and Development ("UNCTAD"), and the Asia-Pacific Economic Cooperation ("APEC"), have allowed competition authorities to create consensus and consistent approaches to antitrust issues and policies. Second, the guidelines discuss how U.S. antitrust law is applied to conduct that is also governed by other legal regimes, including conduct involving foreign commerce, foreign sovereign immunity, acts of state, and other areas of law and policy that have developed since the previous guidelines. With so many legal provisions to consider,

this section provides a helpful overview of how those laws apply and interact in certain instances. Finally, the update includes new illustrative examples of what the agencies have frequently encountered and how those situations are likely to be resolved. Although specific queries and situations that arise for individual parties deserve case-by-case legal analyses, the examples are helpful to understand how the Agencies think about certain categories of commercial activity.

What Do Companies Need to Know?

As the antitrust laws across foreign jurisdictions have become increasingly more compatible with that of the United States, it has become easier for the U.S. authorities to assert their jurisdiction over foreign conduct that has direct, substantial, and reasonably foreseeable effects on U.S. interstate commerce. This is due to the flattening of enforcement barriers that would have otherwise existed under conflicts of laws.

Therefore, any company whose activities—whether foreign or domestic—may have direct, substantial, and reasonably foreseeable effects on U.S. interstate commerce should be proactive in ensuring compliance with U.S. antitrust laws. Foreign companies in particular should maintain up-to-date compliance programs that include a robust overview of U.S. laws. For example, some of the updated laws since the 1995 version of the guidelines include the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which provide for leniency mechanisms and procedures, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, whose merger filing thresholds are adjusted annually. U.S. antitrust enforcement activity with respect to international operations has increased significantly over the past decade, with substantial civil penalties and criminal prosecutions. Investing in up-to-date antitrust compliance training will therefore be vital to protect a firm's reputation and successful business growth. M&A due diligence reviews should also include U.S.-specific antitrust and merger control analysis.

The 2017 IP Guidelines

What Key Principals Remain Intact?

As with the first iteration of the IP Guidelines issued in April 1995, the 2017 IP Guidelines reiterate three fundamental principles. First, the Agencies rely on the same antitrust analysis when analyzing conduct involving IP as they do other forms of property (i.e. the burden-shifting rule of reason standard is used, except in limited circumstances when the conduct is per se unlawful). Second, "[t]he Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner," because in most instances there are sufficiently close substitutes for the relevant product or technology. Although the Agencies previously provided a caveat that the law was unclear in this area, as a result of *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006), the 2017 IP Guidelines have removed this disclaimer. Finally, the 2017 IP Guidelines reiterate that licensing IP can, and typically does, have procompetitive benefits. Even restrictions on IP, such as field-of-use and territorial restrictions, may protect the licensee, allow for the combination of multiple technologies, prevent free-riding, and incentivize advancements.

What Is New?

The 2017 IP Guidelines have replaced the concept of "innovation market" with "research and development markets." According to the 2017 IP Guidelines, agreements for IP can have competitive effects on research and development that must be analyzed separately from the markets for the underlying product and existing technology.

Also new, while the previous version of the IP Guidelines acknowledged that many IP licensing arrangements included exclusivity, the 2017 IP Guidelines recognize the increasing use of partially exclusive licenses, such as territorial or field-of-use licenses. As with broader exclusive licenses, even partially exclusive licenses may result in anticompetitive harm. Nevertheless,

the 2017 IP Guidelines state that exclusive licenses, including partially exclusive licenses, raise potential antitrust concerns only if the parties have a horizontal relationship.

Following the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the 2017 IP Guidelines also address resale price maintenance ("RPM") in the context of IP. In line with the *Leegin* decision, the 2017 IP Guidelines now clarify that if RPM is contained in an IP license, such as conditioning the license on the resale of the finished product above a certain price-point, such an arrangement shall be adjudged under a rule of reason analysis.

What Should Companies Take-Away?

If nothing else, companies should have three take-aways from the updated IP Guidelines. First, the U.S. Agencies recognize that agreements concerning IP often have pro-competitive benefits. Whenever contemplating an IP agreement, companies should carefully consider these advantages and contemporaneously document them. Second, licensing of IP can raise antitrust concerns. However, exclusive licenses wherein all parties have only vertical relationships generally are not problematic and, as the 2017 IP Guidelines specifically state, "a non-exclusive license of [IP] that does not contain any restrictions on the competitive conduct of the licensor or the licensee generally does not present antitrust concerns." Finally, the 2017 IP Guidelines continue to provide for an "antitrust safety zone" for IP licenses. The U.S. Agencies will not challenge a license if: (a) the IP license is not facially anticompetitive (i.e. it does not provide for price-fixing, market allocation, bid rigging, or output restrictions) and (b) the licensor and all licensees do not have combined more than twenty percent of any relevant market.

As always, companies contemplating an IP licensing arrangement or other agreement should consult counsel, particularly if any of the parties have considerable market shares or the agreement may foreclose a not-insubstantial number of competitors from a potential market.

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