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Joint Group on Trade and Competition

RIGHTS OF FOREIGN FIRMS UNDER COMPETITION LAWS

-- United States --

Delegations will find attached the response by the United States to the questionnaire on the rights of foreign firms under competition laws [COM/DAFFE/CLP/TD(96)140/REV1]. Submissions received from other Delegations will be progressively circulated together with a draft synthesis by the Secretariat in view of their first consideration at the next meeting to be held on 20 June 1997.

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RIGHTS OF FOREIGN FIRMS UNDER COMPETITION LAWS

-- United States --

1. What are the rights of foreign as compared to domestic firms to sue directly in national courts under the antitrust laws? If firms can bring private actions, what tests must be satisfied for a firm to have standing to sue? To appeal from an adverse decision by a trial court or court of first instance?

There is no difference between foreign and domestic firms with respect to the right to pursue private rights of action for antitrust violations in the U.S. courts. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained." Courts have developed rules clarifying what is meant by antitrust "injury," so as to focus on the objectives of the antitrust laws (*i.e.*, protecting competition, not competitors), and antitrust "standing," so as to eliminate suits by plaintiffs whose interest is excessively remote or indirect -- but these rules apply equally to all plaintiffs, foreign or domestic. Rights to appeal trial and appellate court decisions are also neutral, and follow established rules of appellate procedure with regard to timing, posting of bonds, etc. With respect to the rights of foreign firms in state courts, we are not aware of any states which treat foreign firms differently from domestic ones.

2. What rights do foreign as compared to domestic firms have to petition the competition authority to bring action? Are there any differences in the rights of foreign firms vis a vis the rights of domestic firms concerning such petitions? For example, are there differences in the rights to a response by that authority? What kind of response must be or is provided? Within what time limits? Is that authority compelled to respond or is response discretionary? Is the opening of an investigation pursuant to such a petition mandatory or discretionary? What rules, if any, guide the application or discretion? What kind of explanation, reasoning or justification, if any, must accompany a response? Is the response made public? What rules, if any, govern publication of such decision?

Foreign and domestic firms have the same right to notify the Department of Justice about possible violations of the antitrust laws. There is no formal procedure for making such notifications, and no requirement that the Department respond or act in response to requests from foreign or domestic firms. The Department, following its internal procedures, retains discretion in determining whether to open and pursue an investigation, taking into account its policy priorities and resource constraints. Decisions not to prosecute ordinarily are not publicly announced, although they typically are made known to the party or parties which had raised the issue to the Department’s attention. State attorneys-general do not discriminate in their treatment of complaints from foreign and domestic firms.

Similarly, foreign and domestic firms have the same right to petition the Federal Trade Commission to bring an enforcement action. The FTC Rules of Practice and Procedure ("Commission Rules") provide that "any individual, partnership, corporation, association, or organization may request the Commission to initiate an investigation in respect of a matter over which the Commission has

jurisdiction." Rule 2.2(a), 16 CFR 2.2(a). Both foreign and domestic firms are required to provide a signed statement that includes a description of the alleged violation, any available supporting documentation and the name and address of the complainant which, pursuant to general Commission policy, is not divulged except as required by law. Rule 2.2(b), 16 CFR 2.2(b).

There is no distinction made between requests by domestic versus foreign complainants. While there is no requirement that the Commission respond to requests to initiate an investigation, Bureau of Competition staff does acknowledge receipt of such requests, either in writing or by phone. (Where the allegations do not fall within the FTC's statutory jurisdiction, staff will so inform the requesting party.) The decision to investigate, which is based in part on the seriousness of the allegations, the Commission's enforcement priorities and its resource constraints, is entirely discretionary.[1]

Moreover, the decision of the Bureau to open or close an investigation is non-public as is the fact of the existence of an investigation. There is no obligation to notify complainants or petitioning firms that an investigation has been closed, although letters advising a party under investigation that an investigation has been closed may be issued (but are not mandatory) and, if issued, are a matter of public record. Rule 2.7(g), 16 CFR 2.7(g). The Commission does make public its enforcement decision to commence an adjudicative proceeding by issuing an administrative complaint or to provisionally accept a proposed consent agreement subject to a public comment period.

3. What rights, if any, does a foreign or domestic firm have to appeal decisions by the competition authority concerning its petition? To appeal inaction on its petition?

Neither foreign nor domestic firms have a right to appeal a decision by federal or state antitrust authorities not to investigate or prosecute.

4. What rights do foreign and domestic firms have to intervene in cases brought by the competition authority? In cases brought by another firm in a national court?

There is no right to intervene in criminal cases brought by the Department of Justice. In the case of consent decrees filed by the Department and a defendant or defendants, the Tunney Act gives interested parties a period of sixty days after publication of the proposed decree to file comments. Private parties may be permitted to file *amicus curiae* briefs in proceedings involving consent decrees, and in rare cases, if directly affected by the antitrust violation, to intervene as of right and to participate in the formulation of suitable relief. All of these rights are available equally to foreign and domestic firms. The right to intervene in private litigation is governed by the rules of civil procedure[2], which are neutral with respect to the nationality of the parties.

The FTC Rules make clear that a firm requesting an investigation is not regarded as a party to any proceeding that may result from any investigation. Rule 2.2(c), 16 CFR 2.2(c). However, a person or firm (domestic or foreign) may move to intervene and appear in a proceeding (by counsel or in person). Section 5(b) of the FTCA, 15 USC 45(b). The Administrative Law Judge or the Commission may order the intervention on such terms as are provided by law or are otherwise proper.

5. Are the costs of action significantly different for foreign firms? Are local lawyers necessary? Are there particular provisions to be observed? Which foreign languages, if any, are acceptable in submissions to the competition authority or to courts?

The costs of litigation for foreign and domestic firms are substantially the same. Whether a firm can appear in court through someone other than a lawyer depends on local court rules. However, firms in antitrust litigation normally are represented by counsel. Courts have the discretion to permit lawyers licensed in other jurisdictions to appear, and commonly do so, although the participation of a locally-licensed lawyer is also required. Submissions to the courts are in English. There is no formal requirement that submissions to the Department be in English, but the Department has very limited capacity to translate or work directly with foreign language submissions, and in practice submissions normally are in English.

Similarly, for administrative actions, no special requirements or costs are imposed on foreign firms. Commission Rule 4.1(a)(2) allows for appearances by European Community-qualified attorneys.[3] While there is no Commission Rule governing the language to be used in submissions, as a matter of practice, submissions usually are made in English. When original documents written in a foreign language are submitted in response to a discovery request, the submitting party generally volunteers to translate all documents. Alternatively, the submitting party may agree to translate into English those documents identified by FTC staff or to pay an equitable portion of the translation costs.

6. **Finally, respondents are invited to submit any additional information which they believe pertinent to understanding the ability of foreign firms to pursue their rights under national competition laws.**

Recently, the FTC received a request from a foreign firm to investigate an alleged violation in the nonmerger area. The FTC responded by undertaking a non-public investigation that later was closed. There frequently are foreign complainants in the area of mergers and acquisitions. In Hart-Scott-Rodino investigations, foreign firms, often through a U.S. subsidiary, complain about pending transactions and provide substantial evidence as to why a transaction should be barred or restructured. Information from foreign or foreign-owned firms has been helpful in formulating proposed consent agreements. (Where the complaint is submitted by a U.S. subsidiary of a foreign firm and the foreign firm transacts business in the U.S. through the local subsidiary, it may not always be clear which is the actual complainant.)

Notes

[1] Commission Rule 2.2, which governs requests for Commission action, explains that "the Commission specifically retains its right to take such action as it deems appropriate in the public interest and under any of the statutes which it administers." 16 CFR 2.2(d).

[2] Rule 24 of the Federal Rules of Civil Procedure, for example, states that "anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

[3] This rule states that "[p]ersons who are qualified to practice law in a Member State of the European Community and authorized to practice before the Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission." 16 CFR 4.1(a)(2).