

AMERICAN ANTITRUST INSTITUTE

■ International
Antitrust Roundtable ■

**CRITICAL ISSUES IN GLOBAL ANTITRUST:
COMITY, INTELLECTUAL PROPERTY, AND DUE PROCESS**

February 8, 2017

National Press Club, Washington, D.C.

OVERVIEW

On February 8, 2017, the American Antitrust Institute (AAI) will host an International Antitrust Roundtable where experts from business, academia, law, and government in the U.S. and abroad will gather to discuss major competition enforcement and policy issues on the global antitrust agenda. As competition enforcement agencies in the U.S. and abroad revise their international and/or intellectual property (IP) guidelines, and a new administration takes over in Washington, it is an opportune time to survey a number of issues and controversies. These include the extraterritorial and overlapping application of U.S. and foreign competition law, as well as some of the critical IP/competition issues facing antitrust authorities around the globe. In the process, the Roundtable will take stock of growing concerns over foreign jurisdictions' due process standards (or lack thereof). These not only raise independent "good governance" issues but also may influence the debate over comity and substantive international antitrust and IP standards.

The Roundtable will consist of an introductory review of key developments in the year, three panels, and a keynote luncheon address. Each panel is followed by a moderated discussion among the panelists and the audience.

Panel 1: Antitrust and the Golden Rule – Assessing the Pending Revisions to the FTC/DOJ International Guidelines

The U.S. federal antitrust agencies have proposed significant revisions to their joint *Antitrust Guidelines for International Enforcement and Cooperation (Guidelines)*. The Guidelines are designed to assist businesses involved in international activity by shedding light on the agencies' thinking and practice in a variety of areas. These include: applying U.S. antitrust law to conduct involving foreign commerce; affording appropriate deference to principles of international comity; dealing with foreign governments participating directly in global commercial markets; and effectively cooperating with foreign civil and criminal investigations. This panel will unpack various aspects of the agencies' approach to international enforcement, as reflected in the revised Guidelines. It will consider questions such as: What are the appropriate extraterritorial limits of U.S. antitrust law? What is the proper balance between protecting American consumers and respecting foreign sovereigns? Does the availability of private remedies abroad change the calculus? Where are multinational corporations susceptible to enforcement overlaps and enforcement gaps? How does the U.S. approach to comity considerations differ from the approaches of other major jurisdictions?

Panel 2: Limitations on Patent Enforcement – A Comparative International Assessment

While the new U.S. administration sorts out its approach to patents, one of the key issues will be its policies towards abusive patent enforcement. At the same time, foreign antitrust enforcers are actively pursuing patent abuse cases, such as the KFTC's recent action against Qualcomm. Major jurisdictions around the globe recognize the problem of patent holdup, which tends to arise in information technology industries when a patented technology is essential to a widely used industry standard or otherwise covers only a minor component of an infringing product. This panel will consider the extent to which IP and competition law in the U.S., Europe, and Asia limit the ability of patent holders—particularly holders of standard essential patents (SEPs) and non-practicing entities—to obtain or threaten injunctive relief or excessive royalties. The panel will address questions such as: What limitations do competition laws impose on the ability of a patent holder to seek an injunction as a remedy for patent infringement? Is there an international consensus on an appropriate negotiating framework for determining when a SEP holder subject to a FRAND commitment may seek an injunction on the ground that a licensee is an “unwilling licensee”? What are the salient issues and differences across the major jurisdictions in defining FRAND royalties or reasonable royalties more generally? To what extent are foreign jurisdictions attracting, or likely to become attractive venues for, patent assertion entities? The panel will also consider other prominent issues raised by recent cases and the IP-abuse guidelines adopted by jurisdictions in Asia and elsewhere.

Panel 3: Global Due Process Standards – Where Are We and Where Are We Heading?

A growing chorus of large multinationals has raised concerns about the lack of procedural due process protections afforded by various competition enforcement regimes around the world. Numerous domestic and international organizations have issued reports and recommendations on the topic. Problems reported by companies have ranged from inadequate opportunity to advocate before enforcement authorities; insufficient protections for confidential business information; and meager attorney/client privilege protection; to insufficient judicial review of agency enforcement measures and the misuse of competition law to benefit competitors or implement industrial policy. Meanwhile, due process considerations are reflected in negotiations involving multilateral trade agreements such as TPP and TTIP. This panel will assess the state of play in emerging international due process standards. We will hear the perspectives both of counsel for multinationals on the front lines and enforcers navigating disparate legal and cultural norms to effectively protect competition and consumers. The panel will look to identify core differences and areas of common ground, along with ways to advance the ongoing global discussion of this important topic.