The American Antitrust Institute

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By Email: ATR.InternationalGuidelines@usdoj.gov

United States Dept. of Justice
Federal Trade Commission

Re: Comments on Proposed Updates to International Antitrust Guidelines

We write in response to your invitation for public comment on the Agencies' proposed Antitrust Guidelines for International Enforcement and Cooperation ("Proposed Guidelines").

We commend the Agencies for undertaking this important project. We agree that the Guidelines warrant updating and generally agree with the proposed changes. However, we have concerns involving: (1) appropriately defining the scope of the import commerce exclusion under the Foreign Trade Antitrust Improvements Act (FTAIA); (2) consistency in the language used to articulate the governing standard for "directness" under the domestic effects exception of the FTAIA; (3) coherence in the language, logic and substance of the governing standard for the "gives rise to" requirement of the domestic effects exception; (4) application of an exception to *Illinois Brick* if the direct purchasers' claims are barred by the FTAIA; (5) availability of restitution for victims whose antitrust injuries are proximately caused by anticompetitive activity abroad; and (6) clear articulation of the exceptions to the *Noerr-Pennington* doctrine.

Any questions or concerns regarding these comments should be directed to the undersigned.

I. THE DEFINITION OF CONDUCT "INVOLVING IMPORT COMMERCE" SHOULD BE MORE EXPANSIVE

The Proposed Guidelines' discussion (§ 3.1) of the FTAIA's "import commerce exclusion" is appropriate, as far as it goes. But it should be expanded to define more broadly conduct "involving . . . import trade or import commerce." Conduct involving import trade or import commerce includes foreign price fixing where the price-fixed products are imported into the United States and the price fixers intend such a result.

The Proposed Guidelines appropriately make clear that a foreign price fixer need not function as the actual importer. *See Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470, 471 n.11 (3d Cir. 2011) (the "import [exclusion] is not limited to importers, but also applies if the defendants' conduct is directed at an import market");

United States v. Hui Hsiung, 778 F.3d 738, 756 (9th Cir. 2015) ("To suggest, as the defendants do, that AUO was not an 'importer' misses the point. The panels were sold into the United States, falling squarely within the scope of the Sherman Act."). But they should also make clear that it is not necessary that the sale by the price fixer be made in or for delivery to the United States. Rather the initial sale may be made in or for delivery to a foreign country, provided that the price fixer intends that its products will be imported into the United States. Furthermore, when price-fixed products are intended to be imported into the United States as components of manufactured products, the price fixing reasonably can be said to involve import trade or commerce.[1]

It is sometimes argued that a narrow construction of the import commerce *exclusion* is necessary in order to give meaning to the import commerce *exception*. The claim is that import-related conduct that has an "effect" on import commerce must be broader than conduct "involving" import commerce; otherwise the "effect" exception would be surplusage. That view is incorrect. The exception applies to both "wholly foreign" commerce and export commerce.[2] So, for example, an export cartel would not involve import commerce, but would come within the import commerce exception if it created a worldwide shortage that raised the prices of U.S. imports. *See* Proposed Guidelines § 3.2, at 20 n. 93.

Congress intended that the import-commerce exclusion be read broadly. *See* H.R. Rep. No. 97-686, at 9 (1982) (bill modified "to remove any possible doubt" that the legislation could be interpreted to apply to "imports"). Accordingly, when price-fixed products are sold with the intention that they are to be imported into the United States, the price fixing conduct should be treated as involving import commerce, rather than "wholly foreign" commerce subject to the FTAIA.

II. THE GUIDELINES SHOULD ADOPT THE "REASONABLY PROXIMATE CAUSAL NEXUS" STANDARD FOR "DIRECTNESS"

The discussion (§ 3.2) and examples (C & D) of conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce is generally well taken. However, the formulation used to define directness should be modified. Section 3.2 of the Proposed Guidelines states, "An effect on commerce is 'direct' if it is proximately caused by the alleged anticompetitive conduct." Proposed Guidelines § 3.2, at 18. This phrasing should be amended because it departs from the language that the government has consistently sought and won in federal court in a series of amicus and merits briefs

[1] Intent here means in the sense of an intentional tort, i.e., that the price fixer subjectively intends or knows with substantial certainty that the price-fixed products will be imported into the U.S. If it is merely reasonably foreseeable that the products will be imported, the FTAIA's import commerce exception would come into play.

[2] *See* H.R. Rep. No. 97-686, at 10 (1982) ("It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment, but that import transactions are not."); *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 163 (2004).

spanning many years and many cases. Consistent with the language used in the government's arguments and adopted by receptive courts, the Guidelines should state that "An effect on commerce is 'direct' if there is a reasonably proximate causal nexus between the effect and the alleged anticompetitive conduct."

The government has advocated for causal "nexus" language to define "directness" in nearly all of its FTAIA briefs going back to the turn of the century. *See, e.g.*, Br. for the U.S. and the FTC as Amici Curiae in Support of Neither Party 14, *Motorola Mobility LLC v. AU Optronics Corp*., 775 F.3d 816 (7th Cir. 2015) (No. 14-8003) (filed Sep. 5, 2014) [hereinafter "U.S. *Motorola* Br. III"] ("Department of Justice's approach" is that "'direct' means only 'a reasonably proximate causal nexus'"); Br. for the U.S. and FTC as Amici Curiae in Support of Defendants-Appellees 24, *Lotes Co. v. Hon Hai Precision Industry Co*, 753 F.3d 395 (2d Cir. 2014) (No. 13-2280) [hereinafter "U.S. *Lotes* Br."] ("In the context of the FTAIA, the term direct means only a reasonably proximate causal nexus."); *see also* Br. for U.S. and FTC as Amici Curiae in Support of Petition for En Banc Rehearing 9, *Empagran v. F. Hoffman-LaRoche*, 315 F.3d 288 (D.C. Cir. 2003) (No. 01-711) ("Congress . . . ma[de] the nexus of 'conduct,' 'effect,' and 'claim' the key to the FTAIA").[3]

Appellate courts have obliged the government's wishes by explicitly adopting this language as the standard for "directness." *See, e.g.*, *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 857 (7th Cir. 2012) (en banc) (agreeing with DOJ that "the term 'direct' means only 'a reasonably proximate causal nexus.'" (quoting Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. Ann. Surv. Am. L. 415, 430 (2005) (remarks of the Deputy Assistant Attorney General))); *Lotes Co.,* 753 F.3d at 398 (directness requirement is satisfied "so long as there is a reasonably proximate causal nexus between the conduct and the effect").

Aligning the language of the Proposed Guidelines with the language of the government's longstanding advocacy position as adopted by multiple courts would eliminate potential confusion and speculation as to why the government's guidelines would otherwise depart from this language. *Cf., e.g.*, Larry M. Eig, Cong. Research Serv., No. 97-589, Statutory Interpretation: General Principles and Recent Trends (Dec. 19, 2011) (describing principle of statutory construction whereby "failure to employ terms of art or other language normally used" for a given interpretation "may or may not signal that a different result is intended").

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[3] When it has not advocated directly for causal "nexus," it has advocated for the concept of causal "relationship," which is the same thing. *See, e.g.*, Br. for Appellant United States 37, *U.S. v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2004) (No. 02-16472) [hereinafter "U.S. *LSL* Br."] ("[a] definition of 'direct' that focuses on causal/logical relationships" is appropriate because directness is "analogous to the common law concept of 'proximate cause'"); Br. of U.S. and FTC as Amici Curiae in Support of Neither Party on Rehearing En Banc 26, *Minn-Chem v. Agrium*, *Inc.*, 683 F.3d 845 (7th Cir. 2012) (No. 10-1712) [hereinafter "U.S. *Minn-Chem* Br.") (dictionary definition corresponding to proper usage of "direct" is ""characterized by or giving evidence of a close especially logical, causal, or consequential relationship").

Moreover, the government's longstanding emphasis on the language of causal "nexus" and causal "relationship" serves as an important reminder that the touchstone of the directness inquiry is the "classic concern about remoteness." U.S. *Lotes* Br. at 26 (quoting *Minn-Chem*, 683 F.3d at 857)); U.S. *Minn-Chem* Br. at 21 ("the existence of such a direct effect is 'a question of proximity and de[g]ree'" (quoting *N. Sec. Co. v. United States*, 193 U.S. 197, 409-10 (1904) (Holmes, J., dissenting)); *see* U.S. *Motorola* Br. III at 14 (advocating for nexus language on grounds that it "provides the legal vocabulary for excluding liability for conduct deemed too remote from its injurious effect" and "screens out connections so attenuated that the consequence is more aptly described as mere fortuity"). As we discuss in the next section, it is important to remember that remoteness should be the animating concern of any proximate causation inquiry. *Cf. Minn-Chem*, 683 F.3d at 857 ("directness is a synonym for proximate cause").

There is nothing to be gained, and both case-law congruity and important analytical principles to be lost, by departing from the government's and the courts' "reasonably proximate causal nexus" language. The Proposed Guidelines therefore should be amended accordingly.

III. A "REASONABLY PROXIMATE CAUSAL NEXUS" STANDARD SHOULD ALSO BE ADOPTED FOR THE "GIVES RISE TO" REQUIREMENT

The Proposed Guidelines state:

> In a damages action brought under the antitrust laws, [the "gives rise to"] provision requires that the effect on U.S commerce be an adverse one and that ***the effect proximately cause the plaintiff's antitrust injury***. It is therefore appropriate for courts to distinguish among damages claims based upon the underlying transaction that forms the basis of the injury to ensure that each claim redresses injury consistent with the requirements of the antitrust laws, including the FTAIA. For example, when anticompetitive conduct affects commerce around the world, a plaintiff whose antitrust injury arises from the conduct's effect on U.S. import commerce may recover damages for that injury, but a plaintiff that suffers a foreign injury that is independent of, ***and not proximately caused by***, the conduct's effect on U.S. commerce cannot recover damages under the U.S. antitrust laws.

Proposed Guidelines § 3.2, at 20-21 (emphases added).

The highlighted language misstates the proximate causation inquiry governing the FTAIA's requirement that the harmful domestic effect must "give rise to a claim."[4] Under the Proposed Guidelines, the required causal connection between the domestic effect

[4] The proximate cause standard governing the "gives rise to" requirement was first laid down by the D.C. Circuit on remand in *Empagran II* and has since been adopted by the Second, Ninth, and Eighth Circuits. *See Empagran S.A. v. F. Hoffmann-LaRoche, Ltd*., 417 F.3d 1267, 1271 (D.C.

and the plaintiff's injury depends on the direction of the causation, and recovery is foreclosed when the plaintiff's foreign injury precedes the domestic harm. However, sound logic, the case law, and the government's own amicus briefs all make clear that the FTAIA requires a relationship of proximate cause and not a relationship of "time." Accordingly, we suggest that the first highlighted phrase be replaced with "***the effect have a reasonably proximate causal nexus with the plaintiff's injury***." And the second highlighted phrase should be replaced with "***and not proximately related to***."

Sound logic requires that the statutory language "gives rise to a claim" should be interepreted to require a reasonably proximate causal nexus between the domestic effect and the plaintiff's claimed injury, regardless of the direction of the causation. Consider, for example, that when a manufacturer selling finished products in the United States purchases price-fixed components abroad, the Proposed Guidelines recognize that the cartel may have a direct, substantial, and reasonably foreseeable effect on U.S. import commerce in the finished products. *See* Example C. In that case, the manufacturer's antitrust injury abroad (the overcharge) *proximately causes* the harm to U.S. import commerce (i.e. the domestic anticompetitive effect). But under the Proposed Guidelines' reading of *Empagran*, the manufacturer has no claim because the *reverse* isn't true: the domestic harm to U.S. commerce does not proximately cause the manufacturer's antitrust injury abroad. *See* U.S. *Motorola* Br. III at 21-22; *Lotes Co. v. Hon Hai Precision Industry Co*., 753 F.3d 395, 414 (2d Cir. 2014) ("direction of causation runs the wrong way").

The Proposed Guidelines fundamentally misread *Empagran*. *Empagran* recognized that the purpose of the "gives rise to" requirement was to ensure that the conduct "has an effect of a kind that antitrust law considers harmful." 542 U.S. at 162; *see* H.R. Rep. 97-686, at 11-12. It was not intended to establish an independent standing requirement or to limit domestic redress to foreign injuries that succeed cognizable domestic effects in time.[5] To be sure, *Empagran* offered that, in the circumstances, it "makes linguistic sense to read the words 'a claim' as if they refer to the 'plaintiff's claim' or 'the

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Cir. 2005) [hereinafter "*Empagran II*"]; *Lotes*, 753 F.3d at 415-16; *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig*., 477 F.3d 535, 538 (8th Cir. 2007).

[5] That the "gives rise to" requirement was not intended to establish a separate rule of standing is clear from the legislative history and the fact that the exact same "gives rise to" formulation was added to the FTC Act, which only the FTC may enforce. 15 U.S.C. § 45(a)(3). Moreover, Congress knew how to address "who may bring a suit" when it wanted to, as evidenced by the last sentence of section 6a, which provides that insofar as anticompetitive conduct has an effect on the export trade of a domestic exporter, the Sherman Act applies, but "only for injury to export business in the United States." 15 U.S.C. § 6a. On the other hand, the "gives rise to" language arguably was intended to establish a form of an antitrust injury requirement for the domestic economy. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 489 (1977) (antitrust injury is injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). And, in private actions, where standing is required, the plaintiff's injury must be causally connected to antitrust injury. *See Blue Shield of Va. v. McCready*, 457

claim at issue.'" *Id.* at 174 (emphasis added). But the Court could not have been clearer that it based its reading on the assumption that respondents sought recovery solely for independent foreign harm. *Id.* at 158 ("We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury.").

Indeed, the Court referred to "independent" foreign harm more than 20 times in the opinion. As a matter of comity and history, the Court could find no justification for reading the FTAIA to extend to claims by foreign plaintiffs based on independent foreign harm. Accordingly, although the statute uses the words "*a* claim," and "respondents' reading [may be] the more natural reading of the statutory language,"[6] *id*. at 173-74 (emphasis added), the Court rejected it where the foreign harm for which respondents sought recovery was not linked *at all* to any domestic effects. On those facts, the Court held that "respondents' [literal] reading is not consistent with the FTAIA's basic intent," and respondents had failed to show "we must accept [it]." *Id*. at 174.[7]

In contrast to claims for independent foreign harm, however, allowing claims for foreign injuries that proximately cause anticompetitive domestic effects "would maintain the balance Congress struck in Section 6a to preserve effective antitrust enforcement while avoiding unreasonable interference with the regulation of foreign markets by other countries." U.S. *Motorola* Br. II at 15-16. The "more natural" reading should govern in these circumstances, and the basic purpose of the FTAIA and the Sherman Act—protecting U.S. consumers—should not be undermined by expanding *Empagran*'s linguistic gloss applicable to cases of independent harm. Where the foreign conduct proximately causes domestic harm by virtue of foreign injury, there is no logical reason or statutory purpose for treating this situation differently from cases where the domestic harm proximately causes the foreign injury. If anything, the case for allowing relief is stronger when causation runs in this direction because the relief redresses harm to the domestic economy. *See id.* at 3 (noting that foreign government amicus briefs do not "explain[] why allowing Motorola to recover damages for overcharges it paid on panels incorporated into . . . cellphones [resulting in higher domestic prices] could not reasonably redress that domestic injury").

In fact, *Empagran* specifically recognized that the Sherman Act may apply where "the domestic harm depended in part upon the foreign injury." 542 U.S. at 172 (distinguishing *Dominicus Americana Bohio v. Gulf & Western Indus.*, 473 F. Supp. 680 (S.D.N.Y. 1979)); *see also Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*,

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U.S. 465, 477-78 (1982) (key to standing is "relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned").

[6] It is not just that the statute says "a claim," but "a claim under the provisions of sections 1 to 7 of this title, other than this section." 15 U.S.C. § 6a.

[7] Indeed, reading the statute to mean "gives rise to the plaintiff's claim" was not necessary to the result because the Court could have held that foreign plaintiffs lacked antitrust standing in cases of independent harm, as the Solicitor General alternatively argued. U.S. Amicus Br. at 25-30, *Empagran*, 542 U.S. 155 (No. 03-724).

148 F.3d 1080, 1087 (D.C. Cir. 1998) (foreign plaintiff's exclusion by monopolist abroad satisfied requirements of FTAIA where foreign injury "is ultimately a harm to U.S. purchasers"). The Court also specifically recognized that the Sherman Act may apply where "foreign injury was inextricably bound up with domestic restraints of trade." *Empagran*, 542 U.S. at 171-72 (original alterations and internal quotation marks omitted). And the government's initial *Motorola* brief acknowledged that a panel of the Seventh Circuit could find that harm caused by price-fixed components inserted into products manufactured abroad *prior to* being sold in the United States was "sufficiently intertwined with the effect on U.S. commerce to satisfy the 'gives rise to' requirement." U.S. *Motorola* Br. II at 15; *see also* Brief for the U.S. and the FTC as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc 14-15, *Motorola Mobility LLC v. AU Optronics Corp*., 775 F.3d 816 (7th Cir. 2015) (No. 14-8003) (filed Apr. 24, 2014) [hereinafter "U.S. *Motorola* Br. II"] ("pertinent question [is] whether there is a close causal connection between the effect on U.S. commerce and Motorola's injuries").

Empagran's linguistic gloss on "a claim" should not apply to a situation entirely unsupported by the Court's reasoning. To be sure, the meaning of statutory language ordinarily does not vary when applied in different circumstances. *See, e.g., United States v. Nippon Paper Indus. Co*., 109 F.3d 1, 4 (1st Cir. 1997) (extraterritorial effect of Sherman Act is same for purposes of civil or criminal offense). But this canon of statutory construction does not always apply. *See, e.g., United States v. U.S. Gypsum Co*., 438 U.S. 422, 436 & n.13 (1978) (intent is element of criminal, but not civil, Sherman Act offense); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (identical language in Section 1 of Sherman Act may have different meaning than in Section 3). *Empagran* acknowledged that "[l]inguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the . . . underlying harm." 542 U.S. at 174. And the canon is particularly inappropriate for the "gives rise to a claim" language because it means something different when the government is the plaintiff, *see id*. at 170-71,[8] and the interpretation adopted for one circumstance (independent foreign harm) is counter-textual and chosen for purposive reasons that do not apply in other circumstances.

Accordingly, the Proposed Guidelines should be revised to reflect that the "gives rise to" requirement is satisfied if there is a reasonably proximate causal nexus between the domestic effect and the plaintiff's foreign injury. At a minimum, the Guidelines

[8] The Proposed Guidelines suggest that the "gives rise to [the plaintiff's] claim" gloss does apply when the government is the plaintiff. *See* Proposed Guidelines § 3.2, at 21 ("In such cases, a direct, substantial, and reasonably foreseeable effect on U.S. commerce would give rise to the sovereign's claim."). But it is anomalous to talk about an effect giving rise to "the government's" claim (rather than "a claim") when the government sues for criminal or injunctive relief because the government itself suffers no injury and there is no standing issue, as the government has elsewhere recognized. *See* U.S. *Motorola* Br. III at 10-11 ("A different approach is required for criminal prosecutions and actions in equity brought by the government" because the government can bring suit even "'when no plaintiff has suffered injury.'" (quoting *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002), *abrogated on other grounds by Empagran*, 542 U.S. 155)).

should acknowledge that the Supreme Court has not decided whether the "gives rise to [plaintiff's] claim" gloss applies when the harm to U.S. commerce "depended in part upon the foreign injury" or the two are "inextricably bound up."[9]

IV. TO THE EXTENT THAT THE GUIDELINES READ *EMPAGRAN* TO PROHIBIT DIRECT PURCHASERS ABROAD FROM RECOVERING FOR INJURIES THAT PROXIMATELY CAUSE HARM TO U.S. COMMERCE AND CONSUMERS, THE GUIDELINES SHOULD RECOGNIZE THAT INDIRECT U.S. PURCHASERS MAY RECOVER THEIR DAMAGES UNDER THE SHERMAN ACT

If the Agencies decline to adopt our suggestion in Point III above, and direct purchasers whose injuries proximately cause harmful domestic effects are barred from suit by the FTAIA, then the Guidelines should recognize that indirect puchasers in the United States should be able to recover under the Sherman Act.

The government has already recognized that indirect purchaser recovery is warranted in these circumstances. In *Motorola,* the government stated that "the bar to indirect purchaser damages claims does not 'apply when no purchaser could obtain damages, for then there is no risk of double recovery (and no need to calculate elasticities in order to apportion damages among multiple tiers).'" U.S. *Motorola* Br. III at 22 (quoting *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003)). Moreover, the government noted that "a holding that [*Illinois Brick*] does not apply if the Sherman Act itself, through Section 6a, bars recovery by the direct purchaser does not risk 'litigat[ing] a series of exceptions,'" "[n]or would it 'entail the very problems' of proof and line-drawing the direct purchaser rule was meant to avoid." *Id*. at 23 (quoting *Kansas v. UtiliCorp*

[9] The government should repudiate the *Lotes* court's suggestion, in dicta, that causation "runs the wrong way" when a plaintiff's injury "precedes any domestic effect in the causal chain," *Lotes Co.*, 753 F.3d at 414. This contradicts the government's and dissenting Judge Aldistert's sound reasoning in *LSL Biotechnologies*, which recognized that "proximate cause itself" is only "useful and important" because it "focuses the inquiry . . . into a relationship of logical causation rather than of something else such as time or geography." U.S. *LSL* Br. at 37; *accord LSL Biotechnologies*, 379 F.3d at 693 (Aldisert, J., dissenting). Denying a plaintiff's claim soley because the injury "causes" the domestic effect instead of being "caused by" the domestic effect focuses the proximate cause inquiry on "time" instead of a "relationship of logical causation." This is precisely what the circuit courts in *Empagran II, DRAM* and *Monosodium Glutamate* cautioned against. In those cases, the plaintiff's injury *was* "caused by" the domestic effect, but their claims were denied because there was "only an indirect connection" and not the "direct tie to U.S. commerce" they needed to show. *Empagran II,* 417 F.3d at 1271 (plaintiffs "painted a plausible scenario" whereby the domestic effect was a "but-for" cause of their injury, but "[t]he statutory language—'gives rise to'—indicates a direct causal *relationship* . . . and is not satisfied by mere but-for *nexus*." (emphases added)); *accord DRAM*, 546 F.3d at 987; *Monosodium Glutamate,* 477 F.3d at 538. Even the *Lotes* court "[a]gree[d] with [its] sister circuits" that "the standard" is the "causal connection," and *Lotes* was decided on other grounds (i.e. that the plaintiff sought relief for independent foreign harm, as in *Empagran*). 753 F.3d at 414, 416.

United, Inc., 497 U.S. 199, 216-17 (1990)). Importantly, "absent a construction of the *Illinois Brick* doctrine that permits suit by the first purchaser in affected U.S. commerce, it is possible that no one could recover damages under the federal antitrust laws despite the tremendous harm in the United States threatened by offshore component price fixing." *Id.* Yet the Proposed Guidelines do not address these concerns.

The Guidelines should preserve indirect-purchaser claims because precluding recovery by *both* indirect and direct purchasers when price-fixed imported products are first sold abroad would be devastating to the deterrence and compensation goals of the Clayton Act.[10] For example, the vast bulk of the tens of billions of dollars of panels involved in the LCD price-fixing conspiracy prosecuted by the government were first sold abroad before they were imported into the United States as parts of finished consumer electronics products. *See Hui Hsiung,* 778 F.3d at 743, 759; *Motorola Mobility LLC v. AU Optronics Corp*., 775 F.3d 816, 824 (7th Cir. 2015) ("[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers," and as a result of weak foreign antitrust laws, "the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts"). And the U.S. antitrust laws, including the FTAIA, were specifically designed to deter this kind of injury to the American economy. H.R. Rep. No. 97-686, at 13 ("Any major activities of an international cartel would likely have the requisite impact on United States commerce.").

Effective deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 429 (2012). An exhaustive survey of cartel detection literature shows that, conservatively, detection rates are at most 25-30%, meaning price-fixing cartelists have about a 75% chance of getting away with their crimes. *Id*. at 462-65. Accordingly, the ratio of a cartel's total economic penalties for getting caught relative to the amount of monopoly profits it can extract from American consumers (the "penalty-to-harm ratio") must exceed 400% to adequately deter international cartels that would otherwise prey on Americans. *See* John M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?* 16 (Am. Antitrust Inst., Working Paper No. 12-03, Oct. 15, 2012), http://www.antitrustinstitute.org/sites/default/files/WorkingPaperNo12-03.pdf.

The collective efforts of the Justice Department and private attorneys general have not come close to achieving this level of deterrence. Combining fines and payments resulting from both government and private cases, the penalty-to-harm ratio for international cartels affecting the United States does not even reach 100% on average. *Id*. at 15. In other words, typically it is *net profitable* for international cartels to illicitly appropriate wealth from U.S. businesses and consumers, even if they are caught. And the situation has been getting worse, not better. From 2000-2010, as compared to 1990-1999, the pen-

[10] Moreover, preserving indirect purchaser claims is important to the public fisc, as the government may seek recovery of damages as a purchaser under Section 4A of the Clayton Act.

alty-to-harm ratio for international cartels has significantly *declined*. *Id*. Predictably, international cartels are proliferating. *See* Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Sept. 12, 2016), https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more (vast majority of largest fines involve international cartels).

The gaping hole that would be created in the enforcement of U.S. antitrust law by denying both direct and indirect purchaser recovery would not be ameliorated by the possibility of suit under foreign antitrust laws. It is doubtful that foreign countries that are home to price fixers have an interest in providing a remedy to foreign victims of their export cartels, just as U.S. law affords no such relief against U.S. export cartels. *See Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012); 15 U.S.C. § 6a. In any event, private antitrust actions in foreign countries are underdeveloped, to say the least. *See generally The International Handbook on Private Enforcement of Competition Law* xi (Albert A. Foer & Jonathan W. Cuneo eds., 2010).

Moreover, while several foreign jurisdictions are moving slowly towards permitting private damages remedies for antitrust violations, many of those jurisdictions, unlike the United States, will allow a pass-on defense. *See, e.g.,* Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 16, Art. 13 (requiring Member States to permit defendant to show that claimant passed on the whole or part of the overcharge).[11] Perversely, then, under the law in those jurisdictions, the more that direct purchasers abroad pass on to American indirect purchasers, the less cartelists will be deterred. And if they pass on the full amount of the overcharge to American indirect purchasers, cartels would escape all potential liability for damages in the United States *and abroad* for products imported into the United States by direct purchasers.

Nor is the gap in enforcement likely to be filled by consumer indirect-purchaser suits brought under state laws. Indirect purchasers of TVs, monitors, and notebook computers (but not cell phones) in twenty-three states did obtain substantial settlements from the defendants in the LCD price-fixing conspiracy. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. April 3, 2013). However, roughly half the states lack *Illinois Brick* repealers. *See* Herbert Hovenkamp, *Federal Antitrust Policy* 680-81 (4th ed. 2011). Moreover, as a rule, direct-purchaser recoveries typically dwarf those of indirect purchasers. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1286-87 (2013) (study of successful private actions showed that indirect purchasers

[11] While the EU directive also requires Member States to adopt laws allowing indirect purchasers to sue, American consumers are unlikely to be able to take advantage of such remedies, particularly since collective redress mechanisms (class actions) are neither required, nor generally available. *See* Directive 2014/104/EU, L 349/3, at ¶ 13; Bojana Vrcek, *Overview of Europe*, in *International Handbook on Private Enforcement* at 277.

obtained about 15% of the compensation that direct purchasers received); Connor, *Private Recoveries*, at 5-7 (ratio of direct to indirect recoveries in cartel cases is 12 to 1).

V. THE GUIDELINES SHOULD CONSTRUE THE DEPARTMENT'S LENIENCY POLICY TO NOT REQUIRE RESTITUTION FOR VICTIMS ONLY WHEN THEIR FOREIGN INJURIES ARE INDEPENDENT OF ANY DOMESTIC EFFECTS PROXIMATELY CAUSED BY THE ANTICOMPETITIVE ACTIVITY BEING REPORTED

The Proposed Guidelines state that "[c]onsistent with the Supreme Court's and courts of appeals' interpretation of the 'gives rise to' provision . . ., the Department construes the leniency policy to not require restitution to victims whose antitrust injuries are independent of and not proximately caused by an adverse effect on U.S. commerce." Proposed Guidelines § 3.2, at 21, n. 96. However, this is inconsistent with the Department's existing leniency policy, and in any event is unwarranted.

The Department's recently revised model corporate conditional leniency letter provides that the leniency Applicant must agree to:

> mak[e] all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of the anticompetitive activity being reported, in which Applicant was a participant. However, Applicant is not required to pay restitution to victims *whose antitrust injuries are independent of any effects on United States domestic commerce proximately caused by the anticompetitive activity being reported*.

Model Corporate Leniency Letter ¶ 2(g) (emphasis added).

This standard appropriately reflects the comity concern animating *Empagran*, which precludes foreign victims of a cartel whose injury is independent of the effects on U.S. commerce from recovering under the Sherman Act. At the same time, the standard implicitly recognizes (or does not foreclose) that victims of a cartel whose foreign injury proximately causes harm to U.S. commerce may recover under the Sherman Act or be entitled to restitution.

Furthermore, the language in the Proposed Guidelines is unwarranted because even if direct-purchaser victims abroad are barred by the FTAIA from recovering for injuries that proximately cause harmful domestic effects, that is no basis to preclude restitution to such victims. Restitution to those victims is not impractical. "There is a strong presumption in favor of requiring restitution in leniency situations. Restitution is excused only where, as a practical matter, it is not possible." Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008) (emphasis added) (identifying as impractical only situations where the leniency applicant is in bankruptcy or where there is only one victim of the conspiracy and it is now defunct); *see also* Antitrust Division

Manual (Fifth) IV-83 (2015) (noting that U.S. Sentencing Guidelines call for courts to order restitution as a condition of probation or supervised release, except where "'(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process'" (quoting U.S.S.G. §§ 5E1.1(b)(2), 8B1.1(b)(2))).

Nor is there a basis in prescriptive comity to preclude restitution to such victims. Having exercised the Executive Branch's independent discretion to challenge a foreign price-fixing cartel criminally, after "careful consideration of international comity" and in light of "its prudence in bringing antitrust enforcement actions," U.S. *Motorola* Br. III at 19-20, it would be anomalous for the government to choose in its own discretion to withhold restitution from deserving victims. At a minimum, for the reasons explained in Point IV above, if the Department construes the leniency policy to deny restitution to direct purchasers abroad whose injuries proximately cause harmful domestic effects, the Guidelines should construe the leniency policy to require restitution to domestic indirect purchasers.

VI. THE DISCUSSION OF *NOERR-PENNINGTON* SHOULD BE MODIFIED

The proposed guidelines appropriately take the position that "the principles undergirding th[e *Noerr Pennington*] doctrine apply to the petitioning of foreign governments." Proposed Guidelines § 4.2.4, at 29. However, the articulation of the exceptions to the doctrine is too narrow. In particular, "sham activities" are not the only exception to *Noerr*. *See generally* Brief for Amicus Curiae Federal Trade Comm'n in Support of Neither Party and in Favor of Reversal, *Amphastar Pharmaceuticals, Inc. v. Momenta Pharmaceuticals, Inc.*, No. 16-2113 (3d Cir. Nov. 8, 2016). We recommend that an additional sentence be added to the end of this paragraph:

> Nor will the Agencies refrain from acting when another exception to *Noerr* applies. *See, e.g., Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (fraudulent procurement of patent may violate Sherman Act); *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (*Noerr* "cannot be stretched to cover petitions based on known falsehoods"); *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015) (petitioning in breach of promise not protected by *Noerr*).

Accordingly, the Discussion of Illustrative Example F should be modified. The last sentence should be eliminated and the following italicized clause should be added to the end of the first sentence, so that the entire discussion would read: "Had Corporation 1's activities been directed at a U.S. government entity, *Noerr Pennington* would be implicated and the Agencies would not take action against Corporation 1 *unless an exception to the doctrine were applicable*."

* * *

We appreciate the opportunity to provide these comments.

Very truly yours,

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