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GEOGRAPHIC MARKET DEFINITION

-- Note by Spain --

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More documents related to this discussion can be found at ww.oecd.org/daf/competition/geographic-market-definition.htm

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-- SPAIN --

1. The present document presents the CNMC experience in geographic market definition, in particular in cases where markets were alleged or found to be national or broader in scope. It is structured in three sections. The first section describes the Spanish approach to geographic market definition, identifying the main analytical tools and factors which affect market definition. The second section reflects on the existing and upcoming challenges on market definition brought by the development of online trade and the increasing globalisation. The third and last section focuses on the Spanish experience in cooperating with other competition agencies for the purposes of geographic market definition.

1. The Spanish approach to defining geographic markets with a national or broader scope

2. In the Spanish jurisdiction, a relevant market refers to the area where the undertakings concerned supply or demand their products and where the conditions of competition are relatively homogeneous and can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

3. Market definition is a complex task which often requires a substantial amount of resources. It is not a goal in itself but a tool which serves to identify the competitive constraints faced by the parties to a merger transaction or an antitrust investigation. Therefore, although the CNMC always refers to a relevant geographic market or a set of possible geographic markets, we do not normally define the precise geographic scope of markets unless this is necessary for the outcome of the case; otherwise, we leave market definitions open, in particular if we can confirm our competitive assessment in whichever possible market definition. For example, in some merger cases where it was not clear whether markets were either national or broader in scope, we have not adopted a conclusion on the precise scope of the market when it was possible to discard negative effects in the narrowest market definition.¹

4. For the purposes of market definition, the CNMC analyses both demand-side and supply-side substitutability. In practice, the definition of geographic markets involves an iterative process: starting from the minimal geographic area where we can reasonably assume that the conditions of competition are homogeneous, we test substitutability with other areas and enlarge the original area with the ones where there is substitutability, until we find an area where the conditions of competition are sufficiently distinct from other areas.

5. The main tools that we use in this process comprise:

- **Analysis of market characteristics** which can facilitate or restrain trade flows, such as transport costs, consumer patterns, product regulations, taxation, language or cultural differences.
- **Analysis of precedent cases:** similar past cases constitute a starting point in the analysis of relevant markets.
- **Analysis of business strategies** of the undertakings concerned and their competitors, their suppliers and their distributors: business strategies, including the scale of operations, the geographical organization of activities or the advertising strategies, can reveal differences in the conditions of competition between areas.

¹ See e.g. Decision of the CNMC in case C/0432/12 Antena 3/La Sexta.

- **Analysis of trade flows:** the size of inflows and outflows relative to consumption in the area, as well as the origin and destination of these can reveal substitutability with other areas.
- **Analysis of chains of substitution:** this is particularly relevant for products which can be economically marketed only within a specific distance from the production facility. In such cases, besides direct substitutability between neighbouring overlapping areas, there can be indirect substitutability between non-neighbouring areas through a common neighbour.
- **Market tests:** the views of market participants, suppliers and distributors of these, consumers and regulators constitute a relevant input in the analysis of geographic markets.
- **Analysis of market changes:** where available, we analyse how markets have reacted to changes in relative prices between geographic areas – or other product characteristics.

6. When it comes to analysing markets which can be national or broader in scope, we usually have more evidence available (as many databases are constructed on a nationwide basis). Therefore, while we use the same analytical tools described above, we can focus on specific evidence, such as the size of imports and exports relative to national consumption of the product concerned (i.e., trade openness), the areas of origin of imports and destination of exports (trade partners), changes of import and export flows following changes in relative prices (including changes in exchange rates) or other product characteristics, or price elasticities of imports and exports.

7. According to the CNMC decisional experience, the following factors can play a key role in defining markets with a national or broader scope:

- **Regulatory, cultural and linguistic factors** can limit demand-side and/or supply-side substitutability between countries or create absolute barriers to entry in a country (e.g., radio spectrum frequencies or other national licences). In addition, these can lead companies to organise their activities at national scale, even if they are part of multi-national companies. For example, in a number of cases concerning services where transportation costs are minimal, we identified national markets due to regulatory, cultural and linguistic factors which determined national commercial strategies of the undertakings concerned.²
- **Transport costs and physical barriers to trade.** For example, in a merger case, we discarded an Iberian market for the wholesale supply of electricity – despite the existence of common rules for the wholesale electricity markets in Spain and Portugal. The main ground for such decision was the limited capacity of interconnection between Spain and Portugal at the time, which often led to market splitting and different wholesale prices between Spain and Portugal.³ In another merger case concerning the treatment of hazardous waste, we found that despite the existence of national regulations, the location of recycling plants was key to determining the size of the market, and we eventually defined sub-national markets.⁴
- **The logistics of distribution.** The configuration and requirements of distribution networks is a key element to geographic market analysis. In products which require capillary distribution systems, local presence – directly or indirectly through third-party distributors – is often a requirement for operators to be a competitive constraint. For example, in a merger case concerning outside advertising, we identified a national market but found that presence in the

² See e.g. Decisions of the CNMC in cases C/0573/14 Schibsted/Milanuncios and C/0432/12 Antena 3/La Sexta.

³ Decision of the CNMC in case C/0098/08 Gas Natural/Unión Fenosa.

⁴ Decision of the CNMC in case C/0761/16 Consenur/Activos Cathisa.

largest cities in Spain, namely Madrid and Barcelona, was key for the competitive positioning of operators in the market.⁵ In another merger case concerning the wholesale distribution of periodicals, we found that operators organized the distribution on a local or regional basis due to the importance of local presence, and we defined sub-national markets.⁶

- **Consumer habits.** We have typically applied isochrones to define geographic markets in investigations concerning retail markets for consumer goods (e.g., food retailing⁷, petrol retailing⁸), transportation services (e.g., air transport)⁹ or wholesale markets where time of delivery is an essential element of the activity of distribution (e.g., wholesale distribution of medical drugs).¹⁰ None of the isochrones-based relevant markets in the cases indicated above comprised areas beyond national borders, although this cannot be theoretically excluded.
- **Chains of substitution.** For example, we have taken into account the existence of chains of substitution in several antitrust and merger cases related to the retailing of automotive petrol. In a number of cases, we have concluded that despite the local component of the demand (users would not typically drive but for a few kilometres to fill-in their tanks), the ubiquity of petrol stations across the Spanish mainland resulted in continuous overlaps between catchment areas of petrol stations, thus creating indirect competitive constraints between distant stations.¹¹
- **Import flows.** For example, in one merger case, we analysed the supply of refined petroleum products into the Canary Islands. Although such market had been previously defined as local in scope, we took into account the growth of imports of refined petroleum into the Canary Islands from the Spanish mainland and other neighbouring regions and eventually defined a supra-national market.¹²

2. Challenges and limitations to existing geographic market definition tools brought by new market developments

8. The development of online trade has expanded the traditional geographic boundaries of a number of wholesale and retail markets. Thanks to the use of websites, search engines and trade platforms companies can market their products in far-away markets. In addition, new market participants have arisen (e.g., consumers as suppliers of accommodation or transport services via platforms like Airbnb or Uber).¹³ Some markets which were originally local or national in scope have expanded as a result of the new trading possibilities.

⁵ See Decision of the CNMC in case C/0577/14 JCDcaux/Cemusa.

⁶ See Decision of the CNMC in case C/0119/08 Distirutas/Gelesa/Siglo XXI/Logintegral.

⁷ See e.g. Decision of the CNMC in case C/0001/07 Dia/Plus and Reports of the CNMC in cases C107/07 Eroski/Caprabo and C52/00 Carrefour/Promodes.

⁸ See e.g. Decisions of the CNMC in cases C/0550/14 Repsol/Petrocat, S/474/13 Precios combustibles automoción, S/369/11 Texaco.

⁹ See e.g. Report of the CNMC in case C105/07 Air Berlin/LTU.

¹⁰ See e.g. CNMC case N-06026 Cofares/Hefame.

¹¹ See e.g. Decisions of the CNMC in cases C/0550/14 Repsol/Petrocat, S/474/13 Precios combustibles automoción, S/369/11 Texaco.

¹² Decision of the CNMC in case C/0366/11 CEPSA/CHESA.

¹³ For a factual description of new business models and trends in an online environment, see CNMC (2016), *Conclusiones preliminares sobre los nuevos modelos de prestación de servicios y la economía colaborativa*.

9. The development of online trade has also increased the incidence of multi-sided business models. Online selling platforms, for example, target differentiated groups of customers, typically end-users who can purchase the products sold through the platform and companies who seek a platform through which they can sell their products. From the viewpoint of geographic market definition, the interactions between the different markets or “sides” can bring challenges, in particular when each of them can have a different geographic dimension if treated separately.

10. That being said, we still often find national or even local markets in presence of online trade in our merger and antitrust investigations. The concrete implications of online trade and new market trends need to be analysed on a case-by-case basis.

11. The CNMC has had the opportunity to analyse these recent trends in a number of cases. For example, in a recent merger case we analysed the integration of two online platforms which marketed meal delivery services provided by third-party restaurants.¹⁴ This case is interesting because it illustrates some of the above considerations.

12. Firstly, the case illustrates how the rise of online trade affects the delimitation of some markets. Older competition decisions concerning the restaurant sector had only considered the possibility of identifying a specific market for “take-away/home delivery”, separate from other “informal restaurants” and “quick service restaurants”.¹⁵ In the case at hand, the rise of online platforms led to identifying a separate market for “meal delivery services”, which would not comprise direct consumption at restaurants.

13. Secondly, the case also puts forward specific issues concerning two-sided markets: online platforms which manage meal deliveries “*simultaneously have two differentiated types of customers, restaurants and final consumers, whose demand are mutually inter-dependent through indirect network effects. The more restaurants in the platform, the higher the attractiveness of it for final consumers, as more choice is available. Conversely, the more final consumers in the platform, the higher the attractiveness of it for restaurants, as an increased number of orders can be expected*”. Online platforms which manage meal deliveries were considered to be present in two separate relevant markets with different geographic dimensions: the market for “management of meal delivery services”, which was found to be national, and the market for “meal delivery services”, which was found to be local in scope. That being said, online platforms can compete on a larger scale than the restaurants which ultimately sell and prepare the meals, via e.g. discounts and advertising campaigns. Therefore, the local component of competition, which is still important in meal delivery services from a demand viewpoint,¹⁶ could lose relevance if the weight of online platforms as intermediaries between restaurants and final consumers grows.

14. Finally, it is important to note that the links between the two markets where the merged entity was present (the two “sides”) were important in the competitive assessment of the operation. Although the merged entity reached very high market shares in the market for management of meal delivery services, it did not have a strong position in any local market for meal delivery services. It was concluded that “*the market power that the merged entity acquires with regard to restaurants and, indirectly, with regard to final consumers is limited, having regard to the relatively low proportion of sales which are channelled through online platforms in local markets in Spain*”.

¹⁴ See Decision of the CNMC in case C/0730/16 Just Eat/La Nevera Roja.

¹⁵ See e.g. Report of the CNMC in case S/DC/0510/14 Food Service Project.

¹⁶ See e.g. Report of the CNMC in case N-0646 Vidisco/Telepizza and European Commission Decision in case COMP/M.4220 - Food Service Project / Tele Pizza.

3. Investigation challenges with respect to the definition of markets that are potentially national or broader

15. Obtaining reliable data on the market structure and developments of third countries is often challenging due to the lack of knowledge of data sources, language barriers and lack of jurisdiction. For example, addressing a request for information to an operator located in a third country may pose challenges such as translating the request, obtaining the right address, ensuring the delivery of the request, or lacking coercive powers to make the operator comply with the request within the given deadline.

16. These information problems may sometimes delay or lead to inaccurate conclusions as regards market definition, the competitive assessment, the redress of competitive challenges via remedies or the (monitoring of) compliance with remedies.

17. Cooperation between competition authorities may be an effective mechanism to address these challenges.

18. Cooperation within the EU is today very fluent thanks to the established intra-EU mechanisms. As regards antitrust investigations, we have a framework for cooperation between national authorities and the Commission through the European Competition Network (ECN) as well as formal rules on consultations between authorities and exchanges of information. Through the ECN, National Competition Authorities and the Commission regularly report each other on antitrust investigations which can affect trade between Member States. The ECN also allows for *ad hoc* cooperation between National Competition Authorities and the Commission (e.g., consultations on experiences in other Member States regarding new markets).

19. As regards merger investigations, we would like to refer to a case illustrates how coordination between competition authorities can deal with operations which may have potentially negative effects in several jurisdictions but not be subject to merger review in all of them.

20. On 7 July 2010, we received a notification concerning a merger transaction between two companies active in the markets for the production and marketing of household insecticides in Spain as well as in other EU Member States.¹⁷

21. Although the transaction affected trade between EU Member States, it only was subject to filing in two Member States, namely Spain and Portugal, as in other Member States the notification thresholds were not reached. However, taking into account the potential effect on trade between Member States, the CNMC requested a referral of the case to the European Commission, which was joined by other Member States. Such referral was possible thanks to the rules of cooperation between the European Commission and the EU Member States.

22. The European Commission accepted the referral and analysed the concentration, preliminarily identifying competitive concerns. The parties were found to have substantial overlapping activities in Spain, France, Belgium, Greece and the Czech Republic. A final decision was not adopted since the operation was eventually abandoned.¹⁸

¹⁷ CNMC case C/0254/10 SCJ/Sara Lee – Insecticidas.

¹⁸ See European Commission Decision in case COMP/M. 5969 - SC Johnson/ Sara Lee.