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Working Party No. 3 on Co-operation and Enforcement

GEOGRAPHIC MARKET DEFINITION

-- Summaries of contributions --

28-29 November 2016

This document contains summaries of contributions received for the discussion on Geographic Market Definition (124th Meeting of Working Party No. 3 on Co-operation and Enforcement 28-29 November 2016).

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

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English - Or. English

GEOGRAPHIC MARKET DEFINITION

-- Summaries of Contributions --

This document contains summaries of the written contributions received for the discussion on Geographic Market Definition (124th Meeting of the Working Party No. 3, 28-29 November 2016). When the authors did not submit their own summary, the OECD Competition Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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ARGENTINA

In the majority of cases analyzed by the CNDC, geographic markets are defined at the national or local level. There are, however, a number of CNDC decisions where it was considered appropriate to define broader geographic markets. More than half of these cases belong to the 2012-2015 period, meaning that cases analyzed by CNDC with broad geographic scope became more prevalent in recent years.

Argentina's competition authority follows the same criteria for assessment of geographic markets included in the competition assessment guidelines of the majority of the jurisdictions around the world. The CNDC uses various approaches to define geographic markets that are applied on a case by case basis and as part of an empirical exercise based in business realities. The criteria used to assess geographic boundaries is in general a mix of qualitative and quantitative considerations.

The existence of MERCOSUR directly influence the definition of geographic markets. The foreign trade structure imposed by MERCOSUR determined that, in a number of CNDC decisions, the relevant geographic market was constituted by MERCOSUR or a subgroup of country members. Even though Argentina has competition protection agreements with MERCOSUR members and with Brazil, so far it has made no use of these agreements. In terms of geographic market definition, Argentina could benefit from this cooperation if, for instance, it facilitates obtaining data on markets and players outside of the CNDC's jurisdiction.

Argentina faces two main challenges in terms of geographic market definition. The first challenge is to develop a methodology of when a broader than national geographic market is appropriate that would consistently be used in the analysis of similar cases. The main choice that needs to be made is between defining a global relevant market versus a national market with imports as one additional (effective or potential) competitor. The definition of a global relevant market suffers from some problems, in particular, (a) the need to define global market shares, for which information may not be easily available and (b) even when the market is defined as global, the CNDC's evaluation only relates to the effects within the Argentine borders. The alternative is to define a national market, but including imports as competitors. According to the CNDC Guidelines, potential immediate competitors (including existing imports) should be taken into account when calculating concentration indexes. Potential competitors (such as potential imports when trade barriers are low) should be taken into account when analyzing barriers to entry. In some cases, when structural analysis is not enough to reach a robust conclusion, it is important that the merger analysis be complemented by a price analysis that would incorporate the idea that imports do not need to have a large share in the market to be able to exert competitive pressure.

The second challenge is to improve the quality of the analysis in the sense of incorporating more quantitative tools and recent developments in defining whether the relevant geographic market goes beyond the national market. In particular, the introduction of complementary price analysis to incorporate the idea that imports can exert competitive pressure even when the existing volume of trade is low. In this sense, a more formal analysis of the relationship between domestic and international prices, complemented by co-integration and causality analysis, emerges as a natural candidate to go in this direction.

AUSTRALIA

The Australian Competition and Consumer Commission (ACCC) is Australia's competition regulator and is responsible for enforcing the Australian competition rules, set out in the *Competition and Consumer Act 2010* (CCA). The Australian submission focusses predominantly on geographic market definition in the context of the ACCC's merger clearance function.

The mergers test under section 50 of the CCA requires that the merger must not be likely to result in a substantial lessening of competition in any market in Australia, or a state, territory or region of Australia. Section 50 mandates that, when determining whether an acquisition is likely to substantially lessen competition, consideration must be given to the actual or potential level of import competition in the market.

The ACCC is able to consider markets that are broader than Australia. The ACCC may define multiple markets as relevant to its assessment of a merger. These markets may be global, multi-national, national, state-based, sub-state, regional or local.

The ACCC's approach is that, while market definition is a useful tool for merger analysis, by itself it cannot determine or establish a merger's impact on competition. The view expressed by the Australian courts is that market definition is purposive, in that the definition of a relevant market is designed to capture the substitution possibilities and identify the relevant (potential) competitors that may constrain the merged firm in order to assist in the assessment of the likely competitive effects of the particular merger under investigation.

When considering import competition, the ACCC will, in most cases, define the relevant geographic market to be Australia or a part of Australia and take full account of any competitive constraint actually or potentially provided by suppliers located outside Australia that supply goods into Australia.

While supranational market forces often influence the behaviour of merger parties in Australia, it does not necessarily follow that the geographic scope of the market(s) relevant to assessing the competitive effects of a merger should be global or even supranational. This does not mean that global or supranational forces will not be taken into account – it simply means that the competition assessment does not start with a presumption that these forces are likely to substantially constrain parties engaging in the conduct of concern.

Given that Australia shares no land borders with other nations, the definition of the relevant geographic market in many merger assessments and issues with national/international market boundaries are likely to be different in Australia as compared with Europe and the United States. The geographic isolation of Australia means that for many products and services, cross-border transport costs are typically higher relative to other countries with shared land borders. In some cases, this will tend to limit the competitive constraint posed on the merger parties by external sources of supply.

BELGIUM*

The Belgian Competition Authority focuses on geographic market definition with respect to local markets (e.g. using UPP analysis and isochrones), generally relying on EU precedents when markets may extend beyond national borders. However, in one case, *Covalis/Westvlees*, the Authority applied isochrones that went significantly beyond the national borders, using evidence based on current trade flows. No particular challenges have been encountered with respect to geographic markets with a broader than national geographic scope.

BIAC

BIAC agrees with many of the points raised by the Secretariat in its Background Paper. Above all, BIAC views the process of defining a relevant geographic market, especially where a cross-border market may be involved, as essential in providing a frame of reference for cases potentially raising substantive issues. Even where no firm conclusions are reached, the process of market definition remains a useful discipline. While divergent guidance and the complexity of the analysis can prove daunting, especially for younger agencies, BIAC would encourage agencies to engage with market definition rather than seek to avoid it.

More particularly, BIAC agrees with much of the Secretariat's description of the various analytical approaches to defining a relevant geographic market and the challenges associated with each. Agencies now have a wide range of potential approaches available. BIAC is broadly supportive of agencies making use of the full range of approaches, particularly where more traditional tests and approaches do not easily apply to the market under review.

However, this flexibility must, in BIAC's view, be supported by an evidence-based approach and transparency, both as to why particular approaches have been chosen, and as to the analysis itself. Lack of transparency risks encouraging the view (justified or not) that the agency is applying approaches that result in a particular desired outcome. Transparency has the broader benefit of enabling other agencies and market participants to learn for future cases. It also encourages consistency of approach.

Consistency can arguably best be delivered through the publication and application of guidelines, both as to the approach to be adopted and the substantive analysis itself. Where possible, and consistent with underlying legislation and jurisprudence, BIAC encourages agencies to adhere to recognised global standards such as the ICN *Recommended Practices for Merger Analysis*. Guidelines should be regularly updated to take account of agency experience as well as new challenges and trends.

BIAC acknowledges trends such as the globalisation of business and the rise of disruption across many industries. Indeed, businesses engaged in cross border trade, whether "disruptors" or "disrupted", are often forced to deal with these and other issues on a daily basis. These trends are likely to continue in the years ahead. Agencies, as well as multilateral groups such as the OECD and the ICN, may wish where possible to develop approaches that enable agencies to more rapidly understand such markets and the manner in which they can develop.

More generally, BIAC urges agencies to maintain a practical and open approach, in particular a willingness for dialogue with parties and other market participants - at an early stage - as to how the challenges might be addressed.

EUROPEAN UNION*

Market definition is a tool that allows an antitrust authority to identify in a systematic way the boundaries of competition between firms in their quest for customers. This makes market definition the starting point for an analysis of competition forces.

In geographic market terms, the key question is whether after the merger, competitors from other geographic areas will be able to exercise sufficient competitive pressure on the merging companies. Many companies operate on a global scale and compete with various suppliers in different parts of the world. However, market definition is essentially a customer-focused exercise: it is all about finding out what alternative suppliers are available to customers in a given area. If customers cannot rely on suppliers located outside of this area, those other suppliers are not part of the relevant geographic market. Therefore, demand-side substitution will play the primary role in market definition. Supply-side substitution can also play a role in market definition if it can happen in the short term without the companies incurring significant costs or risks.

Finally, market definition is a factual and empirical exercise undertaken on a case-by-case basis. Defining a market is by its very nature a dynamic exercise. The Commission needs to predict the most likely developments after a merger and has to take possible future changes into account. Market definitions are not carved in stone, and are revised if evidence shows that circumstances have changed over time. This flexibility also extends to the application of recent methodologies in geographic market definition that do not focus on national borders in assessing the competitive impact of a transaction, as will be exemplified by a recent case. The Commission has increasingly been finding regional and EEA-wide markets rather than national markets. This is, amongst others, a result of the creation and development of the EU Internal Market over the past twenty years, which has led to a lowering of trade barriers, changing business practices, regulatory harmonization and lowering of transport and business costs at the EU-level.

The Report on "Geographic Market Definition in European Commission Merger Control", co-authored by Professors Lyons and Fletcher, endorses the Commission's approach. It recommends however that there should be greater clarity in Commission's decisions that market definition provides a useful framework for competitive analysis, but is not an end in itself. The authors further recommend that the Commission should take a stricter approach to supply-side substitutability at the market definition stage, by mainly relying on demand-side substitution, and addressing supply-side substitutability at the competitive assessment stage.

The Ball/Rexam merger is a recent example in which international catchment areas and isochrones, geographic differentiation, cooperation with the FTC and CADE and tailored remedies were used to assess and address competition concerns in a broader than national market.

HUNGARY*

The Hungarian Competition Act provides basic and general guidelines on geographic market definition, thereby recognising it as a relevant concept in competition law enforcement. In the practice of the GVH the concept of geographic markets predominantly presents itself within the framework of merger control.

The Hungarian merger regime used to be based on the dominance test where geographic market definition had a well-defined role in helping to determine whether a dominant market position existed or not. Since 2009, however, the GVH has been applying the SLC-test and in doing so the focus has shifted from defining the geographic markets to assessing geographic aspects of competition and their role in offsetting the potentially harmful effects of mergers.

Recently the GVH performed two thorough Phase II merger investigations where the geographic dimensions of competition played a relevant role. In both cases the parties submitted detailed economic analyses based on transportation costs, rational transportation distances and relevant capacities to argue for a broader-than-national geographic market. Again in both cases the GVH decided to fine tune the parties' calculations by using more accurate and more complete data, and to complement the results with other analyses, including assessments of export-import data, past tenders and market practices, the behaviour of competitors and buyers, probable market reactions to various levels of price increase, etc.

By combining the results of various analyses aimed at assessing the geographical dimensions of competition with other results of competitive effects analysis the GVH was able to come to a satisfactory decision in both cases without having to define exact geographic markets. This shows that in practice issues usually related to geographic market definition can successfully and effectively be incorporated into the assessment of competitive effects.

Recent Hungarian case law also suggests that geographic market definition can have an impact on jurisdictional issues such as the scope of a national competition authority's investigation into competitive effects in case of mergers affecting multiple markets in multiple geographic regions.

INDONESIA*

The geographic market is defined by the Indonesian Commission for Supervision of Business Competition (the "Commission") as: "the territory where business actors are able to increase their price without attracting new entrants or losing significant numbers of consumers who switch to other suppliers outside the territory." In defining the geographic market, the Commission considers a company's policy (which determines the availability of a product in a given geographic area), the cost and length of transportation, trade barriers and price correlation.

Defining the geographic market is becoming more difficult due to the vast development of e-commerce and global trading. The Commission has not yet dealt with any cases related to e-commerce and global trading.

While the internet creates competitive advantages that make it a strong competitor against traditional businesses, experts believe that the internet will never eliminate traditional business due to the fact that economic and educational barriers inhibit some consumers from accessing online markets. Furthermore there are inherent risks of fraud and consumers loss associated with the internet that do not exist in the traditional trading context. Therefore defining geographical markets in the presence of e-commerce may still require the consideration of traditional business models.

Geographical market definition in these cases is likely to face two potential risks: (a) expanding the geographic market definition in order to encompass internet sellers, thereby capturing distant traditional sellers that exert no competitive pressures in the relevant market and (b) assuming internet sellers exert equal competitive pressure in all geographic markets in which they compete when in fact not all consumers use the internet to buy the product. In order to avoid these potential dangers, the Commission proposes that competition authorities first define the geographical market of traditional retailers and then consider the effect of internet competition.

The Commission identified data availability issues as a significant challenge in defining geographic markets, especially price data and data on the responsiveness of consumers to price changes. Since the Commission does not have the ability to compel data from other parties, it is highly dependent on data provided voluntarily. This can be misleading, since defendants have an incentive to provide only that data which serves their interests. Further, data provided by the statistical bureau has a disadvantage in that it generally has a two year time lag. Data shortfalls are particularly pronounced in industries with internet-based participants, with which the Commission has limited experience.

In order to overcome these obstacles, the Commission has identified the following steps:

1. Strengthening the Commission by amending Law No. 5/1999 to allow it to confiscate any necessary data.
2. Strengthening the Data and Information Unit so the Commission will not solely rely on the data from business actors, statistical bureau and any other parties.
3. Strengthening cooperation with other competition agencies in order to share experiences regarding geographic market definition, especially in e-commerce and global trade cases.

ISRAEL

In recent years the Competition Division at the IAA have conducted three extensive market studies. Those studies contributed to the accumulation of a substantial body of knowledge in the scope of local geographic markets. Our experience allow us working with complex economic and geospatial data and help developing models that differ across markets, with respect to the industry in question. The models defines local areas around suppliers and customers with the different approaches presented.

The capabilities and methodologies constructed are important and provide a rich tool set that assists the IAA in approaching local market. This technological and methodological framework helps the IAA evaluate cases in a quick, efficient, and consistent manner.

JAPAN

The view of defining a market in a review of business combination is described in the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (hereinafter referred to as the “Business Combination Guidelines”), and the Japan Fair Trade Commission has defined a market (including a geographic range) in each case according to the Business Combination Guidelines.

As the basic view of defining the geographic range, as well as the product range, it is determined from the perspective of substitutability for users between the products supplied in each area. The degree of substitutability between the products supplied in each area can very often be determined by the behavior of users and suppliers, and the existence of problems regarding the transportation of the product.

In addition, when the geographic range is defined, besides the substitutability for users, if necessary, consideration would also be given to whether suppliers are able to switch the manufacture and sale of one area to another without substantially added cost and risk within a short period of time (the substitutability for producers.).

To assess the behavior of users and suppliers and the existence of problems regarding the transportation of the product, the following factors are considered: (i) business area of suppliers, the area for users to purchase, etc.; (ii) features of goods; and (iii) type or cost of transportation.

KOREA*

In Korea, the FTC uses the same methodology for geographic market definition as it does for product market definition. The geographic market definition refers to the entire geographic area in which major consumers can switch to alternative products when there is a significant, non-transitory increase in the price of a product while the price in all other geographic areas remains the same. Specifically, the geographic market scope is the smallest area within which a hypothetical monopolist could impose a small but significant price increase for a considerable period and could profit from the increase.

In a 2003 merger review by the KFTC involving the production and sale of Soju (Muhak Co., Ltd and Daesun Distilling Co), geographic market definition was a particularly contentious topic. The determination regarding whether the merging parties were in the same geographic market or not (given that they each held a dominant market share of over 80% in their respective regions) was based on whether regional customers would switch to another soju brand in response to a SSNIP. A critical loss analysis was conducted based on interviews with consumers and profit margin evidence from the financial records of the two firms. Particularly controversial subjects included the price increase used for the SSNIP (which, based on the loyalty of consumers, was set at 10-30% by the High Court), and the consideration of variable costs. The KFTC's analysis found that the two regions constituted a single geographic market, and therefore that the combination would have caused a severe restriction of competition.

In the merger of E-land and Carrefour in the hypermarket industry, the geographic market delimitation was the main issue of the case. The merging parties argued that while it is true that franchise stores of a hypermarket operate in different regions, important operational decisions including price policy, opening hours, product composition and store design are made at the central headquarters and a hypermarket competes against other operators on a national level. Therefore, the parties claimed that the relevant market should be nation-wide. The KFTC decided that as the two enterprises sell products closely related to customers' lives, customer welfare should be considered instead of the competition dynamics of the enterprises when delimiting the relevant market. After evaluating changes in the post-combination market share and HHI, the KFTC concluded that restrictions on competition are likely to occur if the combination takes place. The result of a natural experiment also indicated that E-land could increase its product prices in three cities after concluding the combination. Based on these findings, the KFTC approved the combination on the condition that the enterprise sells an E-land or Carrefour Korea franchise store in the three cities.

With respect to the merger of SK Telecom and CJ Hellovision (internet and cable television firms), the main issue was whether to widen the geographic market to a national level or to delimit it to the broadcasting regions of CJH. The KFTC looked into many factors including the result of survey and supply-side substitutability. In addition, decisions on past cases related to cable broadcasting were examined. The KFTC decided to delimit the geographic market to the broadcasting regions of CJH. The KFTC noted that the merging parties' argument that the geographic market should be all of Korea based on the chain of substitutability theory to the case seemed reasonable. However, due to a lack of data and domestic and international cases that applied such theory, the claim was not reflected in the final decision of KFTC.

The KFTC has been working to make objective and fair decisions on competition cases by looking into scientific data, taking in various opinions and reviewing the case results of experienced competition authorities. The cases introduced in the report shows the commitment of the KFTC to objective and fair decision making. The KFTC plans to utilize effective methods for the promotion of fair competition by studying international cases and conducting its own research.

LITHUANIA

The decision by the Competition Council of the Republic of Lithuania (the CC) on whether (and how) to define a geographic market depends on a specific case and not on the geographic market being national or broader in scope. The Lithuanian legislation does not specify the broadest possible geographic market definition.

When defining geographic markets the CC applies certain models depending on the case (e.g., import elasticities, isochrones, price correlation analysis and SSNIP test). Independently of how the geographic markets might be defined (narrower than national, national, or broader in scope), the tools and methodologies used are the same.

When defining markets with a national or broader scope, market characteristics, that might be determinative, will very much depend on the product market definition. Depending on a case various major market characteristics (regulatory and trade barriers, cultural and linguistic factors, current trade flows etc.) have been determinative either by themselves or in combinations.

The CC does not have a documented procedure for transport cost analysis. In order to analyse transport costs for a product in question the CC gathers factual data from the plausible market players (including, if possible, their own evaluation of transportation costs). The CC uses a conservative approach when it comes to estimating transport costs for the geographic market definition.

The CC always evaluates possible supply diversion and it has been done mostly by using the “rapid entrant” concept. Even though the CC has not recently had a case where the concept of “swing capacity” has been used, the CC is fully aware of this concept and would apply it if needed.

The CC holds the view that geographic market definition usually comes prior to determining whether there are any competition issues in that particular market.

When it comes to remedies, the CC holds the position that remedies have to be applied to the whole geographic market. However, in certain cases when applying remedies geographic market definition is not needed.

Although the CC co-operates with other national competition authorities, the CC still faces certain problems when obtaining information from firms abroad.

MEXICO*

(Mexican Federal Economic Competition Commission)

The Federal Economic Competition Law (FECL) and its Regulatory Provisions do not explicitly define the concept of "relevant market"; however, through the criteria contained in its provisions, it is concluded that a relevant market consists of all the products that are reasonably interchangeable or substitutable, according to the purposes for which they were made, considering the characteristics of price, use and quality.

The case-law defines the concept of "relevant market" as the geographic area where similar products or services are offered or demanded. In this regard, the relevant market exists when a set of products or services identical or similar are available to the consumer in an extensive enough territory, so the consumer is willing to get the product or service at some point in that geographic area, over a period of time that he is willing to wait to meet his need. The case-law concludes that the basic conditions needed to define the relevant market are: i) whether the product can be substituted by another product, which requires a substitutability test; ii) distribution costs; iii) ability of consumers to obtain the product in another market and iv) regulatory restrictions.

The Federal Economic Competition Commission (COFECE) considers several elements such as the products or services offered by economic agents in the market; identifies potential substitutes, distribution and input costs; considers costs and the likelihood of users turning into another markets or suppliers; and economic and regulatory restrictions that limit users access to alternative sources of supply. The Commission also assesses the participation of the economic agents involved in the relevant markets and related markets, the existence of barriers to entry, the existence and power of its competitors, the possibility of access to input sources, as well as its recent behaviour, to determine if they have substantial power in the relevant markets. Thus, this a case-by-case analysis in which all relevant factors are taken into account.

In COFECE's latest investigations, the geographic scope of retail or real estate markets has been mainly local, while geographic markets for manufacturing industries can be defined as national, NAFTA, international or global markets, depending on trade barriers, imports, transportation and administration costs, among other factors.

In recent years, COFECE has conducted more sophisticated and detailed analysis of the relevant geographic markets. For example, in a recent retail merger in the Mexican market of supermarkets and department stores, the Commission defined the geographic markets using circular influence areas in which the radius was determined by consumers' travelling times. Isochrones were used for the first time in a COFECE's resolution as a tool for determining the direct competition faced by each store.

In another recent merger investigation in the market of bond paper, the Commission defined the geographic market as broader than national. The geographic assessment of the market showed that a large proportion of the imports of paper come from the United States and Canada, due to, among other things, the fact that transport costs are low and there are no countervailing duties or tariff barriers for most countries (except Brazil). In August 2012, a preliminary countervailing duty on imports of paper from Brazil was established. From that point, an accelerated drop in imports from that country was observed. COFECE assessed that imports in this market represent a competitive constraint for domestic producers. And in view of this evidence, the Commission designed a remedy establishing that the merging parties should refrain from requesting any trade investigation related with unfair trade practices in this market.

MEXICO

(Federal Telecommunications Institute)

In Mexico, the purpose of the geographic market definition is to assess the scope of the area where an economic agent could have substantial market power. Such area includes the location of all the agents that exercise a competitive constraint on the product under study.

The geographic market definition is applied by the Mexican antitrust authorities—the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT)— as part of the definition of relevant markets under four procedures: i) the assessment of mergers; ii) abuse of dominance claims or illegal mergers; iii) special procedures to determinate the existence of essential supplies or barriers to competition; and iv) special procedures to assess competition conditions and economic agents with substantial market power.

The IFT is the authority in charge of reviewing and authorizing the licensing and the transfer of spectrum licensing rights, among other regulatory procedures in the telecommunications and broadcasting sectors. These regulatory procedures are analyzed as mergers and it is necessary to define a geographic market.

In order to provide a clear understanding of the criteria that the authority follows to evaluate mergers in the telecommunications and broadcasting sectors, the IFT is preparing a Merger Guidelines document expected to be issued to public consultation at the end of 2016. These guidelines will include, among other instruments, the main analytical tools and techniques, as well as the methodologies used in geographic market definition.

The Federal Economic Competition Law (FECL) and the Regulatory Provisions of the FECL establish two main aspects for the definition of relevant markets: the geographic area in which a conduct is performed or has consequences and the definition of the goods or services affected by the practice, based on the criteria of substitution.

The IFT has not had major difficulties getting information from foreign economic agents during the study of the geographic markets under merger files or abuse of dominance claims and IFT has found very useful to search for public, tested and confirmed information, published by foreign antitrust or sectorial authorities.

There are some relevant cases that the IFT has investigated in fixed satellite services and commercial radio services.

NEW ZEALAND

The New Zealand Courts and the Commerce Commission define markets in a way that best isolates the key competition issues that arise from the merger or anti-competitive conduct. Geographic markets are defined with reference to both demand- and supply-side substitution. The Commission's general approach to defining the geographic dimension of the market involves assessing the region in which a hypothetical monopolist would profitably impose a SSNIP.

The Commerce Act 1986 defines a market as a market in New Zealand. This statutory definition was considered by the Courts in the Air New Zealand case, which involved several airlines fixing the prices of air cargo services.[1] The Court found that inbound air cargo services were supplied in a market in New Zealand, and that the Court had jurisdiction to hear the Commission's case in full. In this case, the arrival and handling of cargo in New Zealand, and the demand for cargo shipments from New Zealand importers, were key factors in the Court's finding. The Court also found that markets need not be "within" New Zealand; it is sufficient to be "in" New Zealand.

The Commission has rarely had to define a wider market than New Zealand. The general approach in merger cases where imports are available to consumers has been to define the market as nationwide, and then consider imports as a constraint at the competition analysis stage.

Import competition plays an important role in a small, open economy like New Zealand. Imports often make up a large share of a market, and may sometimes have high supply elasticity. The Commission often examines how imports would constrain the post-merger entity. Imports are looked at in three different scenarios:

- an overseas supplier could choose to export to New Zealand
- a New Zealand firm could import from overseas
- consumers based in New Zealand could import directly.

Import competition is taken into account by the Commission in competition analysis, but geographic market boundaries are not automatically extended to include all sources of import competition. The reason imports are analysed in this way is because not all suppliers from the origin countries are potential exporters. Establishing a significant market presence in New Zealand through imports may require a step change in investment, such as significant advertising and promotion and establishing distribution facilities. Also, import competition may not be effective in some markets, or may play a more limited role because imports are differentiated or niche products.

Despite the liberalisation of trade and regulations between New Zealand and Australia under the Trans-Tasman agreements, market competition from Australia has not generally been sufficient to extend the geographic market to Trans-Tasman.

1 *Commerce Commission v Air New Zealand Ltd* [2011] HC Auckland.

ROMANIA

Romania does not have in its competition legislation a maximum level for defining the geographical market. Even so, the great majority of cases involve a market definition that is national or narrower in scope. There are also markets that are left open, due to a lack of competition concerns on the narrowest definition. RCC is continually assessing the need to define a broader scope of the market and takes in consideration all the relevant factors and relevant case study. The online market is still restricted at national level due to language, cost of transportation, access to internet, paying methods etc. But in this aspect things are evolving, and RCC is constantly monitoring the changes that are taking place in this sector.

RUSSIAN FEDERATION

According to the Federal Law of 26 July 2006 N 135-FZ "On Protection of Competition", defining a product market is impossible without determining its geographical boundaries. This is done as a step of competition analysis in accordance with the Procedure of Analysing State of Competition on Commodity Markets. This step includes **three stages**: the preliminary determination of geographic borders, the identification of conditions (economic, technical, etc.) that limit the economic possibility of acquiring the good, and final determination of geographic boundaries. Based on the markets definition, they can be referred to as **federal, interregional, regional and local markets**.

There are **several methods** that can be used by the FAS Russia for defining product markets' geographic boundaries. The authority's classic choice between them is the **"hypothetical monopolist test"**. While undertaking it, the FAS Russia asks customers at which sellers and in which quantity they would prefer to buy the good if its price increased for longer than 1 year by 5-10% on the pre-defined geographic market, while the price outside this market remained the same. The geographic borders of the commodity market in question are then extended so as to include the territories where customers would continue to buy the product in question even after this increase in price. At the same time, opportunities of deliveries are taken into consideration: if due to acquisition of the good delivered from another area customers suffer significant additional costs that exceed, as a rule, 10 percent of the weighted arithmetic mean of prices for the good available to customers located within that area, then it is considered as a separate market.

It is worth adding that in the **sphere of natural monopolies** for defining geographic markets a special procedure is used.

The same is true for cases involving companies operating on the **markets of information and communication technologies (ICT).** The procedure in such cases takes into account many aspects related to the specificity of goods' circulation on markets.

For instance, given the zero cost of replication, reproduction and transportation of the ICT goods and the global nature of production and consumption, the geographic boundaries may initially be defined as global, however while talking about certain product markets it is necessary to take into account the particularities related to goods' consumption (i.e., consumer protection issues) that may affect the customers' behaviour. The FAS Russia had such an experience while considering cases on the markets of online sales.

Moreover, it is necessary to take into account the circulation of goods on the markets that are intrinsically related with the functioning of the ICT markets: the majority of the ICT goods (such as software) do not present an independent consumer value without the appropriate hardware. This was taken into account while considering the case on the Google's abuse of dominance.

To conclude, the FAS Russia has accumulated experience in definition of geographic markets, including in the sphere of digital economy, and it should be emphasized that the authority supports the idea of **international cooperation** and exchange of antitrust enforcement experience in this complex but crucial field.

SPAIN*

In Spain, 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.

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.

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.

This process involves the analysis of market characteristics (transport costs, regulations, taxation, language, etc.), precedent cases, business strategies, trade flows, chains of substitution, market participant views and market changes. Markets that can be national or broader in scope usually have more available evidence, such as databases of trade flows,that allow analysis including price elasticities of imports and exports. According to the CNMC's experience, key factors for markets with a national or broader scope include regulatory, cultural and linguistic factors, transport costs and physical barriers to trade, distribution logistics, consumer habits, chains of substitution and import flows.

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. Some markets which were originally local or national in scope have expanded as a result of the new trading possibilities. The development of online trade has also increased the incidence of multi-sided business models. 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. 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.

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. 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. Cooperation between competition authorities, such as the ECN, may be an effective mechanism to address these challenges.

SWEDEN

In this contribution, the Swedish Competition Authority (SCA) focuses on the impact of online retail on the definition of geographic markets. This note refers to some of the SCA's antitrust and merger cases where the growth of digitalisation and internet-based retailers has, to a varying extent, been part of the analysis.

The growth of e-commerce has increased the number of alternative suppliers that are available to consumers, who are no longer limited to the retailers that have physical presence within a certain distance from where they live or work. Hence, e-commerce has the potential of widening the relevant geographic markets in competition law cases. From a competition perspective this development is of course very welcome as it means that consumers have more choice and more suppliers compete in the market.

However, as the cases outlined show, the emergence of e-commerce has not always, or at least not yet, resulted in wider geographic markets than would have been the case in an "off-line world".

It should be noted that the e-commerce sector continues to develop, and that the definition of relevant markets and the competitive assessment in future cases may differ from past cases. In particular, several initiatives from the European Commission to create a digital single market can make cross-border e-commerce easier and more affordable.[2] More cross-border trade may justify a wider geographic market, or alternatively be taken into account in the competitive assessment as constraints from outside the geographic market.

2 See e.g. the European Commission's press release of 6 May 2015, "A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen", IP/15/4919.

CHINESE TAIPEI*

The FTA defines a "relevant market" as a geographic area or coverage wherein enterprises compete in respect of particular goods or services. The Principles set forth basic principles of the FTC in defining relevant markets, as well as factors that must be taken into consideration in defining a product market and a geographic market.

When defining a geographic market, The FTC regards demand substitution as the primary review item in defining relevant markets, and depending on the features of such goods or services, the FTC may also consider supply substitution. Specific factors considered by the FTC include: price variations between different regions and shipping costs, features and uses of the products, the trading costs to trading counterparts when making product purchases from different regions, the convenience to trading counterparts in obtaining the products, whether an adjustment is made to product prices when trading counterparts choose to make purchases in different regions, the viewpoints of the trading counterparts and business competitors regarding the substitution between product regions, the provisions of relevant laws or administrative regulations, and other evidences related to the definition of a geographic market. In other words, the FTC will consider industry characteristics, the trading situation, foreign trade, language, culture, and the provisions of relevant laws or administrative regulations when delineating a geographic market, in order to assess an enterprise's market power and the impact of its conduct on market competition.

Furthermore, when defining relevant markets, the FTC reviews reasonable substitutability between the goods or services in question and their geographic regions and other goods or services and their geographic regions. In addition, the FTC also applies the cross-elasticity test and the hypothetical monopoly test to define relevant markets. Due to the large number of analytical methods for defining markets, the FTC will consider the facts of the case, the features of the goods or services in question, evidence and data, in order to choose an appropriate analytical method for handling a case. However, the above-mentioned analytical methods are not exhaustive, and the FTC doesn't set prioritization to the use of any of the analytical methods. The FTC once chose the LIFO and LOFI of the Elzinga-Hogarty method to define a geographic market.

In delineating the market of a specific industry, the FTC may refer to the opinion of the competent authority in charge of the specific industry. The FTC has also established corresponding administrative rules for special industries, such as cable TV, telecommunications and digital convergence. Therefore, the FTC complies with such principles or regulations for defining relevant markets in specific industries.

UKRAINE

Antimonopoly Committee of Ukraine's both regulations and practices stipulate approach under which territorial (geographic) market of certain goods (group of goods) is defined by setting a minimal territory outside which purchasing goods (group of goods) within the group of substitute goods (group) is impossible or impractical for consumers.

Bodies of the Antimonopoly Committee of Ukraine define the territorial limits of markets in all cases of applications consideration, cases on concentration of undertakings and cases on abuse of monopoly (dominant) position on the market. However, during investigations of cases on anticompetitive concerted actions of undertakings, the definition of the market, including its geographic boundaries, is carried out not in all cases, but only if it is necessary to evaluate the cumulative effect of the concerted actions participants on the market situation, the primary indicator of which is their total market share. Market is not usually being defined in cases on bid rigging. Market definition is also not conducted in most of cases on the preliminary and follow-up control over public authorities' activity that could affect the competition (in this case the nature of state intervention in business processes is being investigated) and in the cases on unfair competition. In addition, the need or lack of need for the market definition, including defining of its geographical boundaries, depends on the content and nature of the measures taken by the Antimonopoly Committee of Ukraine, instead of the expected geographical borders of the relevant market.

According to paragraph 2 Article 2 of the Law of Ukraine "On Protection of Economic Competition" the Ukrainian legislation on protection of economic competition shall be applied to such relations that ensure from or can have an impact on economic competition in the territory of Ukraine. A sub law "Methodology Applied to Determine Monopoly (Dominant) Market Position of Economic Entities" envisages the definition of national or regional markets. Consequently, there is no legal basis for taking decisions on markets geographic boundaries of which are wider than the territory of Ukraine. However, when considering individual cases on concentrations, cases on abuse of dominant position, in practice the Committee had to deal with situations where product market actually exceeded the national territory of Ukraine.

The biggest challenge with respect to geographical market definition is a scope of markets of differentiated products with big amount of vertical distribution links, especially, when one link operates with different mechanisms of goods flow (e.g., ordinary and Internet trading). Moreover, physically one and the same products at the different distribution links on markets may form different geographical market borders.

UNITED STATES

In assessing competitive effects, the U.S. Federal Trade Commission and the Department of Justice (together "the Agencies") investigate its context. The Agencies' antitrust analysis of the scope of geographic markets in merger cases begins with the Horizontal Merger Guidelines. The Guidelines note that the "arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers." Generally, the Agencies define relevant geographic markets around the locations of producers unless it is possible to discriminate based on customer location, and then the Agencies define the relevant geographic markets as regions into which sales are made. In some instances a geographic market may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area and some geographic markets are global. Furthermore, both Agencies have encountered matters in which they have concluded that it is appropriate to analyze geographic markets both from a national and from a local perspective, determining that national markets and local markets may exist in tandem.