Unclassified

-- UNITED STATES --

1. Introduction

1. This paper discusses techniques, and provides examples of cases, where either the U.S. Federal Trade Commission ("FTC") or the Antitrust Division of the Department of Justice ("DOJ") (together, "the Antitrust Agencies" or "Agencies") alleges a geographic market to inform its analysis. In assessing the competitive effects of particular conduct or of a transaction, the FTC and DOJ will investigate its context, which can include the relevant companies' shares of a defined relevant product and geographic market.

2. While market shares are important elements of an antitrust assessment in the United States, they are not dispositive. Many cases call for a detailed analysis of competitive harm, and in such cases the Agencies often employ a variety of economic methods to assess competitive effects. Some of the tools the Agencies use—including defining a relevant geographic market—are described in the Agencies' 2010 Horizontal Merger Guidelines.[1] The Agencies employ a flexible approach to the use of these tools that depends on the facts of each matter when assessing potential harm to competition and consumers.

2. Geographic Market Analysis in the U.S.

3. The Agencies' approach to geographic market definition is consistent with and informed by that taken by U.S. courts. In *Brown Shoe, Inc. v. United States*

6. Section 4.2 of the Guidelines cites a number of factors that may be relevant to the determination of the appropriate geographic market: transportation costs, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability.[6] For firms outside the United States, these and other factors, such as exchange rates, may also affect their ability to compete, and the Agencies will consider such factors where they are relevant.[7] All of these factors are evaluated by applying the hypothetical monopolist test, which asks whether a monopolist over a candidate market would elect to raise price significantly.

7. Should the Agencies determine that a defined geographic market provides a useful context for gauging a merger's competitive impact, they may use econometric tools to help reveal the scope of such a market. For example, parties sometimes produce loyalty card data in mergers taking place in a variety of industries, including casinos, supermarkets, and movie theatres.[8] These data can be a valuable input into models of consumer choice, including purchase location, which then can be used to analyze geographic markets. The FTC also has used a similar method in its analysis of hospital mergers.[9]

8. Alternatively, in at least one industry, economists at the Agencies have conducted analysis of market data following entry and exit events to shed light on substitution patterns between geographically differentiated competitors. This information was used to assess the importance of companies' geographic proximity to customers in determining the appropriate scope of the relevant geographic market.[10]

3. Geographic Markets and Targeted Customers

9. 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.

10. The FTC encountered this in its recent review of the *Sysco/US Foods* merger, where the Agency's analysis revealed that competition for national customers was different from competition for local customers. While it was clear that all customers received their product from a nearby distribution center, the Agency also determined that some customers, because of the size and location of their operations, required suppliers with a nationwide presence and the ability to offer other important services. As a result, the FTC alleged that national customers prefer to purchase from broadline distributors that can service all of their locations, offer centralized billing and ordering, and combine volume discounts for greater savings.[11]

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6 *See id.*

23. For example, in its recent challenge to Superior Plus Corp.'s proposed acquisition of Canexus Corp., the FTC alleged that North America was the relevant geographic market.[18] In that matter, U.S. customers accounted for about 75% of all North American sales of sodium chlorate, the relevant product, and received product from plants throughout the U.S. and Canada. Freight costs were low, allowing for shipment to customers throughout the continent, but almost no sodium chlorate was imported to North America because imports were "prohibitively expensive and complicated by special handling requirements."[19] Based on the facts of this case, the FTC determined that the relevant geographic market was not bounded by national borders and that the practicalities of the businesses involved supported a broader geographic market.

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28. Similarly, in some instances, other U.S. agencies or authorities establish the scope of a geographic market. For example, the U.S. Food and Drug Administration ("FDA") has authority to approve the sale and marketing of pharmaceuticals in the United States. Thus, in cases involving pharmaceuticals, the Agencies must rely on the determination of the FDA when determining the scope of a geographic market, as no company can market or sell a pharmaceutical in the United States without FDA approval.

6. Conclusion

29. For the reasons discussed above, the Agencies employ a variety of methods to determine the scope of the geographic market in merger and conduct cases.