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### Working Party No. 3 on Co-operation and Enforcement

#### GEOGRAPHIC MARKET DEFINITION

-- Note by the United States --

28-29 November 2016

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*More documents related to this discussion can be found at [ww.oecd.org/daf/competition/geographic-market-definition.htm](http://www.oecd.org/daf/competition/geographic-market-definition.htm)*

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-- 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.<sup>1</sup> 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*, the U.S. Supreme Court instructed that the geographic market employed in a given case must “both correspond to the commercial realities of the industry and be economically significant,” requiring a “pragmatic, factual approach” to market definition, rather than a formalistic one.<sup>2</sup> Thus, the Court recognized that determinations will vary from case to case and that “although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area.”<sup>3</sup>

4. Under Section 7 of the Clayton Act,<sup>4</sup> plaintiffs, including the Antitrust Agencies, typically allege both product and geographic markets in which a merger is likely to substantially lessen competition. That stems from the statute’s reference to “any line of commerce” and “any section of the country” in framing a merger’s potential impact on competition. In their merger analysis, however, the Agencies consider any reasonably available evidence that may bear on the question of whether a transaction could substantially lessen competition.

5. With this in mind, the Agencies’ antitrust analysis of the scope of geographic markets in merger cases begins with the 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.”<sup>5</sup>

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<sup>1</sup> See U.S. Dep’t of Justice and the Federal Trade Comm’n, *Horizontal Merger Guidelines* (2010) (“Merger Guidelines”), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

<sup>2</sup> 370 U.S. 294, 336-37 (1962).

<sup>3</sup> *Id.*

<sup>4</sup> 15 U.S.C. § 18.

<sup>5</sup> Merger Guidelines § 4.2.

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

### 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.<sup>11</sup>

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<sup>6</sup> See *id.*

<sup>7</sup> See U.S. Dep't of Justice and the Federal Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* (1995).

<sup>8</sup> See, e.g., Seth Sacher, "Analyzing Mergers in the Casino Industry—No Need to Gamble on a New Paradigm," *The Threshold*, 12-20 (Spring 2005).

<sup>9</sup> See Joseph Farrell, et al., "Economics at the FTC: Hospital mergers, authorized generic drugs, and consumer credit markets," 39 *Review of Industrial Organization* 271-296 (2011).

<sup>10</sup> See Daniel Hosken and Steven Tenn, "Horizontal Merger Analysis in Retail Markets," in Emek Basker (ed), *Handbook on the Economics of Retailing and Distribution* (2016).

<sup>11</sup> See Complaint, *In re Sysco Corp.*, Dkt. No. 9364 (F.T.C. Feb. 19, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf> [hereinafter Sysco Complaint]; see also *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

11. The existence of some customers whose supply options were more limited than others was also a factor in the FTC’s recent challenge to Staples’ proposed acquisition of Office Depot.<sup>12</sup> The FTC alleged, and the court agreed, that the acquisition would significantly reduce competition nationwide in the market for consumable office supplies sold to large businesses. The evidence showed that large business customers with locations throughout the U.S. or in multiple U.S. regions require an office supplies vendor with national or multi-regional distribution capabilities. Staples and Office Depot were the only two office supplies vendors able to provide a combination of products and services on this basis.

#### 4. Multiple Geographic Markets Affected by a Particular Transaction or Conduct

12. Occasionally, a transaction or conduct may harm consumers in multiple geographic markets. Both Antitrust 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.<sup>13</sup>

13. In the FTC’s action to block the merger of Sysco and US Foods, the FTC alleged that the merger would eliminate competition between the parties in both the national market and in numerous local areas for broadline foodservice distribution.<sup>14</sup> Viewing the parties as “compet[ing] to provide broadline foodservice distribution to National Customers through a network of distribution centers” and some customers with a “single location or a few locations” as requiring “proximity to distribution centers because they often need frequent or next-day deliveries,” the FTC concluded that it was appropriate to analyze the effects of the transaction both from the perspective of national customers and from the perspective of local customers in areas where the companies competed.<sup>15</sup>

14. Another industry where national and local markets may exist in tandem is wireless telecommunications. Traditionally, DOJ examined the competitive impact of wireless mergers by looking at a series of local markets. Many of these mergers involved one of the big national providers acquiring a regional provider. When AT&T attempted to acquire T-Mobile in 2012, however, the transaction involved two of the four nationwide wireless providers. DOJ filed suit to block the merger, alleging anticompetitive effects in both local and national markets, and the parties abandoned the transaction shortly thereafter.<sup>16</sup>

15. Local cellular marketing areas (“CMAs”) were the geographic markets, although the largest four carriers competed nationwide, and the acquisition would have had nationwide competitive effects affecting all local markets. Local CMAs were still important, however, because most customers use mobile wireless telecommunications services at and near their workplaces and homes; they purchase services from providers that offer and market services where they live, work, and travel on a regular basis.

<sup>12</sup> See Complaint, *In re Staples, Inc. and Office Depot, Inc.*, Dkt. No. 93678 (F.T.C. Dec. 7, 2015), available at [https://www.ftc.gov/system/files/documents/cases/151207staplesoffdepot\\_pt3cmpt.pdf](https://www.ftc.gov/system/files/documents/cases/151207staplesoffdepot_pt3cmpt.pdf); see also *FTC v. Staples, Inc.*, 2016 U.S. Dist. LEXIS 64909 (D.D.C. 2016).

<sup>13</sup> See, e.g., *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); see also DOJ cases *U.S. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V.*, case filings available at <https://www.justice.gov/atr/case/us-v-anheuser-busch-inbev-sanv-and-grupo-modelo-sab-de-cv>, and *U.S. v. AT&T Inc., T-Mobile USA, Inc. and Deutsche Telekom AG*, case filings available at <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-att-inc-et-al>.

<sup>14</sup> See Sysco Complaint; *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015).

<sup>15</sup> Sysco Complaint ¶¶ 36, 40. Notably, the FTC alleged in its complaint that firms selling products into a given local market, even if they were located outside the boundaries of the geographic market, could competitively constrain the parties. As long as a company was “currently selling broadline distribution services into the relevant geographic market or [was a firm] to which customers could practicably turn for broadline foodservice distribution,” it would competitively constrain the parties. *Id.* ¶ 49.

<sup>16</sup> Case filings available at <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-att-inc-et-al>.

16. DOJ's complaint alleged local geographic markets for mobile wireless telecommunications services defined by CMAs. AT&T and T-Mobile competed against one another in CMAs that collectively encompassed a large majority of U.S. mobile wireless telecommunications customers, and competed head-to-head in at least 97 of the top 100 CMAs in the U.S. An appendix to the complaint identified those 97 CMAs as a relevant geographic area in which the transaction likely would substantially lessen competition for mobile wireless telecommunications services.

17. On the other hand, AT&T and T-Mobile (and the other two largest carriers) competed on a national level by advertising nationally, having nationally recognized brands, and offering pricing, plans, and devices available nationwide. They released their new devices and system technology to the public simultaneously nationwide. Because of the national decision-making of the largest carriers, DOJ concluded that there was nationwide competition across local markets, and therefore also considered the competitive effects of the transaction at a national level.

18. Another case for which DOJ defined both local and national markets was *ABI/Grupo Modelo*,<sup>17</sup> where DOJ alleged that the acquisition would substantially lessen competition in the market for beer in the United States as a whole and in at least 26 metro areas across the U.S. The U.S. beer industry is highly concentrated. At the time of DOJ's complaint in 2013, two firms accounted for approximately 65% of all sales nationwide. ABI accounted for 39%, while MillerCoors accounted for 26%. Modelo, the third largest seller, had only a 7% share, but DOJ alleged that ABI and Modelo's combined national share understated the effect of eliminating Modelo as a competitor both because Modelo's share was substantially higher in many local areas than its national share, and because of the interdependent pricing dynamic between the largest U.S. brewers.

19. In the complaint, DOJ identified 26 local geographic markets. Consumers in each of them benefitted from head-to-head competition between ABI and Modelo, and in each the acquisition would have substantially lessened competition. DOJ determined that the relevant geographic markets were best defined by the locations of customers who purchase beer rather than by the locations of breweries. Brewers develop pricing and promotional strategies based on assessment of local demand for their beer, local competitive conditions, and local brand strength. Thus, the price for a brand of beer can vary by local market.

20. Brewers can price differently in different locations because arbitrage across local markets is exceptionally difficult. Consumers buy beer near their homes and typically do not travel to buy beer in other areas when prices rise. Distributors' contracts with brewers and importers also contain territorial limits and prohibit distributors from reselling beer outside their territories, and state laws and regulations make arbitrage difficult. For these reasons, DOJ found that the 26 local markets were relevant geographic markets.

21. In addition, brewers compete on a national level. Decisions about beer brewing, marketing, and brand building typically take place on a national level. Most beer advertising is on national television, and brewers compete for national retail accounts. Pricing strategy also originates at a national level. For this reason, DOJ found that the United States was also a relevant geographic market.

## 5. Supranational and Local Markets

22. The Agencies do not restrict their analysis to national borders when the competitive realities of a case lead to a conclusion that the appropriate geographic market is delineated by something other than state or national boundaries.

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<sup>17</sup> See *supra* note 13.

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.<sup>18</sup> 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.”<sup>19</sup> 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.

24. Another case involving a North American market was *Continental/Veyance*, in which DOJ alleged that the relevant geographic market for commercial air springs used in vehicles was North America, after reviewing transportation costs, import taxes, required inspections and qualifications by US-based customers, and issues related to lead time for delivery, shipment delays, and the difficulty of correcting orders from outside North America.<sup>20</sup>

25. Some geographic markets are global, *e.g.*, aircraft engines. Other markets, where the geographic scope for competition is unlikely to change with technological evolution or regulatory changes, may by their nature be regional or even local. Examples include broadcast television spot advertising, radio advertising, waste collection and disposal, aggregates (the material used to build roads), movie theatres, food and agricultural products (including bread, milk, flour, and chickens), health insurance, and off-street parking services.<sup>21</sup>

26. In markets with regulatory barriers, the scope of the geographic market may be coterminous with the scope of regulatory authority.

27. For example, in the FTC’s case against the North Carolina State Board of Dental Examiners, the defendant dental board was charged with interpreting the state statute governing the practice of dentistry and had licensing authority over all dental practices in the state of North Carolina. Therefore, the FTC determined that the appropriate geographic market was limited to the state of North Carolina.<sup>22</sup>

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<sup>18</sup> See Complaint, *In re Superior Plus Corp. and Canexus Corp.*, Dkt. No. 9371 (June 27, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160627superiorcanexuscmpt.pdf>.

<sup>19</sup> *Id.* ¶ 28.

<sup>20</sup> Case filings available at <https://www.justice.gov/atr/case/us-v-continental-ag-and-veyance-technologies-inc>.

<sup>21</sup> See, *e.g.*, *U.S. v. CBS Corp. and American Radio Systems Corp.*, case filings available at <https://www.justice.gov/atr/case-document/competitive-impact-statement-58>; *U.S. v. Standard Parking Corporation, et al.*, case filings available at <https://www.justice.gov/atr/case/us-v-standard-parking-corporation-et-al>; *U.S. v. Allied Waste Industries, Inc. and Browning-Ferris Industries, Inc.*, case filings available at <https://www.justice.gov/atr/case/us-v-allied-waste-industries-inc-and-browning-ferris-industries-inc>; *U.S. and Plaintiff States v. AMC Entertainment Holdings, LLC and Kerasotes Showplace Theatres, LLC*, case filings available at <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-amc-entertainment-holdings-llc-and-kerasotes-showplace-theatres>.

<sup>22</sup> See *In re The North Carolina Board of Dental Examiners*, Docket No. 9343 ¶ 7 (June 17, 2010), available at <https://www.ftc.gov/enforcement/cases-proceedings/081-0137/north-carolina-board-dental-examiners-matter>; *aff’d*, 717 F.3d 359 (4th Cir. 2013), *aff’d*, 135 S. Ct. 1101 (2015).

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.