Guidelines on the Definition of Relevant Market

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China's Anti-Monopoly Commission, which oversees enforcement of the country's year-old Anti-Monopoly Law (AML) directly under the State Council, has released guidelines defining the important concept of "relevant market" that are designed to help other antitrust enforcement agencies determine whether a violation of China's landmark antitrust law has occurred. The Guidelines on the Definition of Relevant Market (Relevant Market Guidelines) are expected to help all three agencies— the Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC), and the National Development and Reform Commission (NDRC)—that enforce the Anti-Monopoly Law under the leadership of the Anti-Monopoly Commission.

China Law Update has previously summarized the AML (October 2007) as well as a variety of rules enacted by enforcement agencies to implement the law. The SAIC has responsibility for the enforcement of rules related to monopoly agreements, the abuse by companies of a dominant market position, and the abuse of administrative powers by agencies or public organizations. The NDRC is charged with enforcing rules related to price-fixing, while MOFCOM handles mergers.

Among those three enforcement agencies, MOFCOM has received the most public attention, in particular for its rejection last March of Coca-Cola's proposed acquisition of one of China's largest and best-known juice manufacturers, China Huiyuan Juice Group Ltd. (See the April 2009 issue of China Law Update.) Coca-Cola makes "Minute Maid" brand juices; MOFCOM concluded, after lengthy review, that the combination would adversely affect competition in China's juice market—and then came under a barrage of
criticism, partly because of the lack of transparency in MOFCOM's definition of relevant market. The Relevant Market Guidelines aim to shine light on the opaque criteria used to define this key term.

**What Is a "Relevant Market"?**

In many if not all analyses of whether a violation of antitrust law has occurred, the concept of a relevant market often plays a central role. In defining this concept, the guidelines enacted by the Anti-Monopoly Commission refer to both the geographic area in which the businesses compete (for example, do retailers have stores in the same city? the same province?) and the scope of the products, or the group of products, in which the businesses compete.

As defined in the Relevant Market Guidelines, a "relevant product market" is the group or category of products that, in practice, consumers believe can easily be substituted for one another, based on product characteristics, price and use. (Since consumers can easily substitute a mint-flavored toothpaste, for example, with one that is cinnamon flavored, both products would generally be considered to be in the same product market. On the other hand, a watch that costs US$50,000 doesn't compete with a $5 brand.)

The Relevant Market Guidelines define a "relevant geographic market" as the area in which consumers or businesses acquire certain products, so that if products are not available in one place they can readily be replaced with products elsewhere. In some cases, the relevant geographic market will vary greatly, depending on such characteristics as the type of product and location. (If the manufacturer of a locally famous brand of tea, which is distributed only in Shanghai, buys another locally distributed tea company, Shanghai would likely be considered the relevant geographic market. Not so with Coke.)

"Substitutability" Analysis

Though product markets and geographic markets are quite different, the Relevant Market Guidelines generally adopt the same basic principle for defining the scope of the relevant market: substitutability analysis. How easily can one product be substituted for another? Or, how easy is it for a consumer to go elsewhere (substitute one geographic location for another) to obtain the same (or a substantially similar) product?
Within that basic framework, there are two types of substitutability, and two types of substitutability analysis: Demand substitutability (and demand substitutability analysis); and supply substitutability (as well as supply substitutability analysis).

Though extremely complicated in practice, the principle of demand substitutability is relatively straightforward. If consumers are confronted with the unavailability of one product—or it is available only at a higher price—how easily can they switch to a different product?

Supply substitutability analysis looks at how suppliers would react to the unavailability of a product (or higher prices). How easy would it be for a new competitor to enter the market, or for an existing company to expand its distribution area or add a new product to its line, in each filling the void and sustaining competition?

The "Hypothetical Monopolist" Test

In cases where the definition of relevant market is more complex and difficult to determine, the Relevant Market Guidelines call for use of the "hypothetical monopolist" test, which typically looks at a relevant product market and analyzes the likelihood that a hypothetical company could impose a modest but substantial (5 to 10 percent) price increase for a sustained period of time (typically one year) and remain profitable even as some consumers stop buying the product.

Conclusion

In practice, the methods used by individual agencies to enforce China's Anti-Monopoly Law, while under the unified oversight of the Anti-Monopoly Commission, will vary depending on the particular product, location and situation. The Relevant Market Guidelines list a number of factors to be considered in defining a relevant product or geographic market, including price discrepancy, use and sales channels, as well as others, for defining a relevant product market; and transportation costs, geographical trade barrier, distribution, etc. for defining a relevant geographic market. While the Relevant Market Guidelines provide some certainty, with detailed criteria to be applied when defining a relevant market, regulators will continue to have considerable discretion in how they apply these principles in practice. Another key issue is whether regulators will apply the rules and principles consistently over time and location—and with different actors.