

Market Definition under China's Anti-Monopoly Law

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I. Market Definition: A Key Aspect for the Enforcement of Antitrust Law

- Market experience over a few hundreds years has provide that when a company becomes so large that it is not longer constrained by market competition, the company tends to raise prices.**
- The Harvard School is of the view that market structure, conduct and performance are closely associated and therefore put forward the S-C-P paradigm.**
- However, Chicago School believes that the companies that are able to survive fierce competition are the best ones.**
- Despite that people remains skeptical about the causal relationships between S-C-P, the market structure stands still at the core of antitrust analysis, also according to China's AML.**
- In consideration of monopolization or competition in the concrete cases, it is normally for the AML enforcement agencies to identify the market power within a defined relevant market.**

II. Market Definition: A Basic Approach to Assess Market Power

- **Based on economics, there are two methods to identify market power:**
 - **Direct assessment**
 - **Indirect assessment by means of defining relevant markets and then measuring market shares**
- **Lerner Index is the direct and simple method to identify market power, which considers the deviation of price from marginal cost.**
- **Even though the price of a product is relatively easy to know, but its marginal cost is hard to assess.**
- **In this case, direct method may be workable only under certain special circumstances.**

- **As an indirect way of assessing market power, market definition is the second best choice.**
- **Three steps towards market power assessment:**
 - **Define relevant markets**
 - **Measure market shares**
 - **Elaborate on market shares (in consideration of competition conditions)**
- **The Guidelines on Market Definition released by the Anti-Monopoly Commission under the State Council: Scientific definition of a relevant market plays an important role in critical issues such as identifying existing and potential competitors, determining the market share of operators and the market concentration ratio, identifying the market power of operators, analysing the effect of operators' acts in market competition, assessing whether or not operators have committed any illegal act and the legal liability incurred shall be borne by the relevant operator that has committed the illegal act. Therefore, the definition of a relevant market is usually the focal point for the analysis of a competition action and an important step towards anti-monopoly law enforcement.**

III. Market Definition: the Foundation of Competition Analysis

- **Apart from assessing market power, market definition has also other functions:**
 - **Screen target cases so that the resources can be concentrated on those cases with most serious impacts on competition**
 - **Identify the competitors in the given cases**
 - **Calculate the fines and damages**
 - **Make competition analyses clearer, more accurate and more convincing.**
- **In short, market definition plays a fundamental role in competition analysis. Should there be any flaws in this exercise, the adjudication of the whole case will be put under risk.**

IV. Limitations of Market Definition

- **Irrespective of its great importance, market definition is not necessary in every antitrust case,**
 - **Not necessary for cases featuring conspicuous unlawfulness ;**
 - **Not necessary for small cases with limited economic impacts ;**
 - **There are also experiences as US Horizontal Merger Guidelines stated:**
 - **Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market.**
- **The EU practice shows that the Commission is open to new economic tools like UPP or merger simulation if they can help to refine the assessment. However, these economic tools can only complement the traditional analysis and therefore do not make the defining the relevant market superfluous.**

V. Market Definition in AML Enforcement

- **China has dealt with more than 2000 antimonopoly cases of various kinds. In the high-profile cases such as the P3 liner shipping network case, the Qualcomm case, the Tetra Pak case, and the Qihoo 360 v. Tencent case, the AML enforcement agencies and courts all define market as the foundation of competition analysis**
 - **Not every case calls for market definition**
 - **Demand substitute plays a major role in market definition: (1) demand substitute is the direct and most important restraint on a company's behaviors; (2) if a company lacks market power under demand substitute analysis, then supply substitute is unnecessary; (3) supply substitute poses more uncertainties.**
 - **There is almost no case employing SSNIP test yet:**
 - **How many the SSNIP size should be ?**
 - **How long the duration after which consumers will switch to alternative suppliers because of the price increase.**

- **In recent years, MOFCOM has used GUPPI to make a quantitative analysis for the post-merger price increase likelihood, for example in the case related Maersk (马士基航运公司). However, that was not a case for direct market power assessment, because the MOFCOM had first and foremost defined the relevant markets and measured HHI, and GUPPI was merely used to predict possible post-merger price increase.**

IV. Conclusion

- **Even though some people is skeptical about the accuracy of market definition, and even in the beginning of AML enforcement, the enforcement Agencies paid no great attention to market definition in the concrete cases, but today almost no one doubts its value in measuring market power.**
- **In brief, market definition is an important instrument in competition analysis under China's AML. Without properly defining markets, the enforcement agencies and the courts are likely to make more mistaken rulings.**

Thank you for your attention!