Plenary Session 3: Challenges of Globalization for Merger Review

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1. Geographic Market Definition
Meeting of the International Competition Network
Merger Workshop

Plenary Session #3: Challenges of Globalization for Merger Review

Christine S. Wilson, Commissioner
November 7, 2018
Tokyo, Japan
Geographic Markets – Basic Approach

• Under both U.S. law and the Horizontal Merger Guidelines, the FTC uses evidence of demand substitution to define relevant geographic markets
  – HMG § 4: “Focuses solely on . . . customers’ ability and willingness to substitute away from one product to another in response to a price increase” or decrease in quality

• Whether other products are in the same geographic market (HMG § 4.2) depends upon factors such as:
  – Transportation costs (as a percentage of total cost)
  – Regulations
  – Tariff and non-tariff barriers
Geographic Markets – Examples

Global
- Aircraft engines
- Fiber channel switches (*Broadcom / Brocade*)

National
- Daily online fantasy sports (*Draft Kings / Fan Duel*)

Regional / Local
- Hospitals
- Retail
1. **Mexico is one of the world’s most open economies**
   - Free trade agreements with 46 nations.
   - Borderline Mexico/US has an extension of 3,000 kilometers
   - Ports in both Atlantic and Pacific oceans.

2. **Indeed, geographical scope of markets is wider today**

   ![Geographical scope of markets](chart.png)

   **Geographical scope of markets**
   - *Number of cases, 1999*
   - 17% Wider than national
   - 83% National, Regional or Local

   **Geographical scope of markets**
   - *Number of cases, 2016*
   - 32% Wider than national
   - 68% National, Regional or Local
Example: Nitrogen fertilizers

**1997**

- Merger: Agro Nitrogenados / Nitroamonia (two Mexican firms)
- Firms overlapped in the manufacture and sale of nitrogen fertilizers.
- Marginal imports (and limited to the border area with the US)
- Joint market shares above 50% at national level.

Market was considered national and the deal was blocked by the Commission

**2014 & 2015**

- Mergers:
  - Pemex / Agro Nitrogenados
  - Pemex / Fertinal
- Vertical integration: ammonia (supplied solely by Pemex in Mexico) is the main input for nitrogen fertilizers (manufactured by Agro Nitrogenados and Fertinal)
- Imports of nitrogen fertilizers (from several countries) accounted for more than 50% of national consumption.
- Some domestic competitors exited the market due to increased foreign competition.

Geographic scope was considered global and both deals were authorized
Plenary Session 3

Challenges of Globalization for Merger Review

Josep M. Carpi Badia
Head of Unit, Mergers Case Support and Policy
DG COMP, European Commission
Globalization
Market definition
- World’s economies have become increasingly interconnected
- This progressive global dimension has to be taken into account in merger enforcement
- Market definition is (merely) a first step in merger assessment
- Based on business realities: empirical, customer-focused and dynamic exercise
- Competitive pressure from producers “outside the market” is incorporated in the competitive assessment

- Some markets remain national, however
- Even if companies active in the relevant sectors operate at a global level
- International cooperation in merger review may also be useful in some of these cases
Geographic Market for Rail Power Supply Systems

M.3653 - Siemens/VA TECH (2000)

Markets considered as national

M.5754 - Alstom Holdings/Areva T&D (2006)

Market considered as at least EEA-wide
Geographic Market for Wholesale Supply of Helium


- Market considered potentially EEA-wide in scope, covering all sources in and around the EEA.

**M.4141 - Linde/BOC (2006)**

- Market considered as worldwide. But it could not be excluded that the market could tend towards EEA-wide scope.

**M.8480 - Praxair/Linde (2018)**

- Market defined as worldwide, despite the existence of regional specificities.
Challenges of globalization for merger review: Russian experience

Andrey Tsyganov
Deputy Head of the FAS Russia
Japan, November 2018
Defining the geographic scope of a market in merger review

- Digitalization and technological progress
- Infrastructure development
- Economic concentration, growth of TNCs
- Trade liberalization
- Global value chains
- New fast growing markets

Not only national but also global market should be analyzed

Tight cooperation between competition authorities in M&A review
Perspective approach predicting and analyzing the consequences of merger including technological changes (disruptive technologies)

Big data, IPR and innovative potential of merging companies

Heterogeneity and individualization of goods/services

✓ New approach to market analysis
✓ New forms of remedies
✓ Accuracy of remedies
2. Communication with Agencies in other Jurisdictions
International cooperation
Communication between agencies
ICN MWG Work Products


Merger Remedies Guide (2016)
International Cooperation: percentage over complex merger cases

Complex Merger Cases

2010-2015
2016-2017

International Cooperation: by Jurisdiction in merger cases (2014/2015)

USA 34%
Canada 15%
Brazil 11%
China 6%
Australia 7%
Japan 4%
Serbia 4%
South Africa 4%
Chile 2%
Israel 2%
Kenya 2%
Mexico 2%
Pakistan 2%
South Korea 2%
Switzerland 2%
Turkey 2%

Essilor/Luxottica (2018)
Phase II unconditional clearance
Cooperation with 12 Agencies outside the EU
From: single calls on the status of proceedings
To: regular engagements, exchange views on market definition, theories of harm, investigation findings; timeline of the investigation; exchange of document submissions

European Commission
Intervention cases (2018)
(until 31/10)

Phase I with remedies

(cont.)

Phase II with remedies

Phase II abandoned

Cooperation with non-EEA Agency
Cooperation with foreign competition authorities while considering global mergers

### Bilateral cooperation
More than 60 official documents, (MoUs, programs of cooperation, agreements)

### EAEU
EAEU Treaty, cooperation with EEC

### CIS
Joint market studies in socially important markets

### BRICS
MoU between the BRICS Competition Authorities
Global nature of the merger in the oligopolistic fast growing market

The merger affects the markets for the products used by agricultural producers (seeds, technologies, genetics and selection, data, complex solutions)

Application of waivers for consultations with India, China, Brazil and European Commission

New methodological approaches to identify potential anticompetitive effects of the merger both in the Russian and global markets

The FAS Russia took into account the information provided by counterparts in other jurisdictions including on the basis of waivers to consider the merger in the most proper way and to make the most balanced decision.
3. Extra-territorial Remedies
Extraterritorial Remedies

• FTC and DOJ recently issued new *Antitrust Guidelines for International Enforcement and Cooperation* (January 13, 2017)
  – These Guidelines update an earlier 1995 edition
  – FTC and DOJ will seek extraterritorial remedies only if:
    • Remedy of “conduct or assets outside the United States” is
    • “needed to effectively redress harm” or threatened harm”
    • “to U.S. commerce and consumers” and
    • “is consistent with the Agency’s international comity analysis”

• In short, the focus remains on how the remedy redresses harm to *consumers in the United States*
Extraterritorial remedies

In our experience, location of parties’ assets and sales have been key factors when considering possible extraterritorial remedies ...

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<tr>
<th>Assets &amp; Sales</th>
<th>Remedies coordination</th>
<th>Examples</th>
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| **Assets in Mexico** | • Consistent remedies to those of other jurisdictions  
• Remedies offered in other jurisdictions may include Mexican assets  
• Additional remedies may be imposed in Mexico to attend concerns in national markets | ChemChina / Syngenta  
(global deal, national markets, specific remedies for Mexico) |
| **No assets in Mexico** | • Difficult and costly to monitor compliance  
• Other authority best suited to monitor compliance  
• Cofece only requires the parties to prove they fully complied with the remedy imposed by other jurisdiction | Dow/DuPont – Acid copolymer business  
(global deal, global market, no specific remedies for Mexico)  
Delta/Aeromexico  
(JCA, cooperation with US sectoral regulator, remedies in both countries) |
| **Low sales in Mexico** | | Emerson / Pentair  
(global deal, global market, no specific remedies for Mexico) |
Extraterritorial remedies

Global economy vs national institutions

- Ex-post control of the behavior of the merged companies
- Suppression of anticompetitive practices in case of violations and failure to implement the remedies

Imposition of extraterritorial remedies is quite complex and it is difficult to supervise its compliance