

Relevant Market Definition in U.S. Antitrust Law and the Alternatives of China

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Résumé

Cet article discute des changements récents apportés à la définition de « marché visé » en droit antitrust américain et des impacts possibles sur le droit chinois. L'auteur est d'avis que la Chine devrait s'inspirer de ces changements importants pour améliorer sa législation en la matière.

Abstract

This article deals with the recent changes to the definition of “relevant market” in U.S. antitrust law and their possible impacts on Chinese law. The author suggests that these changes should be adopted by China to improve its legislation.

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“Relevant market” is a unique concept of antimonopoly law¹, the definition of which is a significant procedure in the implementation of antimonopoly law. In theory and practice of antimonopoly law, apart from some “core cartel” conduct, the illegal purpose or effect of which is blatantly apparent and thus does not need relevant market definition, the method of relevant market definition is widely adopted in the regulation of vertical agreement, the abuse of a dominant market power, as well as the concentration to review and evaluate the anti-competition effect of the undertakings’ conduct. In August 2010, the U.S., which has the most advanced antimonopoly legislation and highest level of antimonopoly law enforcement, issued new guidelines for horizontal merger (hereinafter referred to as the 2010 Horizontal Merger Guideline), announcing that relevant market definition is no longer a necessary procedure in antimonopoly law enforcement, repositioning the function of relevant market definition in the review of concentration and demonstrating a considerable change of the enforcement direction of U.S. antitrust law. Such a change causes other nations which are learning from the U.S. to lose direction and face the problem of reversing the traditional way of antimonopoly law enforcement which emphasizes relevant market definition.

The Anti-monopoly Law of the People’s Republic of China (hereinafter referred to as “CAML”) establishes the concept and position of relevant market definition in legislation. China’s antimonopoly authorities have repeatedly adopted the method of relevant market definition to demonstrate the limitation or elimination effect which results from concentration. Thus, it can be concluded that relevant market definition is a necessary procedure of enforcement of CAML. This article reveals the reasons and rationality of the change for relevant market definition in the U.S. 2010 Horizontal Merger Guideline by analyzing the theory and practice development of U.S. antitrust law enforcement. Moreover, it discusses the problems of relevant market definition in CAML by analyzing the structural feature of the Antimonopoly Law as well as its practice. Finally, the possible influence that may be exerted on China as a result of the

¹ There are several terms of “antimonopoly law” in different countries. It is entitled “antitrust law” in the United States, “Competition Law” in European Union, “Forbidden Monopolization Law” in Japan, “Against Restraints of Competition Law” in Germany, “Fair Trade Law” in Korea and Taiwan China, and “Anti-monopoly Law” in China. The general title of “Anti-monopoly Law” in China is adopted in this article. Different titles for different countries means the same.

change of position in the U.S as well as the corresponding position and measures that should be brought to CAML are also discussed.

I. The Development of Relevant Market Definition of U.S. Antitrust law

A. Relevant Market Definition of U.S. Antitrust Law

The U.S. has the earliest and most effective system for antitrust law legislation and enforcement, thus, its antitrust law enforcement system often influences other nations. In the practice of U.S. antitrust law, the first authority who defined relevant market was not the Department of Justice and the Federal Trade Commission, both of which are responsible for antitrust law enforcement, but the courts. In a series of cases in the 1950s and 1960s, the U.S. judiciary often adopted various methods to define relevant market, of which “demand replacement analysis”² has already become a traditional method. Demand replacement analysis depends on the subjective judgment of the antitrust authorities. In the initial stages of U.S. antitrust law enforcement during which the structuralism prevailed, the idea of splitting up the large enterprises occupied the dominant position, and the courts were satirized for always siding in favor of the government in antitrust suits³. In the 1960s and 1970s, the U.S.’s economic status dropped due to the huge challenge brought by the post-war economic revival of Europe and Japan. While contemplating the cause for the decline of the U.S.’s economic domination, the behaviorism regula-

² “Demand substitution” is also called “cross elasticity of demand”. Cross elasticity of demand is a basic concept in microeconomics, which reflects the market signal of price adjustment in the wake of the demand change. In general, cross elasticity of demand is presented with the proportion of two variables A & B in the market. When the price of A is increasing, the demand for the similar product of B or the product B with the cross elasticity of demand occurs. The higher the price increase level of product A, the more demand for product B in the market. Assuming that the supply for the product B is sufficient, the proportion change of the price increase of product A to the demand for the product B shall represent the cross elasticity of demand between A and B, which is: Cross elasticity of demand = demand change for B / price change of A.

³ Herbert HOVENKAMP, *Federal Antitrust Policy: the Law of Competition and its Practices*, 3rd ed. (translated by Guangyao Xu, Jiangshan and Wangchen), Law Press·China, 2009, p. 63-64.

tion theory of the Chicago School replaced the structuralism⁴. The U.S. antitrust law enforcement stepped into the era of the behaviorism regulation theory which emphasizes the economic efficiency analysis of the undertakings' conduct. Thus, the implementation of U.S antitrust law became much milder.

In 1968, the Antitrust Division of the U.S. Department of Justice issued the Merger Guideline to instruct the practice of the concentration⁵ review. The Merger Guideline says that if a specific market is overly concentrated, the undertakings may implement collusion or at least reach potential consensus to avoid price competition. On basis of structuralism, Merger Guideline proposes strict regulation position for concentration, which relies upon the market concentration rate judgment. The guideline attempts to use the market concentration rate of the four and eight biggest enterprises to classify the market through analyzing the sales percentage of these enterprises after concentration. If the market share of the four biggest enterprises is more than 75% after concentration, detailed review is required for such concentration. When there are no special reasons for easy market access, an enterprise which occupies 10% of the market share will usually be prosecuted by the Department of Justice if it acquires an enterprise whose market share is 2%⁶.

Following the behaviorism regulation theory of the Chicago School, the U.S. Department of Justice issued a new Horizontal Merger Guideline in 1982 (hereinafter referred to as the "1982 Merger Guideline"), which reflected significant changes in the U.S. government's position in antitrust law enforcement. The 1982 Merger Guideline creatively adopts the method of Hypothetical Monopolist Test to define relevant market⁷. The basic

⁴ The theory development of industry organization economics such as structuralism and behaviorism has been widely studied in China, thus this article will not go into details. For more information, see: Xuheng ZANG, *The Development and Perspective of Basic Theory of Industry Organization Economics for Antitrust and Competition Policy*, Economic Research, China, Issue 3, 2004, p. 116-123.

⁵ There are different terms for concentration in different countries, such as "concentration" from EU competition law, "merger" from the U.S., and "enterprise combination" from Japan. Those different terms have the same meaning. "Concentration" or "merger" is used in this article.

⁶ The U.S. Department of Justice, *1968 Merger Guidelines*, available at: <<http://www.justice.gov/atr/hmerger/11247.pdf>>.

⁷ "Hypothesis Monopolist Test" is the SSNIP testing method which is widely adopted by various nations. SSNIP is the abbreviation for "Small but Significant and Non-transitory Increase in Price."

principle of such method is to primarily establish a candidate market, assuming that some hypothetical monopolist is conducting a small but significant and non-transitory increase in price (SSNIP), observe the reaction of other neighboring products in the candidate market, and ultimately establish a relatively fixed relevant product market or relevant geographic market. For example, assume that SSNIP is happening in a candidate fruit market in which the price of apples increases from RMB10/kg to RMB12/kg, the hypothetical apple market is an independent relevant product market if the apple sellers still can make profit.

However, after the rise of the price of apples, if customers switch to other substitute fruits, such as peaches so that apple sellers do not benefit due to the decrease in sales, there would be cross-elasticity of demand between the apple and the peach and they will/would be in the same product market. Continue the testing to other relevant product, in the same principle. If the sales of grapes are expanded as a result of the price increase of apples in the candidate market, there would be cross-elasticity of demand between apples and grapes, and then grapes would be allocated to this product market. Keep repeating the testing for several times until a market dominant scope is established in which the hypothetical monopolist can raise prices freely without worrying about the decrease of sales of relevant products. Then establish the market domination scope at this point. Such scope is a relatively independent product market. This method can also be applied to test the relevant geographic market.

The 1982 Merger Guidelines also changed the previous use of the largest four and eight companies' market share in measuring the market concentration rate. In its replacement, the new guidelines adopted the Herfindahl-Hirschman Index (HHI) to measure before and after changes in the market concentration rate. HHI is equivalent to the square sum of the relevant product market's enterprise market share. Under normal circumstances, increases in HHI values indicate increases in degrees of market concentration, and a maximum HHI value of 10,000 suggests a monopoly in the market. Conversely, decreases in HHI signal decreases in the degree of market concentration rate, and an HHI value of 0 signifies that the market is at a perfectly competitive state. According to the size of the HHI value, relevant markets are divided into high, medium and low categories: low-concentrated markets have HHI values under 1,000, while medium-concentrated markets have HHI values between 1,000 and 1,800, and high-concentrated markets exceed 1,800. By comparing the before-

and-after-concentration changes in the size of the HHI, the market concentration rate changes caused by such concentration can be tested⁸.

In 1992 and 1997, on the basis of 1982 Merger Guidelines, the U.S. Department of Justice and Federal Trade Commission revised the contents of the guidelines (hereinafter referred to as the “1997 Merger Guidelines”)⁹. The revised guidelines introduced economic analysis methods for both coordinated and unilateral effects. The so called coordinated effects enable enterprises in relevant markets to cooperate with each other successfully and comprehensively in doing harm to consumers, thus, achieving the goal of reducing competition. Unilateral effects give the enterprise the ability to carry out a unilateral price increase or reduce output with the help of the reduced competition, product differentiation and other factors, even if the merger fails to increase the possibility of coordination. The 1997 Merger Guidelines also established a five-stage analytical framework for concentration, namely: (1) relevant market definition and market shares determination; (2) anti-competitive effects analysis caused by the merger; (3) market entrance analysis; (4) efficiency analysis; and (5) analysis of bankrupt enterprises. Of these stages, relevant market definition is the primary step, which is thereby the premise of concentration review analysis.

The 1997 Merger Guideline not only played a significant role in the enforcement of U.S.’s antitrust law, but also influenced the review of concentration by U.S. district courts to some extent. Among the antitrust actions brought by the Department of Justice, although the guideline formulated by administrative agencies is not binding upon the court, there are many cases in which the court adopted the method stated by the guideline to define relevant market¹⁰.

⁸ The 1982 Merger Guideline establishes different assessment standards for anti competition effect resulted from concentrations, before and after which the HHI index increase is 50,50-100 100 in markets with different concentration rate. Those standards are extended in 2010 Merger Horizontal Guideline to adapt to the needs of reviewing concentration in the economic globalization background.

⁹ The U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, April 8, 1997, available at: <<http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>>.

¹⁰ Hayashi SHUYA, “The criterion of relevant market definition on competition law”, (2002) 126-1 *Civil and Business Law Magazine* 47.

The method of defining relevant market established by the 1997 Merger Guideline is also adopted by other nations. For example, the European Union, Japan, Canada, England, Australia and New Zealand all adopted similar methods in their antimonopoly law enforcement. In the European Union, the European Commission released the "Announcement on Relevant Market Definition of the EC Competition Law", which fully stated the basic position of the European Commission when defining relevant market¹¹. Compared to U.S., the method of relevant market definition established by the European Commission is not limited to concentration regulation, but also applies to the EU competition law as a whole. Since the system features of EU competition law are embodied as the regulation of abuse of a dominant market power, relevant market definition plays a crucial role for the implementation of the EU competition law¹².

The analytical techniques of relevant market definition, which have been formed by antitrust agencies of the United States within two decades after the first Horizontal Merger Guideline, have gained common acknowledgement in the enforcement of antitrust law by many other countries. However, the American academics have turned to the inquiry of the limitations of the current practice in defining relevant market and, with that support, the enforcement of American antitrust law is altering quietly, while all other major countries are still studying and imitating. It has been noticed by the American theorists that the definition of relevant market, which should have been applied to confirm the existence of adverse competitive effect of some merger parties, had confined the Agencies to nearly always form that conclusion. On the other hand, in light of the abstracted way used to define the relevant market, the likelihood is high that precise definition appears to be impossible to be given or that court-made definitions based on the Guidelines may differ from those made by the Agencies¹³. In fact, during the enforcement of antitrust law in the United States, many judgments have been decided against the definition made by the Agencies.

¹¹ *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*, Official Journal, C 372/3 09/12/1997.

¹² Giorgio MONTI, *EC Competition Law*, Cambridge, Cambridge University Press, 2007, p. 127-158.

¹³ ANTITRUST GROUP, SHERMAN & STERLING LLP, *The 2010 DOJ and FTC Horizontal Merger Guidelines; Increasing Realism While Reducing Predictability*, available at: <<http://www.shearman.com>>.

B. The Reversed Position in the 2010 Horizontal Merger Guideline

Obama administration has come out with a new concept of enforcement of antitrust law since 2008¹⁴. On August 19, 2010, the DOJ and FTC released a comprehensive revision of the Horizontal Merger Guidelines (hereinafter referred to as 2010 Horizontal Merger Guidelines)¹⁵, which represents the new position supported by the United States. Guidelines hold that, by relocating the market definition in concentration, relevant market definition is pretty much a tool rather than the ultimate target when used to evaluate the reverse competitive affects resulted from a concentration. The Agencies claimed that relevant market definition is not beginning where the analysis should start with reliance upon the reverse competition effects. Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. Evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can, in itself, establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

The 2010 Horizontal Merger Guidelines have illustrated why the Agencies have changed their position by recognizing the limitations in carrying out relevant market definition before concentration inquiry. For example, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. Defining a market broadly to include relatively distant substitutes is unlikely to commensurate the competitive significance with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing

¹⁴ After Obama administration came into power, it changed the chief officer of DOJ and FTC, emphasizing the importance of reinvigorating antitrust enforcement. See Leslie C. OVERTON and Ryan C. THOMAS, "Antitrust Enforcement in the OBAMA Administration", (2009) *Jones Day*, available at: <<http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=6176>>.

¹⁵ US DOJ & FTC, *Horizontal Merger Guidelines*, Issued on August 19, 2010. See FTC Website.

so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance. It indicates that market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. Properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase. The hypothetical monopolist test (SSNIP) can be used flexibly to ensure that relevant markets are not overly narrow in this respect. Relevant antitrust markets defined according to SSNIP are not always intuitive and may not align with how industry members use the term “market.”

The Horizontal Merger Guidelines have some subtle change in describing SSNIP, representing the new direction that the United States holds. First, it is not the full range of substitute products of candidate market in applying SSNIP to a small but significant and non-transitory increase in price, but “at least one product in the market”. The 1997 Horizontal Merger Guidelines details that in “any or all of the additional products”. No different meaning could be observed about the two sentences, although the words Guidelines select reflect the orientation change of Agencies’ understanding about the function and limitations of relevant market definition. Second, 1997 Horizontal Merger Guidelines accents that SSNIP should be applied in the sequence of extending from a single product to the closest substitute product, but in 2010 Horizontal Merger Guidelines this rule has been deleted. Therefore, Guidelines seem to indicate that such sequence is not necessarily needed. Finally, 1997 Horizontal Merger Guidelines indicates that the Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test, while 2010 Horizontal Merger Guidelines consider that market definition and market shares simply aim to analyze the competition affects resulted from concentration. The relevant market concluded by the principle noted above will be used in investigating the competitive affects. According to Carl Shapiro, it can lead to an over-narrowly defined relevant market and false judgment about the existence of competition relationship, if this “smallest market” principle is strictly followed.

Another significant change in 2010 Horizontal Merger Guidelines is to consider a “critical loss analysis” to assess the extent to which it corroborates inferences drawn from the evidence, which is not practiced in

Guidelines 1997. Critical loss analysis is consisted of the three steps below. First, presume the number of lost unit sales that could leave profits unchanged, those sales are what we called critical loss¹⁶. Second, presume the number of candidate products unit sales that the hypothetical monopolist is predicted to lose under SSNIP, those sales is what we called “predict loss”. Third, compare the magnitude of those two losses. If critical loss is less than predicted loss, that is to say SSNIP reduced the hypothetical monopolist’s profits, we can conclude that the candidate product market is narrowly defined; on the contrary, that is to say SSNIP raises the hypothetical profits, which means the conditions of SSNIP have been fulfilled. 2010 Horizontal Merger Guidelines mention that two points about critical loss analysis should be noticed. The first point is that critical loss analysis is basically “breakeven” analysis which differs itself from the profit-maximizing analysis that is called for by the hypothetical monopolist test. The second point is that the Agencies should consider all evidence, special combined with adjusted marginal price and quantitative cost in assessing the predicted loss. Even if high marginal price and cost is calculated, the existence of overly estimated predicted loss can still suggest economic inaccuracy. Merging parties should be asked to present more comprehensive conclusion.

The 2010 Horizontal Merger Guidelines have repositioned the function of relevant market definition in horizontal merger overall and made it explicit that it is the evaluation of concentration’s competitive effects rather than spinning around the definition of relevant market that matters in reaching the ultimate aim of antitrust investigation. Such back-to-basic change is quite positive. However, the methods used in 2010 Horizontal Merger Guidelines are after all quite different from the accustomed. This makes it necessary to give the Agencies a period of time to practice the methods detailed in the Guidelines. Also, the 2010 Horizontal Merger Guidelines represents only the Agencies, the reaction of courts, which have the final power in judging those antitrust cases, remains to be confirmed. According to Thomas Rosch, commissioner of FTC, the 2010 Horizontal Merger Guidelines overemphasize economic formulas and models based on price theory, saying comparatively little about non-price competitive effects and fail to offer a clear framework for analyzing non-price con-

¹⁶ Critical loss could be calculated according SSNIP’s range $X\%$, price/cost margins, that is: $CL=X/(M+X)$.

siderations¹⁷. Still, the 2010 Horizontal Merger Guidelines reflect the new alternatives that US Agencies take in investigating antitrust especially in debating the effect of relevant market definition and emphasizing the evaluation of anticompetitive effects. Such alteration will absolutely affect practitioners engaged in concentration investigation greatly. The enforcement of antitrust law in the United States has always represented the highest level of that in the world. From this point, 2010 Horizontal Merger Guidelines will, to some extent, influence how other countries conduct horizontal merger investigation.

II. Definition and Practice of Relevant Market in China

A. The Provision about Relevant Market Definition in CAML

CAML defines the relevant market expressly in article 2.2: “The term “relevant market” as mentioned in this Law refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services.” This provision is the definition of relevant market as well as the principle of the enforcement of CAML. According to this provision, CAML divides relevant market into product market and geographic market, which represent the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services respectively. CAML also provides that the so-called product market and geographic market all exist in “certain period of time”, namely, “relevant time market”. However, the period of time in which business operators compete against each other could be absorbed in the definition of relevant product market out of many cases, relevant time market is not treated as a problem separately¹⁸.

¹⁷ Thomas ROSCH, *Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines*, Project No. P092900, 2010, available at: <<http://www.ftc.gov/opa/2010/08/hmg.shtm>>.

¹⁸ Xianlin WANG, “Relevant Market Definition in the Enforcement of Antimonopoly Law”, (2008) 1 *Law Science* 123.

On May 24, 2009, Anti-monopoly Committee of the State Council (ACSC) issued a Guide for the Definition of Relevant Market¹⁹ (hereinafter referred to as ACSC guidelines) which is based on the relevant market guidelines that the Chinese Ministry of Commerce, one of the China Anti-monopoly Bureau (hereinafter MOFCOM) drafted. ACSC guidelines expressed precisely that:

“In the work of prohibiting monopoly agreements between business operators, prohibiting the abuse of dominant market positions by business operators, controlling the concentration of business operators that has resulted or may result in excluding or limiting competition and other work of anti-monopoly law enforcement, the definition of the relevant market may be involved.”

This indicates that the methods and principles of relevant market definition established by ACSC guidelines have uniform application in the CAML. This emulates the *Notice on the definition of relevant market for the purposes of Community competition law* which has been issued by the Commission of EU in 1997. To some extent, it explained the legislative intention of China government by the fact that ACSC guidelines is not issued by Ministry of Commerce but ACSC.

The ACSC Guidelines provide that when defining the relevant market, demand substitution analysis can be conducted based on the characteristics, uses and price of commodities, and supply substitution analysis can be conducted when necessary. When the market scope within which business operators compete with each other is not clear or is difficult to determine, the relevant market can be defined by the analysis approach of the “hypothetical monopolist test”. From the perspective of demanders, the higher the substitution level of the commodities, the more intense the competitive relationship between them would be, and the more they are likely to belong to the same relevant market. From the perspective of suppliers, the less investment the other business operators make in renovating the production facilities, the less extraneous risks they would bear; the faster the close substitutes are supplied, the higher the supply substitution level is. When applying SSNIP, MOFCOM sets the price increase within a range of 5% to 10% as a standard, according to EU. In principle, when defining the relevant market with SSNIP, the benchmark price selected

¹⁹ ACSC *Guideline on Relevant Market Definition*, Issued on May 24, 2009, available at: <<http://fldj.mofcom.gov.cn/aarticle/j/200907/20090706384131.html>>.

must be the market price in full competition. In cases of concentration of business operators who abuse their dominant market positions, try to make collusion or have already made collusion, anti-monopoly agencies should adjust current price into more competitive market price.

The ACSC Guidelines do not position the hypothetical monopolist as the main approach of defining a relevant market. On the contrary, it is simply treated as a supplement in certain meanings. Where such factors as production cycle, life time, seasonal features, fashion style or protection period of intellectual property rights have become commodity characteristics that cannot be ignored, the factor of time shall be considered in the definition of the relevant market. In the anti-monopoly enforcement of technology trade, license agreements or any other issues involving intellectual property rights, the relevant technology market may need to be taken into account. Overall, ACSC Guidelines adopt a comprehensive approach of relevant market definition with priorities and sequences. The ACSC Guidelines' selected approach noted above do not take into account the fact that China has a vast territory and different regional environments. Complicated transport conditions and living standards as well as limiting factors in regions exist extensively and require, when defining the relevant market in China, a modulated approach in accordance with those special conditions.

B. Practices in Defining Relevant Market of CAML

After the promulgation of CAML, the regulation on monopolistic agreements and abuse on dominant market position has not been implemented effectively. At present, the implementation of Antimonopoly Law mainly focuses on the regulation of concentration. Until the end of 2010, the MOFCOM had received about two hundred merger cases relating to concentration which reveal definition of relevant market when reviewing the applications²⁰. Among the seven public cases, one is prohibited (Coca-Cola acquire Huiyuan case), the other six have been permitted with restrictive conditions.

²⁰ According to Article 30 of China's anti-monopoly law, anti-monopoly law enforcement agencies only publish centralized cases that are prohibited or permitted with restrictive conditions attached. Thus, the majority of cases that the Commerce Department accepted for reviewing are not disclosed outside. Data refers to Zhang Bin, "The amount of anti-trust filing surge, the Ministry of Commerce has not tightened as foreign investment", *Economic Observer*, January 29, 2011.

On November 18, 2008, MOFCOM published the first merger decision and approved InBev NV/SA's ("InBev") proposed acquisition of shares of Anheuser-Busch Companies Inc. ("AB")²¹. Being global famous beer companies, they both have joint ventures and corresponding production bases in China. Their global market scale and China's market scale have met the reporting standard of CAML, therefore they have to submit applications to MOFCOM before acquisition. However, MOFCOM did not conduct relevant market definition when reviewing this case. It can be concluded from the report, which is less than 800 words, that MOFCOM did not reveal the process of review or other details, and did no detailed analysis or evaluation of relevant market definition and competition impact. As the first public case that MOFCOM accepted to review, it illustrates MOFCOM's prudence and lack of experience.

On March 18, 2009, MOFCOM published the second merger decision of Coca-Cola's acquisition of Huiyuan Company²². MOFCOM believed that if they got approved, the juice company would be affected due to their "dominant conduct effect", "brand effect", "stifle innovation effect"²³. Besides that, the concerned companies did not propose satisfactory relief measures. Judging from the announcement, MOFCOM did not conduct any relevant market definition or detailed analysis on how the above effects originated. They just believed the acquisition would produce effects restricting or eliminating competition according to the anti-monopoly law of China. This case was inconsistent with the widespread of America's financial crisis, which also sparked international concern on China's foreign investment policy²⁴. On March 25, in the conference of MOFCOM,

²¹ Order of Ministry of Commerce of the People's Republic [2008] No. 95, November 18, 2008. See the official website of the Anti-monopoly Bureau of the Ministry of Commerce of the People's Republic of China: <<http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html>>.

²² Order of Ministry of Commerce of the People's Republic [2008] No. 95, November 18, 2008; Order of the Ministry of Commerce of the People's Republic [2009] No. 22; Notice on the Ministry of Commerce's decision on the Prohibition of the Coca-Cola's acquisition of China Huiyuan, March 18, 2009. See the official website of the Anti-monopoly Bureau of the Ministry of Commerce of the People's Republic of China: <<http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>>.

²³ About the three effects, see DAI long, "The Enforcement on Merger Regulation of China's Antimonopoly Law: Focusing on resent cases", (2009) 52-30 *Journal of Japan Economic Association* 104.

²⁴ After the publicity of the case, senior officials, including the Minister of Commerce, explained their views on many occasions and said that the prohibition on Coca-Cola's

spokesman Yaojian specifically explained the process of review and the details related to the decision-making, etc.²⁵. Therefore, we know that MOFCOM has defined relevant market in juice beverage market in this case, including 100% pure juice, mix juice with a concentration of 26% -99% , and juice beverage with a concentration below 25%. Meanwhile, both belonging to non-alcoholic drinks, carbonated drinks and juice are not interchangeable, and were considered as two adjacent markets by the Ministry of Commerce. From the whole process of this case, we can conclude that the influence arising from the prohibition of the above acquisition may be far beyond Ministry of Commerce's expectation. Also when reviewing cases on concentration of business operators, MOFCOM is requested to disclose more details and promote the transparency of procedures.

On April, 24, 2009, the MOFCOM published the third merger decision of Mitsubishi Rayon Company's acquisition of Lucite²⁶. For the first time, MOFCOM carried out definition on relevant market. Relevant product markets were defined in MMA, SpMas, PMMA particles and PMMA plate. Meanwhile relevant geographic market was defined in China. On the ground of relevant market definition, MOFCOM evaluated the influence on competition and then issued permissions with additional restrictive conditions including structural relief ad behavior remedies. From then on, defining relevant market has been a necessary process when MOFCOM reviews cases of concentrations of business operators, which is

acquisition of Huiyuan was based on the unavoidable effect of restrictions on competition. On the subject, see: Li JING and Chen DEMING, "Huiyuan acquisition case wan the mergers between foreign companies, *Beijing News*, March 23, 2009; REUTERS, "The Commerce Department said the ban on acquisition of Huiyuan would not affect Chinese overseas acquisitions", *Lianhe Zaobao*, Singapore, March 20, 2009.

²⁵ Department of Commerce Office, "Spokesman Yao answered reporters of antimonopoly review decision on the Coca-Cola's acquisition of Huiyuan", March 25, 2009, available at:

<<http://www.mofcom.gov.cn/aarticle/zhengcejd/bj/200903/20090306124140.html>>.

²⁶ Notice of the Ministry of Commerce of the People's Republic [2009] No. 28, April 24, 2009, available at: <<http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>>.

evident in the case of General Motors' acquisition of Delphi²⁷, and Pfizer's acquisition of Wyeth Corporation²⁸.

On October 30, 2009, the Ministry of Commerce made a decision on Japanese Matsushita's acquisition of Sanyo²⁹ and defined the three relevant product market in the coin-type lithium secondary batteries, civilian nickel metal hydride batteries and automotive nickel hydrogen batteries. It is worth mentioning that the MOFCOM, for the first time in that kind of case, defined the geographic market of the above coin-type lithium secondary batteries and nickel-metal hydride batteries as world market. However, from a review of the decision itself we cannot see how MOFCOM defines the world market. It is listed by the MOFCOM that after acquisition, Panasonic will occupy 61.6% market of coin-type lithium secondary battery market, and 46.3% market of civilian nickel-metal hydride batteries respectively. In the automotive nickel hydrogen batteries market, Matsushita and Toyota's joint venture – Panasonic EV Energy Company will occupy 77% share, which may be a major evidence for the Ministry of Commerce to define world market. On August 13, 2010, MOFCOM made a decision on the Novartis AG's acquisition of Alcon³⁰ and defined the relevant product market in ophthalmic anti-inflammatory compounds and contact lens care products. Although the two commodities' market share in Chinese and global market were clearly disclosed by MOFCOM, their relevant geographic markets were not explicitly defined as Chinese market nor global market.

C. Existing Problems in Relevant Market Definition of CAML

ACSC guidelines established the principles and methods, which apply to agreements, abuse of dominant market position as well as concentra-

²⁷ Notice of the Ministry of Commerce Notice No. 76 of 2009, September 28, 2009, available at:

<<http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906540211.html>>.

²⁸ Notice of Ministry of Commerce Notice No. 77 of 2009 (anti-monopoly review decision on the conditional approval of Pfizer's acquisition of Wyeth's), September 29, 2009, available at:

<<http://fldj.mofcom.gov.cn/aarticle/ztxx/200909/20090906541443.html>>.

²⁹ See: <<http://fldj.mofcom.gov.cn/aarticle/ztxx/200910/20091006593175.html>>.

³⁰ See: <<http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html>>.

tion, for the enforcement of CAML when Antimonopoly agencies defining the relevant market. National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) compose the “Troika” of the implementation of CAML. Since the promulgation and implementation of CAML, they have begun, led by MOFCOM, to define the relevant market in practices when reviewing cases of concentration. However, so far neither the NDRC nor the SAIC have defined relevant market in cases related to agreements and abuse of market dominance. Judging from the implementation approach of MOFCOM, the privileges of centralized review are mainly delegated to the MOFCOM. The Ministry of Commerce will not give lower level authorities the power of implementation, but lower government authorities can be entrusted to assist in the investigation in their area of jurisdiction³¹.

from antitrust enforcement procedural provisions announced by the NDRC and the SAIC, it is not clear whether the ACSC guidelines will make a difference. According to “procedures of SAIC to investigate agreements, abuse of market dominant position”³², SAIC may authorize industrial and commercial administrative organs of provinces, autonomous regions and municipalities the power to implement antitrust law related to agreements, abuse of market dominant position when needed. This authorization is limited to cases happening in the area within the provincial administration, and determined by the SAIC whether such grant is necessary depending on actual work conditions. SAIC is still responsible for cases which have significant impact across the country or should be investigated and dealt under SAIC by its own decision. In other words, SAIC can grant industrial and commercial department of provincial government the power of implementation of anti-monopoly law. However, the industrial and commercial department at the provincial level cannot then grant the next level administrative organs of region the implementation or investigation power.

³¹ Among the already promulgated provisions related to the implementation of anti-monopoly law, there is no such one that authorizes provincial commercial department to enforce law or conduct investigation. Centralized review by the Department of Commerce is a question of fact, which is also confirmed in the conversation between the author and the Department of Commerce’s anti-monopoly officials.

³² Announcement made by the SAIC Antitrust and Unfair Competition Law Enforcement Bureau on June 5, 2009, available at: <http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200906/t20090605_61123.html>.

According to Article 3 of the **Provisions on the Administrative Procedures for Law Enforcement against Price Fixing**³³ released by NDRC, NDRC shall be responsible for the law enforcement against price fixing across the country. The competent departments of province, autonomous region or municipality directly under the Central Government as authorized by NDRC shall be responsible for the law enforcement against price fixing within its administrative region. A price fixing case which occurs across provinces, autonomous regions and/or municipalities directly under the Central Government shall be investigated and handled by the competent price department of relevant province, autonomous region or municipality, and NDRC shall directly investigate and handle a significant case. According to Article 4, NDRC or relevant department of a province, autonomous region or municipality may, within its statutory powers, authorize the regional government department at the next lower level to investigate suspected price fixing acts. The authorized regional government department shall, within the scope of authorization, conduct investigation in the name of the authorizing organ, but shall not authorize again any other administrative organ, organization or individual to conduct investigation. That is to say, NDRC's implementation of anti-monopoly law is not through authorization of individual cases, but through direct authorization of the regional department of the province, which shall enforce law within its administrative region according to CAML and provisions against price fixing released by NDRC³⁴. The government department of province shall authorize the regional government department at the next lower level to investigate suspected price fixing acts, but not entitled to punish.

In summary, the three anti-monopoly enforcement agencies in China are widely divergent. The uniform enforcement of the Merger by MOF-COM is in line with international anti-trust law practice. However, judging from SAIC and NDRC's anti-monopoly enforcement approach, it will be a big problem for the authorized government departments in the provincial authority or directly by the relevant departments of the provincial

³³ National Development and Reform Commission Order No. 8, December 29, 2010 announcement, see the Office of National Development and Reform Commission website: <http://www.sdpc.gov.cn/zcfb/zcfbl/2010ling/t20110104_389395.htm>.

³⁴ National Development and Reform Commission Order No. 7, December 29, 2010 announcement, see the Office of National Development and Reform Commission website: <http://bgt.ndrc.gov.cn/zcfb/t20110104_389398.htm>.

government to enforce anti-monopoly law and define relevant market directly. Under China's existing administrative system, great challenges, such as the request of uniform law enforcement standard and law enforcement ability, will be imposed on relevant provincial government departments when implementing laws such as defining the relevant market which is in great need of knowledge of economics and law. In a way, the relevant provincial government departments may be more inclined to identify and deal with suspected violations in their own discretion scope, but will hardly define the relevant market in accordance with State guidelines.

On the other hand, with a vast territory and wide divergence between regions, China faces many problems such as the lack and inaccuracy of statistical data of national and local markets. Meanwhile, China is a multi-ethnic country, with different regional, ethnic habits and consumption levels. Also, there are many objective and subjective factors that limit the flow of goods, such as different traffic conditions and local protectionism. All the above factors will affect the anti-monopoly law enforcement agencies' definition on relevant market. In China, suspected actions which violate the law, such as agreements and abuse of dominant market position, are likely to occur in a regional market. In order to effectively prevent and stop the monopoly, anti-monopoly law enforcement agencies can directly assess the effect of the exclusion or limitation of competition, rather than conduct a prior definition of the relevant market.

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Conclusion: the Reference Value of U.S. 2010 Merger Guidelines to China

The U.S. 2010 Merger Guidelines represent the latest position of U.S. antitrust authorities when reviewing concentration in the context of globalization, indicating a new policy-oriented review for some time to come. In defining the relevant market, the changed position of antitrust authorities is bound to affect the future of antitrust law enforcement. Admittedly, the change of position of the U.S. government has some theoretical and practical basis. It can be expected that the new position suggested by the U.S. 2010 Merger Guidelines will lead other countries to

explore the meaning in defining the relevant market, and most likely to trigger competition agencies in other countries to make similar changes³⁵.

The CAML is in its early stages and can still benefit from developed countries' experiences. Since the promulgation of CAML, three anti-monopoly agencies have gradually introduced rules and regulations on implementation and have accumulated corresponding experiences in the process of reviewing concentration. Overall, the implementation of CAML is still facing various problems, such as law enforcement model differences of relevant agencies and the self-instruction of anti-monopoly law enforcement agencies. CAML is similar to the EU Competition Law in structure, emphasizing market share and market structure more than the U.S., which is particularly prominent in the regulation of abuse of dominant market position. When reviewing concentration, we cannot ignore the effect on evaluating concentration's influence of restricting and eliminating of competition by defining relevant market. MOFCOM uses a variety of methods to define relevant markets and evaluate effect of eliminating or restricting the competition in accordance with antimonopoly law and ACSC guidelines. However, there is still much room for improvement in making the basis for defining the relevant market and doing economic analysis of the effect of restricting competition.

CAML establishes "exclude or restrict competition" as common illegal elements for agreements, abuse of dominant market position as well as concentration, and do not set "produce or enhance the enterprise's market power" as prerequisite for "exclusion or limitation of competition" standard, which in itself has reserved space for the interpretation of antitrust law standard. Based on the structural features of CAML, China and the United States are not bound into the same position and approach. Nevertheless, the U.S. antitrust enforcement agencies reduce the status and role of defining relevant market, which has positive significance, and also complies with the actual situation of the enforcement of CAML. Judging from the importance of defining the relevant market in agreements, abuse of dominant market position and concentration regulation, and the division of enforcement of CAML, reducing the role of defining the relevant mar-

³⁵ On September 16, 2009, the Office of Fair Trading Competition Commission of UK made Merger Assessment Guidelines. Among it, the emphasis on analysis of competitiveness rather than on definition of relevant market is likely to have been influenced by the new American Merger Guidelines.

ket may facilitate relevant provincial government departments in enforcing laws on monopoly agreement and abuse of dominant market position. In fact, antimonopoly agencies do not need to evaluate the effect of restricting or eliminating competition after doing procedural work in defining relevant market. From this perspective, the changed position of U.S. antitrust authorities on defining the relevant market has reference value for the enforcement of CAML. China's antimonopoly agencies can focus antitrust review on the evaluation of the effect of restricting or eliminating competition, so as to enhance the effectiveness of our anti-trust law enforcement and the overall level.