美国律师公会反托拉斯法部和国际法部就中华人民共和国商务部

《关于相关市场界定的指南(草案)》之评论意见

2009 年 1 月 30 日

本文所述观点仅代表上述部门共同提交，未经美国律师公会之代表大会或理事会 的批准。因此不应被视为代表美国律师公会的政策立场。

美国律师公会（简称“ABA”）下属反托拉斯法部和国际法部（统称“两部门”）[1]谨此就中国商务部（简称“商务部”）于 2009 年 1 月 7 日公布的《关于相关市场界定的指南（草案）》征求意见稿（简称“指南草案”）相关内容呈递其评论意见[2]。

两部门对《指南草案》中所反映出的商务部的相当多的思考和努力表示赞赏。同时，两部门藉此机会提出如下评论意见，希望有助于《指南》终稿的完成。在适当时，两部门愿意提供补充意见，或与商务部进行相关磋商。两部门所呈交之评论意见反映了其在美国法律方面的专业知识与经验，同时也反映了其对国际反垄断法、竞争法的熟谙，以及其对诸如相关市场界定等反垄断问题分析中所蕴涵的经济学专业知识的了解。

1 概要及总体意见

对于商务部为提高中国《反垄断法》实施的透明度而公布该《指南草案》并在定稿之前向公众提供发表意见的机会的做法，两部门表示祝贺。我们期待在将来涉及到相关政策、实施指南、执行细则和类似文件时商务部也会做出类似努力，为《反垄断法》的实施提供进一步的指导。按照合理的指南实施和执行《反垄断法》，将有助于确保在中国形成一个强有力的竞争法体系。同时，我们也鼓励反垄断委员会和反垄断执法机构公布公众或国际反垄断团体可能感兴趣的相关决定。

《指南草案》采用了国际竞争法与政策领域内符合国际共识的主流分析方法，两部门对此表示欢迎[3]。指南以经济分析为基础，在市场界定中主要依赖客观因素，特别是运用假定垄断者测试，即SSNIP（小幅但显著且非暂时性的提价）。除非一项标准总体合理并具体符合中国国情，否则遵守这样的标准并不具有价值。然而在此，国际上有关市场界定原则以及尽可能使用客观因素的共识有着强大的知识和分析基础作支持，该基础至少可

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[1] 负责起草该评论意见的工作组成员包括：Terry Calvani、Yee Wah Chin、Paul S. Crampton、Fei Deng、Adrian Emch、John D. Graubert、Margaret E. Guerin-Calvert、Paul Jones、Gergory K. Lenonard、Abbott B. Lipsky, Jr.、Su Sun 以及 Christine Wilson。同时，Matthew I. Bachrack、David Ernst 和 James R. Modrall 也提供了宝贵意见；Shan Hu 和 Yizhe Zhang 为起草工作提供了协助。本意见书中所阐述的观点并不一定代表上述工作组成员所属之专业机构的意见或立场。

[2] 《指南草案》是在商务部网站内发布的公开征求意见稿，其链接地址为：http//fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090105993492.html.两部门就《指南草案》的评论意见基于非官方译文。

[3] 例如：国际竞争网《合并分析的推荐做法》，链接：http://www.internationalcompetitionnetwork.org.

追溯至 1982 年美国司法部反托拉斯局的《合并指南》，而该《合并指南》在大量案件中得到成功应用[4]。

我们就《指南草案》的具体内容提出评论意见，具体见如下所述。希望这些意见对商务部有所帮助。这些评论意见旨在帮助《指南草案》变得更为明晰和健全。

两部门着重建议对下述方面予以澄清：

（1）第二条应澄清并强调市场界定在竞争分析的第一步所起的作用。

（2）第三条应澄清界定相关地域市场所依据的原则，即价格和其他竞争变量是由该地域范围内的经营者之间的竞争而非由来自于其他地域范围的经营者的竞争所决定的。同时，两部门建议将“创新”以及集中对创新的影响作为竞争影响分析的组成部分，而不是要求界定“创新市场”。

（3）第四条可澄清在市场界定和竞争影响分析中都可以考虑供给替代，以改进这一条。

（4）第七条应更明确地表明将假定垄断者 SSNIP 测试作为相关市场界定的主要方法。

（5）第八条应澄清以强化在界定相关市场时，将尽可能地基于市场参与者的实际行为，而其他因素在分析中则将主要起辅助作用。

（6）两部门建议商务部修改第十条和第十一条，以就 SSNIP 测试在经营者集中上的应用提供更为明确的指导。第十条应澄清在经营者集中审查过程中使用 SSNIP 测试时所使用的价格水平一般是当前市场价格。同时，两部门建议商务部澄清 SSNIP 测试的评估期限为一年仅为示例，因为在有些情况下，可能其他期限更为合适。第十一条应澄清 SSNIP 测试在非经营者集中案件中的应用问题，特别是，由于排他性滥用支配地位行为或由于存在限制或抑制竞争的协议而使价格可能显著高于竞争价格的情况下，在使用当前市场价格时务必谨慎。

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[4] 参见美国司法部与联邦贸易委员会横向合并指南（1992 年，1997 年修订）（以下简称“美国合并指南”） 重印于 4 Trade Reg. Rep. (CCH) ¶ 13,104。 比如美国司法部和联邦贸易委员会在其“横向合并指南评论”中（特别是第一部分）提供了大量不同行业和事项中的市场界定原则的应用示例。美国司法部和联邦贸易委员会“横向合并指南评论”（2006）重印于 4 Trade Reg. Rep. (CCH) ¶ 50,208。另见 Michael D. Whnston 在“横向合并中的反垄断政策”中有关 SSNIP 测试的应用问题的讨论，载于产业组织手册第三卷（2007）第 2393 页至第 2394 页；美国律师公会反托拉斯法部所著《反托拉斯法律发展》（2007 年第 6 版）第 549-620 页；Jonathan B. Baker 所著*“对经济学和法院工作动态的回应：合并指南中的市场进入问题”*，见 http://www.usdoj.gov/atr/hmerger/11252.htm; David Scheffman、Malcolm Coate 和 Louis Silva 所著*“联邦贸易委员会 20 年合并指南的执行：经济视角”*，见 http://www.usdoj.gov/atr/hmerger/11255.htm; Gregory J. Werden 所著*“1982 年合并指南与假定垄断者模式的兴起”*，见 http://www.usdoj.gov/atr/hmerger/11256.htm.

（7）关于第十一条，两部门注意到价格歧视市场将涉及大量事实，因此建议尽量少用。

2　对第二条的意见

《指南草案》第二条规定“相关市场的界定是对竞争行为进行分析的前提，是反垄断执法工作的重要步骤”。相关市场的界定是一项根本性的工作，且是竞争分析中的一个有用的工具[5]。市场界定为了解所要分析的经济活动的特征奠定了基础，使得执法部门能够更好地预测经营者集中或行为的影响。然而，市场界定只是为实现最终目标——即评估经营者集中以及其他各种竞争行为对竞争的影响——所设计的过程中的一个步骤[6]。

此外，市场界定是一个程度问题，在界定相关市场的范围时必须运用合理判断。经常很难收集到足够信息进行精确分析以就市场界定做出清晰明确的判断，特别是考虑到为实现执法机构或司法审查效率而规定的审查期限的限制。然而，集中各方有时提出市场范围界定时毫无根据地表现得过于自信和确定。使用这种方法的原因在于，市场如何被界定对市场集中度的衡量具有重大影响，而集中度以及集中度的变化通常在竞争影响分析中起到一定作用。

然而，并不总是要求必须对市场界定完全确信后，才能够就竞争影响做出足够合理的、以事实为依据的判断。通常，我们可以并且应当根据市场的替代界定方案进行分析，只要每种替代界定方案都是可信的且有依据支持的。如果市场界定较窄，可以在分析过程的后续某一点（例如在市场进入或扩张评估中或在对竞争的影响分析中），考虑被从界定的市场中排除的产品对竞争行为的约束作用[7]。相反，在市场界定较宽的情况下，其内所包含的产品对经营者可能的未来行为的约束作用可能十分有限。竞争影响的最终分析会适当考虑这些因素。

经验以及周全的经济分析表明，应承认市场界定所存在的不确定性，同时，也应该明确考虑到其有关竞争影响的结论对所选择的相关市场定义的敏感程度。如果对市场结构

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[5] 美国的许多法院认为市场界定对于评估竞争影响有帮助，且市场界定通常是一项核心的决定性的问题。参见 FTC v. H.J. Heinz Co., 246 F.3d 708, 715(D.C. Cir. 2001); F.T.C. v. Whole Foods Market, Inc., 2009 WL 47019 (D.D.C.2009)。亦见美国律师协会反托拉斯法部所著《反托拉斯法律发展》（2007 年第 6 版）第 549-620 页。

[6] 美国执法部门和法院不是完全依赖市场界定和市场集中度，而是通盘考虑所有可获得的证据，以评定对竞争的潜在损害。例如参见美国合并指南§1.52；United States v. General Dynamics Corp., 415 U.S. 486 (1974)。

[7] 例如：Canival-Princess 游轮公司合并案中关于市场界定的讨论，联邦贸易委员会的意见陈述，“In the Matter of Royal Caribbean CRUISES, Ltd./ P&O Princess Cruises plc and Carnival Corporation/ P&O Princess Cruises plc”（2002 年 10 月 4 日），见于 http://ftc.gov/os/2002/10/cruisestatement.htm（其中指明尽管陆上休假旅游会形成一定竞争威胁，相关市场很可能是游轮这一相对较窄的市场，但同时认识到存在相对较高的行业弹性）。亦见联邦贸易委员会竞争局局长 Joseph J.Simons 2002 年 10 月 24 日在第十届金州反托拉斯法与不正当竞争年会上所作的主题演讲《联邦贸易委员会合并案件执法》，见于 http://www.ftc.gov/speeches/other/021024mergeenforcement.shtm.。

特征过于关注（即交易对集中度的影响），可能会导致过度强调市场界定，而有损于对竞争影响的判断这一最终的更为重要的目标[8]。较为妥当的做法是承认竞争分析的每一部分的重要性，而避免过于强调结构层面。在存在其他有关竞争影响的直接证据的情况下，这种做法尤为恰当。在存在可靠的直接证据的情况下，市场界定和集中度指标所起的作用可以减弱[9]。

总之，两部门建议在第二条第一段的末尾增加以下内容："虽然市场界定应该是竞争分析的第一步，但重要的是认识到相关市场并非总是能够完全精确地界定。在此情况下，只要存在可信的并有依据支持的替代市场界定方案，可以使用该替代市场界定方案进行竞争分析。此外，在存在有关对竞争影响的直接证据的情况下，市场界定和集中度指标在分析中所起的作用将减弱"[10]。

3. 对第三条的意见

第三条规定"相关地域市场范围内的竞争条件基本一致，并明显区别于其他地域市场的竞争条件"。为了进一步澄清，该句可修改为"在相关地域市场范围内，价格和其它竞争变量是由该地域范围内的经营者之间的竞争而非由来自于其他地域范围的经营者的竞争所决定的"。"一致"一词的使用会向人们发出一种错误的暗示，即价格或其它竞争变量存在差异的言外之意是缺乏竞争，而此处的核心概念是该等变量是由相关地域市场范围内的经营者而非该市场范围之外的经营者所决定的。

第三条最后一段提到了"创新市场"这一概念。实践证明，该概念很难执行，而且在美国也颇受争议[11]。此处的一项担心是，研发成果本身存在不确定性，这使得基于研发

[8] 《美国合并指南》§2 中考虑了与竞争影响相关的其它市场因素。亦见 Whinston (2007)，第 2395 页至 2396 页。其它作者也指出了二手货市场以及经营者之间多市场联络的重要性。参见 Dennis W. Carlton 和 Robert Gertner 所著"耐用品行业的市场支配力和合并"，法律与经济学期刊，1989 年第 32 期第 203 页；以及 B. Douglas Bernheim 和 Michael D. Whinston 所著"多市场联络与合谋行为"，兰德经济学期刊，1990 年第 21 期第 1 页。

[9] 例如参见：Jonathan B. Baker 所著"市场界定"，美国律师公会反托拉斯法部编《竞争法律与政策问题》, (W. D. Collins, ed., 2008) 第 315 页。

[10] 在面对潜在竞争影响的证据时，美国法院对市场集中度数据的依赖较少。相反，美国法院以市场界定为起点，对竞争影响进行范围更广的调查。例如参见 United States v. Baker Hughes Inc., 908 F.2d 981, 984-85 (D.C. Cir. 1990) (引用了 Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)); United States v. General Dynamics Corp., 415 U.S. 486 (1974)，以及 In re Evanston Healthcare Corp., 2005 FTC LEXIS 146 (FTC 2005), *aff'd* 2007 FTC LEXIS 95 (FTC 2007)。亦见 Orley Ashenfelter、David Ashmore、Jonathan B. Baker、Suzanne Gleason 和 Daniel S. Hosken 所著"合并分析中的实证方法：FTC v. Staples 案中对定价的经济计量分析"，国际商业经济期刊(2006)第 13 期第 265 页。

[11] 例如 Dennis W. Carlton 所著"市场界定：应用与滥用"，国际竞争政策（2007）第 3 期第 24-25 页。在其 2007 年的《报告和建议》中，美国反垄断现代化委员会承认关于创新问题还需要进一步研究。美国反垄断改革委员会：报告与建议(2007)，第 67 页, 见于 http://govinfo.library.unt.edu/amc/。虽然目前的合并案执法政策具有一定灵活度，而不需要大幅度的变革，委员会建议执行机构应该更多地重视能够表明合并将促进创新的证据(同上，第 49 页)。

进行市场界定更具臆测性。同时，经济学界内对竞争、创新与新产品投放之间的关系的争议非常激烈，它表明“创新”界定起来更加困难[12]。因此，在使用“创新市场”这一概念时，我们建议谨慎行事。两部门建议在第三条最后一段之后增加以下内容“在有些情况下，也许更为合适的作法是考虑集中和相关行为对产品和服务质量与创新的影响，而不是界定一个创新市场”。

4. 对第四条的意见

第四条表明，虽然需求替代性是相关产品市场界定中的最重要的因素，但也可以考虑供给替代。在市场界定中，可通过多种不同途径考虑供给替代问题。美国《合并指南》在界定市场时一般仅以需求层面的因素为依据，而在进行竞争影响分析时考虑供给层面的因素，这也是最为普遍的应用方式[13]。欧盟委员会《关于市场界定的通知》以及澳大利亚《合并指南》都明确规定了在市场界定过程中如何考虑供给弹性[14]。值得强调的是，即使某些供给层面的因素（例如市场进入的难易程度）是在相关市界定后而非界定过程中考虑的，在竞争影响分析中，这些因素都会被考虑在内并且会得到应有的重视[15]。两部门因此建议在第四条末尾增加以下内容：“在对经营者集中或相关行为进行竞争影响分析过程中，可以充分考虑供给替代问题”。

5. 对第七条的意见

两部门认识到可使用各种不同的方法确定相关市场的范围，且在具体某些情况下，有些方法比其它方法更为合适或可行。如果SSNIP测试是其中一种可选择的可行方法，我们建议使用SSNIP测试，因为它在其它司法辖区中已经有多年的成功实践经验[16]。因此，我们建议将第七条第一段的最后一句修订为“一般情况下，应通过假定垄断者测试（具体见第十条）界定相关市场”。

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12 对比以下两篇文章：Richard T. Rapp 所著“创新市场在合并案分析中的错误应用”，反垄断法期刊，1995 年第 64 期第 19 页，和 Richard J. Gilbert & Steven C. Sunshine 所著“创新市场的应用：对 Hay、Rapp 和 Hoerner 的回复”，反垄断法期刊，1995 年第 64 期第 75 页。第二篇文章是继 Richard J. Gilbert and Steven C,. Sunshine 在“合并分析中纳入动态效率方面的考虑”(反垄断法期刊，1995 年第 63 期第 569 页)中就竞争对创新的影响以及如何在合并分析中考虑创新因素问题对相关经济文献进行详细评论后发表达表的另一篇文章。

13 美国合并指南§1.0。

14 欧盟委员会有关共同体竞争法中的相关市场界定问题的通知，*C-372* (Sept. 12, 1997) ¶¶ 20-23，见于 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML.。

15 参见美国合并指南§3.0。亦见 Gregory J. Werden 和 Luke M. Froeb 所著“横向合并促进市场进入的作用：探索性分析”，产业经济学期刊，1998 年第 46 期第 525 页，以及 Timothy F. Bresnahan 和 Peter C. Reiss 所著“高集中度市场中的市场进入与竞争”，政治经济学期刊，1991 年第 99 期第 977 页。

16 例如参见：Gregory Werden 所著“1982 年合并指南与假定垄断者模式的兴起”，反垄断法期刊，2003 年第 71 期第 253 页。

我们同时建议在第七条末尾增加以下内容“竞争影响的直接证据可作为界定相关市场的补充”[17]。这着重表明了评估竞争影响这一终极目标，而且与该终极目标一致。此外，第七条最后一句中的“不能偏离商品的基本属性”意思模糊，我们建议澄清或者删除。

6. 对第八条的意见

两部门建议将第八条第一句修订为“从需求角度界定市场时，购买者针对价格相对变化而转而购买其它商品的实际行为直接涉及到替代问题，因此是需要考虑的最有用的因素。在无法获得需求者实际行为方面的信息时，在有些情况下可以考虑以下几方面的因素：”

在相关市场界定中，在能够获得有关市场参与者实际行为的信息的情况下，例如需求者根据价格的变化转而购买其它产品或转向其它供应者的行为，或供应者调整生产或供应新产品的行为，这些市场参与者实际行为方面的信息通常是最有价值的信息[18]。这种信息直接涉及到替代性这一核心问题，并且一般是比较客观的信息。如果无法获得该等信息，则其它一些例如第八条提到的指标可能会发挥一定作用。然而，除第八条所提及的诸如产品特征与用途、价格差异、分销渠道以及其它因素之外，还有很多其他可能的因素。许多行业的实际经济情况相当复杂，上述因素之外的因素经常可能会对市场界定有帮助。此外，第八条所提及的几个因素存在公认的局限性，这一点应该予以承认，具体见下文所述。市场界定的目标在于识别与所述产品存在竞争关系的一系列产品，以便在进行竞争分析时能够着重考虑特定集中或相关行为对市场结果的影响或可能影响。第八条所提及的因素对该项调查工作并不直接相关，但在特定情况下可能会对影响不同产品之间交互作用的根本性竞争力量问题提供一些信息。最根本的经济调查工作应始终放在首位，且应明确承认依赖上述具体因素可能产生的潜在弊端。

6.1 第 8(2)条

依赖于价格差异（而非对价格变化的反应）定义市场可能会很成问题。[19] 例如，自有标识商品通常以比类似的品牌商品价格低很多的折扣价出售，即使有这样大的价格差异，还是被纳入与类似品牌商品相同的相关产品市场中。[20] 与此类似，尽管价格

[17] 例如，美国法院将竞争影响（例如定价行为）的证据作为界定相关市场的补充因素考虑，或作为存在子组市场的实际证据。例如参见 FTC. v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997)。

[18] 例如参见 Carl Shapiro 所著“差别产品的合并”，反垄断，1996 年第 10 期第 23 页，其中讨论了差别产品案件中的转换比率；以及 FTC. V. Arch coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004)，其中涉及到用户转而购买不同质量等级的煤炭的问题。

[19] 例如，见 Baker, 同上文注 9，334-335 页。

[20] 例如，见 U.S. v. Interstate Bakeries 案的起诉书，网址为 http://www.usdoj.gov/atr/cases/f0300/0301.htm。美国司法部定义白面包市场既包括品牌产品，也包括私有标识产品。亦见美国律师公会反托拉斯法部所著《反托拉斯法律发展》（2007 年第 6 版）第 572-574 页对有关私有标识产品和品牌产品案件的讨论。

变动有时会提供有用的资料，但也会误导市场定义。[21] 价格经常会由于与竞争无关的因素而变动；例如，这些产品可能都具有相同的成本因要素，或者他们可能都同时受到宏观经济条件、国际汇率变化或类似因素的突然而广泛变动的影响。相反地，即使对于激烈竞争的产品，价格在短期内也不一定会一同变动（例如，一种产品通常在现场交易中出售，而另一种产品则一般根据长期合同供货）。因此，在将价格变动用于界定相关市场之前，必须对价格变动的这些不同解释进行调查。两部门建议在第 8(2)条结尾处加上下列句子："但是，在用价格模式定义相关市场之前，应当考虑导致该等价格模式的其他原因。"

6.2　第 8(3)条

用不同的分销渠道作为产品被销往不同市场的指标也同样会面临几个隐患。通过不同渠道销售的产品可能在更接近用户或消费者的下游相互竞争。即使产品是通过不同的分销渠道和中间买方销售的，下游的竞争也能够将产品置于同一市场。[22] 在此情况下，将市场定义基于分销渠道的差别之上会导致市场定义的不正确。因此，两部门建议在第 8(3)条结尾处加上下列句子："但是，在使用这一因素定义相关市场之前，必须考虑分销渠道之间竞争的可能性。"

6.3　第 8(4)条

第 8(4)条列出了消费者对产品的偏好和依赖、品牌忠诚度、转换成本和风险、区别定价、供应商转产的成本和风险、生产流程和工艺以及营销渠道，作为确定相关产品市场的附加因素。

针对具体品牌或供应商的转换成本不一定会提供能用于界定相关产品市场的信息。针对具体品牌的转换成本，比如品牌忠诚度，可能会减少对特定品牌的需求价格弹性。[23] 例如，在涉及差异产品的集中案件中，品牌之间竞争的首要指标需要对那些在一个品牌的价格发生SSNIP的情况下会从一个品牌转向另一个品牌的消费者（即转换成本对他们而言并非高得不可接受的消费者）的行为进行检验。[24] 这些"边际"消费者起到对该品牌的价格进行约束的作用。关键问题是，这些边际消费者会转向哪个品牌？[25] 在对相关

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[21] Gregory J. Werden & Luke M. Froeb，"相关、因果及诸如此类：反垄断市场划分价格测验的内在缺点"，产业组织评论，1993 年第第 329 页。亦见 Roy J. Epstein & Daniel L. Rubinfeld，"技术报告，涉及差异产品的合并的影响"(2004)，对使用价格关联的相关问题进行了详细评论，见于 http://ec.europa.eu/competition/mergers/studies_reports/effects_mergers_involving_differentiated_products.pdf 。

[22] 例如，见美国合并指南§ 1.11，其中下游竞争被列为会影响市场定义的因素。

[23] 总体见 Dennis W. Carlton & Jeffrey M. Perloff，*现代产业组织* (2005 年第 4 版) 第 200-234 页。

[24] 见，《反托拉斯法律发展》，同上文注 5，第 566-568 页，讨论差异产品和品牌产品，包括，例如讨论 United States v. Gillette Co.案。亦见 Jerry A. Hausman & Gregory K. Leonard，"以现实世界数据对差异产品合并的经济分析" 乔治梅森法律评论，1997 年第 5 期第 323 页。

[25] 同上。

市场进行定义时，对很多消费者（“边际以下”消费者）而言转换成本过大或高得不能接受这一事实根本无关紧要。[26]

如果不是针对具体供应商，而是从一个相对通用的产品类别转换到另一个产品类别的情况下，替换成本可能更有意义一些。[27] 例如，在制造过程中使用一种类型材料的客户可能发现转而使用另一类型材料的成本太高。这一事实可能表明该第一种材料可能是一个单独的相关市场。因此，两部门建议将第 8(4)条修改为：“其他重要因素。例如，消费者对特定产品特性的偏好或依赖，或其他可能损害或阻碍大量消费者转向某些潜在替代产品而非其他替代产品的障碍、风险或成本，对确定何种潜在替代产品应当被纳入相关市场可能具有作用。”

7. 对第十条的意见

两部门对第十条中使用假定垄断者SSNIP测试表示欢迎。该测试比其他市场定义分析方法具有更被长久接受的纪录，因而应做为定义相关市场的首选方法。第十条第三段将“非临时性的”期间规定为一年。两部门建议让这一说法更具有些弹性，说成“比如，一年”。正如在对第十一条的意见中所讨论的那样，对于这样一些问题——“非临时性的”或用于实施假定垄断者测验的假定涨价幅度等——要想精确地找到最适当的水平通常是事与愿违，因为这样做成本会很高，并可能分散回答关键的分析性问题这一目标的精力。[28] 因此，重点应当放在基础概念的调查分析上（需求弹性、供给弹性、市场进入等），而不是涨价的精确程度或期间的确切长度上。此外，两部门建议将第十条第三段的最后一句进行修改，删掉“假定垄断者是产品的唯一生产商”的说法，因为它是分析的前提，而不是结论；通过假定垄断者方法定义的相关市场可能有很多生产商。

两部门建议将第四段的首句修改为：“如果涨价导致转向其他替代产品，足以使假定垄断者的涨价行为无利可图，则替代产品应纳入相关市场。” 这一修改设定了一项客观的测试。与此相类，两部门建议将第十条最后一句中的“强烈”一词删除；关键因素在于是否有足够的替代使得涨价无利可图，而不是替代是否够“强烈”。

第二段里，我们建议用“高于基准水平的价格”替换“高于竞争性水平的价格”。这样可以解决下文对第 11 段的评论中所述的“玻璃纸谬误”问题。

8. 对第十一条的意见

两部门赞赏《指南草案》中对“玻璃纸谬误”的认同，并建议将第十一条第一段修改为：

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[26] 同上。

[27] 见 Baker, 同上文注 10，脚注 44。

[28] 例如，见国际竞争网，*合并审查的调查技术指南*，2005 版中的讨论，见于 http://www.internationalcompetitionnetwork.org，及国际竞争网，*合并原则工作手册*, 2006 年版，第 20 页，讨论适于考虑不同期间的情况，见于 http://www.internationalcompetitionnetwork.org。

> “在集中案件中，以假定垄断者测试定义相关市场所适用的基准价格一般应为当前市场价格。但是，在滥用支配地位和合谋行为案件中，当前价格可能不宜作为基准价格。如果当前价格显著背离竞争价格，比如由于所审查行为的排他性所导致，或者由于当前价格系由默契协调的结果，则使用当前价格作为基准价格将导致不准确的相关市场定义。在此情况下，原则上应使用更具竞争性的价格作为基准。但是，这一价格难于确定，而且可能不可确定。如果发生这种情况，可使用其他方法进行市场定义。”

此外，我们建议第十一条的第二段中加进一个句子：“一般而言，5%至 10%之间的涨幅是适当的。” 最后，两部门建议将第十一条的最后一句修改为：“此时，相关市场的界定也可以考虑需求者群体和特定地域的情况。”

8.1 对集中案件与滥用支配地位和合谋行为案件的市场定义的区别

《指南》看起来要总体适用于《反垄断法》项下可能发生的所有类型案件的市场定义过程——对集中、合谋行为、支配地位企业行为的评估。这几种不同类型的案件的市场定义方法可能有所不同。

在涉及集中的案件中，一般认为不必考虑当前市场价格是否与假定的“竞争”价格不同，因为竞争分析的目标是确定该交易是否会严重削弱目前（交易前）的竞争状况。这项调查符合逻辑地采用当前市场价格作为标准来衡量可能会因集中而发生改变的假定的未来市场状况。

但是，正如第十一条所述，在滥用支配地位或合谋行为案件中用SSNIP测试按照当前价格来定义市场可能会导致“玻璃纸谬误”。[29] 玻璃纸谬误指的是这样一种情况：一家或多家处于支配地位的企业收取高于竞争水平的价格，而在高于竞争水平的价格上，存在支配企业的产品的紧密替代产品，但在较低的、具有竞争性的价格水平上该产品并不是紧密替代产品。[30] 按照通行（高于竞争水平）价格使用SSNIP测试，会过宽地纳入那些仅仅因为处于支配地位的企业通过其滥用行为已经收取的高于竞争水平的价格而成为紧密替代品的产品，从而导致对市场的定义过于宽泛。

由于玻璃纸谬误带来的危险，在涉及支配企业行为或合谋行为的案件中，合乎逻辑的做法可能是查明合谋行为或处于支配地位的企业实施垄断权的行为是否已经对价格产生了影响，然后再按照所确定的没有这些行为影响的情况下的价格做SSNIP测试。但是，经验表明这是一项非常困难的调查，因为未受该等行为影响情况下的价格属于未知，必须进行估算。要确定在没有该等行为的情况下可能出现的假定的市场行为需要大量的判断和相

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[29] Gene C. Schaerr, 玻璃纸谬误及司法部横向合并指南，耶鲁法律期刊，1985 年第 94 期第 670 页; William M. Landes & Richard A. Posner, 反垄断案例中的市场支配力量，哈佛法律评论，1981 年第 94 期第 937 页。

[30] “玻璃纸谬误”是来自 United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)这一美国案例的一种说法。在此案中，市场定义过于宽泛，未能甄别玻璃纸独家生产商实施市场支配力量的情况。

当程度的推测。简言之，支配地位和合谋行为案件中的市场定义多了一层集中案件中所没有的复杂性，因而更加困难。[31] 所以，这方面的任何举措均需非常慎重。

因此，我们建议《指南》应规定集中案件中的市场定义一般应使用当前价格作为基准价格，并如其在第 11 条中所做的那样，承认在滥用支配地位和合谋行为案件中确定适当的基准价格的困难。

8.2 "小幅但显著的提价"的定义

第十一条第 2 段提出了在进行SSNIP测试时，如何定义"小幅但显著的提价"的幅度问题。确实SSNIP测试的结果会因所使用的SSNIP的幅度而不同（例如，一个能够提价5%而获利的假定垄断者可能无法提价 20%而获利）。但是，美国和欧盟的经验表明在大多数分析中，5％到 10％的SSNIP是一个适当的、有用的参照点。[32] 在一些罕见的情况下，使用低于 5％的SSNIP可能是合适的。例如，有关行业的毛利率非常低，5％的提价相对于毛利而言可能意味着大幅的提价，从而宜于使用较小的SSNIP。[33] 不管怎样，如上所述，在大多数案例中不可能做到精确。

8.3 价格歧视市场

第十一条最后一段似乎是指"价格歧视市场"，亦即根据某种产品和此产品的消费者群体对有关市场加以定义，这些消费者可以由供应商单独区分出来，并且对该种产品的需求弹性较低。[34] 在上述两个条件下，假定的垄断者即使不能通过不能针对所有消费者的SSNIP获利，但能够通过针对这一特定消费者群体的SSNIP获利。因此，这一消费者群体可能构成单独的相关市场。

对价格歧视市场的定义可能涉及大量的事实，而且非常复杂。确实，供应商是否能够足够准确地识别对价格不敏感的消费者并对其收取更高的价格，这个关键问题很难确

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[31] 总体见 Lawrence J. White"垄断案件中的市场支配力量和市场定义"，刊登在美国律师公会反托拉斯法部，*竞争法律与政策问题*, 第 315 页 (W.D. Collins, ed., 2008 年)；美国司法部"竞争与垄断：谢尔曼法第二款项下的单个企业行为"(2008)第 26-27 页；Carlton, "市场界定：应用与滥用", 见上文注 11， 第 19-21 页。

[32] 例如，见美国合并指南，§ 1.11；欧盟委员会有关共同体竞争法中的相关市场界定问题的通知 *C-372*, (Sept. 12, 1997) ¶ 17, 见于 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML.; United States v. Engelhard Corp., 970 F. Supp. 1463, 1467-70 (M.D. Ga.), *aff'd*, 126 F.3d 1302 (11th Cir. 1997)

[33] 见，国际竞争网，*合并指南工作手册*，对使用 SSNIP 测试的讨论和对价格变化水平的考虑。美国合并指南中规定了参考一般范围加以调试而适用于具体案例的概念: "总体而言，被假定为提高的价格将是在接受检查的有关行业阶段中被认定的产品价格。要客观地确定'小幅但显著且非暂时性的提价'的影响，该部门在多数情况下使用在可预见的将来持续存在的百分之五的价格涨幅。但是，什么构成'小幅但显著且非暂时性的提价'将取决于该行业的性质，而该部门有时会使用大于或小于百分之五的价格涨幅。" 美国合并指南§1.12（脚注略）。

[34] 例如，见美国合并指南，§ 1.12

认。[35] 仅仅发现存在对价格不敏感（“边际以下”）的消费者是不够的，因为几乎任何产品都有边际以下的消费者。边际以下消费者的行为一般都与竞争行为无关，除非这些消费者能够由供应商非常准确地确认出并加以歧视。两部门建议在反垄断执法部门依照《指南》获得更多经验之前，要特别小心不要广泛使用 “价格歧视市场”这一概念。

结论

我们希望这些建议有所裨益，并愿意在商务部定稿《指南》的过程中继续提供有益的协助。两部门赞赏商务部为起草 《指南草案》已经做的大量工作，并感谢商务部在对《反垄断法》的实施和执行过程中对我们的意见及其他方面的意见加以考虑。

[35] 例如，见 Jerry A. Hausman, Gregory K. Leonard, & Christopher A. Vellturo, “价格歧视下的市场定义”，*反垄断法期刊* (1996)，第 64 期第 367-386 页。此外，要使价格歧视成为可能，则不可能在非目标消费者和目标消费者之间进行套利。

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE MOFCOM DRAFT GUIDELINES FOR DEFINITION OF RELEVANT MARKETS

January 30, 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association ("ABA")[1] respectfully submit these comments on aspects of the Guidelines for Definition of Relevant Market (Draft) ("Draft Guidelines") of China's Ministry of Commerce ("MOFCOM") published for comment on January 7, 2009.[2]

The Sections appreciate the substantial thought and effort of MOFCOM reflected in the Draft Guidelines and take the opportunity to offer these comments in the hope that they may assist in the completion of final Guidelines. The Sections are available to provide additional comments, or to participate in consultations with MOFCOM, as appropriate. The Sections' comments reflect their expertise and experience with U.S. law and their familiarity with antitrust/competition law internationally, as well as expertise in the economics underlying the analysis of antitrust issues such as the definition of relevant markets.

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2 The Draft Guidelines were published for public consultation on MOFCOM's website at http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090105993492.html. The Sections' comments on the Draft Guidelines are based on unofficial translations.

1. Executive Summary and General Comments

The Sections congratulate MOFCOM for facilitating transparency in the application of China's Anti-Monopoly Law ("AML") by publishing the Draft Guidelines and providing the opportunity to comment before they are finalized. To provide further guidance regarding how the AML will be enforced, we look forward to similar efforts in the future for policy and enforcement guidelines, implementation rules, and similar documents. Enforcement of the AML consistent with sound Guidelines will help ensure the development of a strong competition law system in China. We also encourage the Anti-Monopoly Commission and the Anti-Monopoly Enforcement Authorities to publish decisions that are likely to be of interest to the general public or the international antitrust community.

The Sections welcome the Draft Guidelines' adoption of analytic approaches that are within the mainstream of international competition law and policy, and consistent with international consensus.[3] The Guidelines make economic analysis the basic foundation and rely primarily on objective factors for market definition, particularly the hypothetical monopolist SSNIP (Small but Significant Non-transitory Increase in Price) test. Conformity to a standard is not independently valuable unless the standard is sensible both in general and for China in particular. Here, however, the broad international consensus with respect to market definition principles and the use of objective factors wherever possible is based on a strong intellectual and analytical foundation that dates back at least to the 1982 U.S. Antitrust Division Merger Guidelines, which have been applied successfully in numerous cases.[4]

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[3] *See, e.g.,* INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER ANALYSIS, *available at* http://www.internationalcompetitionnetwork.org.

[4] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992, revised 1997) [hereafter, *U.S. Merger Guidelines*] *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104. For example, the U.S. Department of Justice and Federal Trade Commission's "Commentary on the Horizontal Merger Guidelines" provides, particularly in Section 1, a number of examples of the application of market definition principles in a

We offer comments on specific aspects of the Draft Guidelines, as explained in detail below, that we hope will be helpful to MOFCOM. These comments are intended to help clarify and further strengthen the Draft Guidelines.

In particular, the Sections recommend clarification in the following areas:

(1) Article 2 should clarify and emphasize the role that market definition plays as the initial step of the competitive analysis;

(2) Article 3 should clarify that the determination of geographic market definition is based on the principle that prices and other competitive variables are determined by competition among enterprises within that geographic area, rather than by competition from enterprises in other geographic areas; the Sections also recommend that "innovation" and the effects of concentrations on innovation be dealt with as part of the competitive effects analysis, rather than requiring definition of "innovation markets;"

(3) Article 4 would benefit from clarifying that consideration of supply substitution may take place during both market definition and competitive effects analysis;

(4) Article 7 should more expressly recognize the hypothetical monopolist SSNIP test as the primary approach that will be used in defining the relevant market;

(5) Article 8 should be clarified to reinforce that actual behavior of market participants will be relied upon wherever available in defining the relevant markets, and that other factors will be used primarily to supplement the analysis;

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variety of different industries and matters. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, JOINT COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 50,208. *See also* discussion of the application of the SSNIP test in Michael D. Whinston, Antitrust Policy Toward Horizontal Mergers, 3 HANDBOOK OF INDUS. ORG. 2393, 2393-94 (2007); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 549-620 (6th ed. 2007); Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, *available at* http://www.usdoj.gov/atr/hmerger/11252.htm; David Scheffman, Malcolm Coate, & Louis Silva, *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, *available at* http://www.usdoj.gov/atr/hmerger/11255.htm; Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, *available at* http://www.usdoj.gov/atr/hmerger/11256.htm.

(6) The Sections recommend that Articles 10 and 11 be revised to provide more express guidance with regard to the application of the SSNIP test in concentrations. Article 10 should clarify that the price level that will be used in applying the SSNIP test in the review of concentrations will generally be prevailing market prices. The Sections also recommend clarifying that the one-year time frame over which the SSNIP test is evaluated is an example, since other time frames may be more appropriate in some cases. Article 11 should clarify issues associated with application of the SSNIP test in non-concentration cases, where caution should be exercised in using prevailing prices, particularly where it appears that such prices may be significantly above the competitive price, for example, because of an exclusionary abuse of dominance or an anticompetitive agreement; and

(7) With regard to Article 11, the Sections note the fact-intensive nature of price discrimination markets and recommend that they be used sparingly.

2. <u>Comments on Article 2</u>

The Draft Guidelines state in Article 2 that "defining a relevant market is a prerequisite for analysis of competitive conduct, an important step in anti-monopoly enforcement efforts." Defining the relevant market is an essential discipline and a helpful tool in competitive analysis.[5] Market definition provides a good foundation for understanding the character of the economic activities being analyzed and better equips the enforcement authority to predict the effects of the concentration or conduct in question. However, market definition is only one step in the process

[5] Many U.S. courts have considered market definition helpful in order to assess competitive impact, and often market definition is a central and threshold issue. *See, e.g.,* FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001); F.T.C. v. Whole Foods Market, Inc., 2009 WL 47019 (D.D.C. 2009). *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 549-620 (6th ed. 2007).

designed to achieve the ultimate goal: assessing the competitive effect of concentrations and other types of competitive conduct.[6]

Moreover, market definition is a matter of degree, and reasonable judgment must be exercised when drawing the boundaries of the relevant market. It is frequently very difficult to gather enough information to perform an analysis with the type of precision that leads to clear and unambiguous judgments about market definition, especially within the timeframe required for efficient agency or judicial review. Nonetheless, parties sometimes present a market definition with an unjustifiable degree of conviction and certainty. This approach may be used because how a market is defined can make a substantial difference in measures of concentration and, in turn, concentration levels and changes in concentration levels often play a role in the competitive effects analysis.

It is not always essential, however, to be completely certain about market definition before one is able to make reasonably sound and fact-based judgments about competitive effects. Often, one can and ought to analyze a transaction under alternative market definitions, provided each alternative is both plausible and supportable. If the market is defined narrowly, the competitive constraints exercised by products excluded from the definition may nevertheless be considered at a subsequent point in the analysis, such as in the evaluation of entry and expansion or in the competitive effects analysis.[7] Conversely, products included in the market under a

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[6] The U.S. enforcement agencies and courts do not rely exclusively on market definition and market concentration, but rather consider all available evidence to assess potential competitive harm. *See, e.g.*, U.S. Merger Guidelines § 1.52; United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[7] For example, *see* discussion of market definition in the Carnival-Princess cruise line merger, Statement of the Federal Trade Commission, "In the Matter of Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc" (Oct. 4, 2002) *available at* http://ftc.gov/os/2002/10/cruisestatement.htm (noting that while land-based vacations provided some competitive threat, the relevant antitrust market was likely a narrower market for oceanic cruising, recognizing a relatively high industry elasticity. *See also*, Joseph J. Simons, Dir. Bureau of Competition, Fed. Trade Comm'n., Keynote Address to the Tenth Annual Golden State Antitrust and Unfair Competition Law Institute: Merger Enforcement at the FTC (Oct. 24, 2002), *available at* http://www.ftc.gov/speeches/other/021024mergeenforcement.shtm.

broad definition nevertheless may have limited effects in disciplining the likely future behavior of participating firms. These considerations are appropriately taken into account in the ultimate analysis of competitive effects.

Experience and thoughtful economic analysis show that the uncertainties of market definition should be acknowledged and the degree to which a conclusion regarding competitive effects may be sensitive to the choice of market definition should be explicitly taken into account. Excessive focus on structural characteristics of the market – i.e., the effect of the transaction on concentration measures – can lead to overemphasis on market definition and can detract from the broader and ultimately more important judgment regarding competitive effects.[8] The better course is to acknowledge the importance of each part of the competitive analysis, but to avoid overemphasizing structural aspects. This approach is particularly appropriate in those situations where there is other direct evidence regarding competitive effects. Where there is reliable direct evidence, market definition and concentration measures can play a lesser role.[9]

In conclusion, the Sections propose that the following language be added to the end of the first paragraph of Article 2: "Although market definition should be the first step in a competition analysis, it is important to recognize that a market cannot always be defined with complete precision. In that case, the competition analysis may be conducted using alternative market definitions, as long as these alternatives are both plausible and supportable. Moreover, when

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[8] The U.S. Merger Guidelines at § 2 consider other market factors that pertain to competitive effects. *See also* Whinston, *supra* note **Error! Bookmark not defined.**, at 2395-96. Other authors have pointed out the importance of a market for used goods and multimarket contacts between firms. *See* Dennis W. Carlton & Robert Gertner, Market Power and Mergers in Durable Goods Industries, 32 J. L. &ECON., 203 (1989); B. Douglas Bernheim & Michael D. Whinston, *Multimarket Contact and Collusive Behavior*, 21 RAND J. of ECON. 1 (1990).

[9] *See*, *e.g.*, Jonathan B. Baker, *Market Definition*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 315 (W. D. Collins, ed., 2008).

there is direct evidence regarding competitive effects, market definition and concentration measures may play a lesser role in the analysis."[10]

3. <u>Comments on Article 3</u>

Article 3 states, "[i]n the relevant geographic market dimension, the conditions of competition are basically homogeneous and are appreciably different from other geographic market." This statement could be clarified by stating instead that "in a relevant geographic market, prices and other competitive variables are determined by competition among enterprises within that geographic area, rather than by competition from enterprises in other geographic areas." Use of the term "homogeneous" may suggest incorrectly that differences in prices or other competitive variables imply an absence of competition, whereas the key concept is that such variables are determined by firms in the relevant geographic market rather than by firms from outside that market.

The last paragraph of Article 3 mentions the concept of "innovation markets." This concept has proved to be difficult to implement in practice and therefore is controversial in the United States.[11] One concern in this area is that the results of research and development are inherently uncertain, which makes the definition of markets based on research and development

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[10] When faced with evidence of likely competitive effect, U.S. courts have relied less on market concentration data. Instead, U.S. courts have used market definition as a starting point from which to launch a broader inquiry into competitive effects. *See, e.g.,* United States v. Baker Hughes Inc., 908 F.2d 981, 984-85 (D.C. Cir. 1990) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)); United States v. General Dynamics Corp., 415 U.S. 486 (1974); In re Evanston Healthcare Corp., 2005 FTC LEXIS 146 (FTC 2005), *aff'd* 2007 FTC LEXIS 95 (FTC 2007). *See also* Orley Ashenfelter, David Ashmore, Jonathan B. Baker, Suzanne Gleason & Daniel S. Hosken, *Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in FTC v. Staples*, 13 INT. J. OF THE ECON. of BUS. 265 (2006).

[11] *See*, *e.g.*, Dennis W. Carlton, Market Definition: Use and Abuse, 3 COMPETITION POL. INT. 3, 24-25 (2007). In its 2007 "Report and Recommendations," the U.S. Antitrust Modernization Commission recognized that there remains a need for additional learning regarding innovation. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 67 (2007), *available at* http://govinfo.library.unt.edu/amc/. Although the current merger enforcement policy is flexible and no substantial changes are necessary, the Commission recommended that the agencies give substantial weight to evidence demonstrating that a merger will increase innovation. *Id.* at 49.

activities more speculative. There is also a vigorous debate in the economics community about the relationship among competition, innovation, and the introduction of new products, which suggests further difficulties in defining "innovation".[12] Accordingly, we urge caution in the use of the "innovation markets" concept. The Sections suggest that a sentence be added to the last paragraph of Article 3: "In some situations, it may be appropriate to consider the impact of concentrations and conduct on innovation and quality of goods and services instead of defining an innovation market."

4. <u>Comments on Article 4</u>

Article 4 indicates that while substitutability in demand is the most important factor in relevant product market definition, supply substitution also may be considered. There are various approaches to the consideration of supply substitution in defining markets. As most frequently applied, the U.S. Merger Guidelines base market definition generally on the demand-side factors only, and address supply-side considerations when analyzing competitive effects.[13] The European Commission Market Definition Notice and the Australian Merger Guidelines are explicit about the manner in which supply elasticity may be taken into consideration in the market definition process.[14] It may be helpful to emphasize that even if certain types of supply side considerations -- such as ease of new entry -- are taken into account not during but after defining the relevant market, they will be considered and given full weight in the competitive

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[12] *Compare, e.g.,* Richard T. Rapp, *The Misapplication of the Innovation Market Approach to Merger Analysis*, 64 Antitrust L.J. 19 (1995), *with* Richard J. Gilbert & Steven C. Sunshine, *The Use of Innovation Markets: A Reply to Hay,Rapp, and Hoerner*, 64 Antitrust L.J. 75 (1995), which followed on a more detailed review of the economic literature on the effects of competition on innovation and how innovation can be incorporated into merger analysis in Richard J. Gilbert & Steven C. Sunshine, Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets, 63 ANTITRUST L.J. 569 (1995).

[13] *U.S. Merger Guidelines* at § 1.0.

[14] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, *Official Journal C-372* (Sept. 12, 1997) ¶¶ 20-23, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML.

effects analysis.[15] The Sections therefore suggest adding a sentence to the end of Article 4: "Supply substitution may also be considered fully during the analysis of the competitive effects of a concentration or course of conduct."

5. Comments on Article 7

The Sections recognize that there are different methods for determining the bounds of a relevant market, and some methods may be more appropriate or feasible than others in particular circumstances. Where one of the feasible alternatives is the SSNIP test, we suggest that it be applied, because it has a long established history of success in other jurisdictions.[16] Therefore, we suggest that the last sentence in the first paragraph of Article 7 be revised to: "The methodology of "Hypothetical Monopolist Test" (*see* Article 10 for details) generally should be employed to define the relevant market."

We also suggest that a sentence be added to the end of Article 7: "Direct evidence of competitive effect may supplement the definition of a relevant market."[17] This highlights and is consistent with the ultimate goal of assessing the competitive effect of conduct. In addition, we suggest that the phrase "may not deviate from the fundamental attributes of the product" in the last sentence of Article 7 be clarified or deleted. Its meaning is unclear to the Sections.

6. Comments on Article 8

The Sections suggest that the first sentence of Article 8 be revised to: "When defining the relevant market from the demand perspective, information on the actual switching behavior of

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[15] *See* U.S. Merger Guidelines at § 3.0. *See also,* Gregory J. Werden & Luke M. Froeb, *The Entry-Inducing Effects of Horizontal Mergers: An Exploratory Analysis*, 46 J. OF INDUS. Econ. 525 (1998); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. OF POL. ECON 977 (1991).

[16] *See*, *e.g.*, Gregory Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust L.J. 253 (2003).

[17] For example, U.S. courts have considered evidence of competitive effects such as pricing behavior to supplement the definition of a relevant market or as practical indicia of a submarket. *See, e.g.,* FTC. v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

buyers in response to relative price changes is the most useful factor to consider since this information directly addresses the question of substitution. When information on actual behavior of buyers is not available, the following factors may, in some cases, be considered."

Information regarding the actual behavior of market participants (buyers switching between products or suppliers, or suppliers adjusting production or offering a new product, in response to price changes) is usually the most valuable in defining relevant markets, when such information is available.[18] Such information speaks directly to the crucial question of substitutability and tends to be objective. If this information is unavailable, then other indicia (such as those mentioned in Article 8) may have some utility. There are, however, many possible indicia beyond those mentioned in Article 8: product characteristics and use; price differences; distribution channels; and other listed factors. The economic reality in many industries is complex, and factors beyond these often may be useful in defining the market. Moreover, several of the factors mentioned in Article 8 have recognized limitations that should be acknowledged, as discussed below. The goal of market definition is to identify the set of products that competes with the products at issue in the case, so that the competitive analysis can be focused on how a particular concentration or course of conduct has influenced or would tend to influence market outcomes. The factors mentioned in Article 8 are not directly relevant to that inquiry, but may in specific circumstances provide some information on more fundamental competitive forces that affect the interaction between and among distinct products. The fundamental economic inquiry should be kept paramount and the potential shortcomings that may be associated with reliance on these specific factors should be acknowledged clearly.

[18] *See*, *e.g.*, Carl Shapiro, *Mergers with Differentiated Products*, 10 ANTITRUST 23(1996) for discussion of diversion ratios in differentiated products case. *See also* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004), for discussion of customer switching between various grades of coal.

6.1 Article 8(2)

Relying on price differences (as opposed to responses to price changes) to define markets can be particularly problematic.[19] For example, private label products, which are commonly offered at a substantial discount from the price of similar brand name products, have been found to be within the same relevant product market as their branded counterparts, despite these substantial price differences.[20] Similarly, although price movements can sometimes provide useful information, they can also lead to misleading market definitions.[21] Prices often move together for reasons that have nothing to do with competition; for example, such products may have a common cost component or they may be influenced simultaneously by sudden and broad shifts in macroeconomic conditions, international exchange rates, or the like. Conversely, even for closely competitive products, prices may not move together in the short run (*e.g.*, where one product is typically sold in spot-market transactions while the other usually is offered under long-term contracts). Thus, before using price movements to help define a market, these alternative explanations for price movements must be investigated. The Sections suggest that the following sentence be added at the end of Article 8(2): "However, other causes for such price patterns should be considered before the price patterns are applied to define the relevant market."

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[19] *See*, *e.g.*, Baker, *supra* note 10, at 334-335.

[20] *See*, *e.g.*, Complaint, U.S. v. Interstate Bakeries, available at http://www.usdoj.gov/atr/cases/f0300/0301.htm. The DOJ defined the market for white pan bread to include both branded and private label products. *See also* discussion of cases regarding private label and branded products in ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 572-74 (6th ed. 2007).

[21] Gregory J. Werden & Luke M. Froeb, *Correlation, Causality, and All That Jazz: Inherent Shortcomings of Price Test for Antitrust Market Delineation*, 8 REV. OF INDUS. ORG. 329 (1993). *See also* Roy J. Epstein & Daniel L. Rubinfeld, *Technical Report, Effects of Mergers Involving Differentiated Products* (2004), *available at* http://ec.europa.eu/competition/mergers/studies_reports/effects_mergers_involving_differentiated_products.pdf, for a detailed review of issues associated with use of price correlations.

6.2 Article 8(3)

Use of distinct channels of distribution as an indicator that products are sold in separate markets is similarly subject to a number of pitfalls. Products sold through different channels may compete with each other further downstream, closer to the level of the user or consumer. The downstream competition could put the products in the same market even if they are sold through different distribution channels and intermediate buyers.[22] In that case, basing market definition on the difference in distribution channels would lead to an incorrect market definition. Therefore, the Sections suggest that the following sentence be added to the end of Article 8(3): "Nonetheless, the possibility of competition between distribution channels must be considered before applying this factor to define a relevant market."

6.3 Article 8(4)

Article 8(4) lists customer preferences, reliance on the product, brand loyalty, switching costs and risks, and price differentials, as well as supplier switching costs and risks and production processes and skills and distribution channels, as additional factors in determining the relevant product market.

Brand- or supplier-specific switching costs do not necessarily provide information that is useful for determining the appropriate product market definition. Brand-specific switching costs such as brand loyalty may reduce the price-elasticity of demand for the particular brand.[23] In concentration cases involving differentiated products, for example, the primary indicator of competition between brands requires an examination of the behavior of customers who would switch away from one brand to another (*i.e.*, the consumers for whom the switching cost is not

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[22] *See*, *e.g.*, U.S. Merger Guidelines at § 1.11, where downstream competition is noted as a factor that would affect market definition.

[23] *See*, *generally*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 200-34 (4th ed. 2005).

prohibitive) based upon a SSNIP in one of the brand's prices.[24] These "marginal" customers are the ones that constrain the brand's pricing, and the key question is, to which other brands would these marginal customers switch?[25] In defining relevant markets, it could be irrelevant that for many customers ("inframarginal" customers) switching costs are substantial or even prohibitive.[26]

Switching costs may have more relevance when they are not supplier-specific, but instead apply to switching from one relatively homogeneous product category to another.[27] For example, customers who use one type of material in a manufacturing process may find it costly to switch to another type of material. This fact might imply that the first type of material is a separate relevant market. Therefore, the Sections suggest that Article 8(4) be revised to: "Other important factors. For example, customers' preference or reliance on certain product attributes, or any obstacle, risk, or cost that may impede or deter a significant number of customers from switching to some potential substitute products but not others, may be relevant for determining which of the potential substitute products should be included in the market."

7. Comments on Article 10

The Sections welcome the use in Article 10 of the hypothetical monopolist SSNIP test. It has a more established track record than other analytic approaches to market definition and therefore should be the primary approach used in defining the relevant market. In the third paragraph, Article 10 seems to define a "non-transitory" period as one year. The Sections

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24 *See* ANTITRUST LAW DEVELOPMENTS, *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 566-68 for discussion of differentiated and branded products, including for example, discussion of United States v. Gillette Co. case. *See also* Jerry A. Hausman & Gregory K. Leonard, *Economic Analysis of Differentiated Products Mergers Using Real World Data*, 5 GEO. MASON L. Rev. 323 (1997).

25 *Id*.

26 *Id*.

27 *See* Baker, *supra*, note 10, at 324 n. 44.

suggest that this statement be made more flexible, to say "for example, one year." As discussed further in connection with Article 11, with regard to a number of such issues -- the length of the "non-transitory period" or the size of the hypothetical price increase used to implement the hypothetical monopolist test -- it is typically counterproductive to attempt to identify with precision the most appropriate level to use because such attempts can be costly and can distract from the goal of answering the crucial analytical questions.[28] Thus, emphasis should be placed on the underlying conceptual issue being explored (demand elasticity, supply elasticity, new entry, *etc.*) rather than on the precise size of the price increase or length of time period used. In addition, the Sections suggest that the last sentence of the third paragraph of Article 10 be revised to delete the phrase "the hypothetical monopolist is the sole producer of the product," because it is the premise of the analysis, not a conclusion; the relevant market that is defined as a result of the hypothetical monopolist approach may have many producers.

The Sections suggest that the first sentence of the fourth paragraph be revised to: "If the price increase leads to substitution by other products sufficient to make the price increase by the hypothetical monopolist unprofitable, then the substitute products should be included in the relevant market." This revision sets forth an objective test. Similarly, the Sections suggest deletion of the word "strong" from the last sentence of Article 10; the crucial factor is whether there is sufficient substitution to render the price increase unprofitable, not the "strength" of the substitution.

[28] *See*, *e.g.*, INTERNATIONAL COMPETITION NETWORK, ICN INVESTIGATIVE TECHNIQUES HANDBOOK FOR MERGER REVIEW (2005), *available at* http://www.internationalcompetitionnetwork.org; ; INTERNATIONAL COMPETITION NETWORK, ICN MERGER GUIDELINES WORKBOOK 20 (2006), *available at* http://www.internationalcompetitionnetwork.org for discussion of circumstances in which different time periods may prove useful to consider.

In the second paragraph, we would suggest replacing "prices above the competitive level" with "prices above the benchmark level." This would address the issue of the "Cellophane fallacy" that is discussed below in connection with Article 11.

8. Comments on Article 11

The Sections appreciate the recognition in the Draft Guidelines of the "Cellophane fallacy" and recommend that the first paragraph of Article 11 be replaced with the following:

> "In a concentration case, the benchmark price applied to define the relevant market via the hypothetical monopolist test shall normally be the current market price. In abuse of dominance and concerted conduct cases, however, the current price may be an inappropriate benchmark. If the current price prominently deviates from the competitive price, for example, because of the exclusionary nature of the conduct being reviewed, or because the prevailing price is a result of tacit price coordination, then the application of the current price as the benchmark price will result in an inaccurately defined relevant market. Under such circumstance, in principle, a more competitive price should be used as the benchmark. However, determining this price is a difficult exercise and may not be feasible. In that case, other approaches to market definition may be used."

In addition, we suggest that a sentence be added to the second paragraph of Article 11: "In general, a price increase of between 5% and 10% would be appropriate." Finally, the Sections suggest that the last sentence of Article 11 be revised to "At that time, the determination of relevant market may also consider the situation of the group of customers and the specific geographic area."

8.1 Differences in Market Definition Between Concentration Cases and Abuse of Dominance and Concerted Conduct Cases

It appears that the Guidelines are intended to apply generally to the market definition process in all types of cases that might arise under the AML -- assessment of concentrations, concerted conduct, and dominant-firm conduct. The approach to market definition may differ among these different types of cases.

In cases involving concentrations, it is generally considered unnecessary to consider whether prevailing prices differ from hypothetical "competitive" prices, because the object of the competitive analysis generally is to determine whether the transaction would lead to any significant lessening in competition from its current (pre-transaction) status. This inquiry logically adopts the current market prices as the standard for measurement against the hypothetical future market situation as it would be changed by the concentration.

However, as Article 11 recognizes, using the SSNIP test to define the market at prevailing prices in an abuse of dominance or concerted conduct case may be subject to the "Cellophane fallacy."[29] The Cellophane fallacy refers to the situation where a dominant enterprise (or enterprises) is charging a price above the competitive level and there are products that are close substitutes for the dominant enterprise's product at that supracompetitive price, but that would not be close substitutes at a lower, competitive price.[30] The SSNIP test applied at prevailing (supracompetitive) prices may define the market too broadly by including those products that are close substitutes only because the dominant firm already is charging a supracompetitive price due to its abusive conduct.

Because of the dangers posed by the Cellophane fallacy, in cases involving dominant-firm conduct or collective conduct it may seem logical to inquire whether prices have already been affected through collective action or by the exercise of monopoly power by a dominant firm, and then to conduct the SSNIP test at what is determined to be the price absent the conduct. Experience has shown that this is a very difficult inquiry, however, because the price absent the

[29] Gene C. Schaerr Note, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 Yale L.J. 670 (1985); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 961, 970-71 (1981).

[30] The "Cellophane fallacy" is an expression stemming from the U.S. case of United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956), in which the market was so broadly defined that it failed to detect the exercise of market power by the sole producer of cellophane.

conduct is unknown and therefore has to be estimated. Determining the hypothetical market behavior that would have been observed absent the conduct requires many judgments and a significant degree of speculation. In short, market definition in a dominance or concerted action case has an additional layer of complexity that is not present in a concentration case, and thus is recognized as being difficult.[31] Therefore, any efforts in this regard should be undertaken with great caution.

Accordingly, we suggest that the Guidelines should specify that market definition in concentration cases should normally use the prevailing price as the benchmark price, while acknowledging as it does in Article 11 the difficulties in determining the appropriate benchmark price in an abuse of dominance or concerted conduct case.

8.2 Definition of a "Small, But Significant Price Increase"

The second paragraph of Article 11 raises the issue of how a "small, but significant price increase" should be defined when performing the SSNIP test. It is true that the result of the SSNIP test could vary depending on the size of the SSNIP used (for example, a hypothetical monopolist that could raise price profitably by 5 percent may be unable to raise its price profitably by 20 percent). However, experience in the United States and European Union suggests that a SSNIP of 5 to 10 percent is an appropriate and useful reference point in most analyses.[32] In some rare instances, it may be appropriate to use a SSNIP below 5 percent. For example, if the industry in question has very low gross profit margins, a 5 percent price increase

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[31] *See generally* Lawrence J. White, *Market Power and Market Definition in Monopolization Cases*, in ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 315 (W.D. Collins ed., 2008); U.S. Dep't. of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* 26-27 (2008); Carlton, *Market Definition: Use and Abuse*, *supra* note 12, at 19-21.

[32] *See, e.g., U.S. Merger Guidelines*, § 1.11; Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law**,** *Official Journal C-372*, (Sept. 12, 1997) ¶ 17, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML.; United States v. Engelhard Corp., 970 F. Supp. 1463, 1467-70 (M.D. Ga.), *aff'd*, 126 F.3d 1302 (11th Cir. 1997).

may represent a large price increase relative to the gross profit, potentially making it reasonable to use a smaller SSNIP.[33] In any event, as discussed above, precision is not possible in most cases.

8.3 Price Discrimination Markets

The last paragraph of Article 11 appears to be referring to "price discrimination markets," which entail defining a relevant market based on a product and a group of customers buying that product who can be separately identified by suppliers and who have a lower elasticity of demand for the product.[34] Given these two conditions, a hypothetical monopolist might be able profitably to target this group of customers with a SSNIP, even though a SSNIP to all customers would be unprofitable. Accordingly, this group of customers may constitute a separate relevant market.

The definition of price discrimination markets can be very fact-intensive and complex. Indeed, the key issue of whether price-insensitive customers can be identified with sufficient accuracy by suppliers as being price-insensitive and targeted for higher prices can be difficult to establish.[35] It is not enough to find that there are price-insensitive ("inframarginal") customers, because there are some inframarginal customers for almost any product. The behavior of inframarginal customers is typically irrelevant to competitive behavior unless such customers

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[33] *See* ICN Merger Guidelines Workbook, for discussion of application of the SSNIP test and consideration of levels of price changes. The concept of referencing a general range, with the prospect of tailoring to the specific example is set forth in the *U.S. Merger Guidelines*, "In general, the price for which an increase will be postulated will be whatever is considered to be the price of the product at the stage of the industry being examined**.** In attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future. However, what constitutes a 'small but significant and nontransitory' increase in price will depend on the nature of the industry, and the Agency at times may use a price increase that is larger or smaller than five percent." *U.S. Merger Guidelines* at §1.12 (footnote omitted).

[34] *See*, *e.g.*, *U.S. Merger Guidelines*, § 1.12

[35] *See*, *e.g.*, Jerry A. Hausman, Gregory K. Leonard, & Christopher A. Vellturo, *Market Definition Under Price Discrimination*, 64 ANTITRUST L.J., Vol. 64, pp. 367-386 (1996). In addition, for price discrimination to be possible, arbitrage must not be possible between non-targeted and targeted customers.

can be identified with a high degree of accuracy and discriminated against by suppliers. The Sections suggest that special caution be exercised to avoid extensive use of the "price discrimination markets" concept until further experience has been gained by the anti-monopoly enforcement authorities under the Guidelines.

Conclusion

We hope these suggestions are helpful and we would be pleased to offer any further assistance that may be helpful as MOFCOM finalizes the Guidelines. The Sections recognize the substantial work that MOFCOM has accomplished in developing the Draft Guidelines, and appreciate MOFCOM's consideration of our comments and those of others as it continues with its mission to implement and enforce the AML.