COMPETITION AUTHORITY OF KENYA REVISED GUIDELINES ON RELEVANT MARKET DEFINITION

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A. INTRODUCTION

1. The purpose of the Guidelines on Relevant Market Definition (Guidelines) is to provide guidance as to how the Competition Authority of Kenya (the Authority) applies the concept of relevant market(s) in its enforcement of the Competition Act, No. 12 of 2010, (the Act). These Guidelines should be read together with the Consolidated Guidelines on the Substantive Assessment of Mergers and the various guidelines on Restrictive Trade Practices for the purposes of market definition relating to Part III and IV of the Act.

2. By rendering public the approach which the Authority follows when considering market definition(s), the Authority expects to create awareness on, e.g. when an entity would be considered to be dominant in a given market and the possible existence of market power besides increasing the transparency in the Authority's decision-making under the Act.

3. Although it is not an end to itself, market definition is the first step in a full competition analysis. It enables the Authority to identify actual competitors of the undertakings involved and the capability of any of the undertakings exercising market power.

4. In this regard, market definition is important because:
    a. Market shares can be calculated only after the boundaries of a market have been defined;

    b. It sets the stage on which competition takes place, for example, when considering the strength of existing competition and the potential for a new entry, it is necessary to identify the relevant market; and

    c. It establishes whether or not particular undertakings fall within the scope of the prohibitions.

    d. In both its product and geographic dimension, it is helps to identify competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.

5. Market definition can be used to identify relatively quickly, cases where mergers, agreements or conduct do not have an appreciable adverse effect on competition or where undertakings clearly will not possess market power because they face significant competition. For instance, where an agreement exists between undertakings, whose combined share of the relevant market is low, the agreement is unlikely to raise competition concerns relating to the Part III of the Act, unless it contains for example, price-fixing, bid-rigging, market-sharing, or output limitations as contained in Section 21 (3) of the Act. .

6. In these Guidelines, the Authority sets out the conceptual framework to be applied when defining markets, and provides examples of the types of evidence and information that the Authority may consider as part of this process.

7. The Authority's approach to defining the relevant market is not binding to the Competition Tribunal nor any court of competent jurisdiction.

8. Lastly, the Authority remains open to the consideration of emerging trends in market definition based on constantly evolving dynamics, associated with big data, multi-sided platforms, non-price effects of conduct, arrangements or mergers (such as innovation, variety and quality) and/or other market developments.

B. DEFINITION OF RELEVANT MARKET

A **Seller and buyer markets**:

9. A market is commonly understood to consist of both buyers and sellers of a product in a certain geographical area. Whereas some competition authorities focus primarily on the seller side of a market for market definition purposes, for a more robust competition assessment, the Authority also focuses on the buyer side. This is because the Authority places special emphasis on the relative (and not only the absolute) power of firms between levels of the supply chain, and in particular, the lawful exercise of buyer power vis-à-vis small suppliers[1]. Investigations into the exercise of buyer power in relation to small suppliers will generally be conducted in a context of a relatively powerful buyer allegedly exercising buyer power vis-à-vis small suppliers in an anti-competitive manner. In this regard, the guidelines in relation to buyer market definition will be articulated with reference to "large" or "powerful" buyer and

[1] Refer to section 24 of the Act dealing with an abuse of dominant position and buying power, the Buyer Power Guidelines and the Retail Trade Code of Practice.

"small" upstream provider. In addition, to prevent confusion, the term "customers" will be used for downstream players in relation to the selling market, and the term "buyers" will be used with reference to players operating downstream to the small upstream suppliers of inputs.

Two dimensions:

10. The term *relevant market* has a specific meaning in competition law. It refers to a "market worth monopolising", which logic is explained under the conceptual tests below. While relevant markets are generally defined according to two dimensions i.e. a product market and geographic market (discussed below); two additional product dimensions, i.e. the functional and temporal elements, are also addressed in the Guidelines in Para 46. It is important that a realistic and holistic approach is taken regarding market definition, in particular when dealing with complex markets like digital or multi-sided platforms.

Product Market

11. The first and essential task of the Authority in market definition is to delineate the product market by identifying all the products that Buyers regard as reasonable substitutes for the product under investigation ("Focal Product"), and then to identify all the sellers who supply the focal product and substitute products, or who could potentially supply them. Therefore a relevant product market comprises all those products which are regarded as reasonably interchangeable or substitutable by the consumers, by reason of the products' characteristics, their intended use, production methodologies involved, raw materials used, and route to market among others.

Geographical Market

12. The identification of product market(s) is followed by defining the geographical market, which may extend beyond the area under investigation and in which the product is sold. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services ("Focal area"), in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

The process of market definition

Conceptual tests:

13. The Hypothetical Monopolist Test is commonly referred to as the Small but Significant Non-transitory Increase in the Price (SSNIP) test (when a seller market is defined) or a Small but Significant Non-transitory Decrease in the Price (SSNDP) test (when a buyer market is defined). The SSNIP and SSNDP tests are applied as follows:

Seller market:

14. The SSNIP test is a conceptual approach used to define markets. It is a price elevation test that tries to identify all the products that customers regard as reasonably substitutable for the product under investigation. When defining a seller market, the SSNIP test involves selecting a pool of candidate products that are likely to compete with the Focal Product under consideration (i.e. defining a preliminary relevant market) and subjecting all of these products (including the Focal Product) to a small but significant non-transitory increase in the price (Usually 5%-10%). The SSNIP Test Steps are attached as **Annexure**

15. If this scenario would enable a hypothetical monopolist to increase profitability, all of these products would constitute the relevant market. However, if increased profitability would not to be achieved, the candidate market would have to be widened through a second iteration, by incorporating more substitute products into preliminary market and running the test again until the product market could be successfully monopolized.

Buyer market:

16. When defining a buyer market, the SSNDP test is conducted. The SSNDP test involves selecting the relevant powerful buyer (e.g. large retailer) who is subjecting a small upstream supplier (e.g. a producer of agricultural products) to a small but significant non-transitory decrease in the price offered to it for its products. If the small supplier would be unable to secure a higher price for its product from alternative buyers, the relevant market would constitute the original powerful buyer.

17. However, if the small supplier would indeed be able to secure a higher price for its product from alternative buyers at this point in the iterative test, the candidate market would have to be expanded by the addition of the alternative buyers into the pool. The reason why buyer market definition is more concerned with the identification of alternative buyers as opposed to substitutes to the Focal Product, is that the supplier would not necessarily be

able to substitute away from the production of the Focal Product to the production of alternative products realizing better prices.

18. Demand substitutability and supply substitutability constitute the main factors to be considered in market definition. Demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions, these are the competitors that actually constrain the exercise of market power. Demand substitutability is therefore the main factor considered in market definition.

Step 1: Identify the Focal Product, that is;

a) What are the features, attributes, and characteristics of the product?

b) Who uses it, how is it used and where?

c) How is the production process carried on? And

d) What is the distribution process involved?

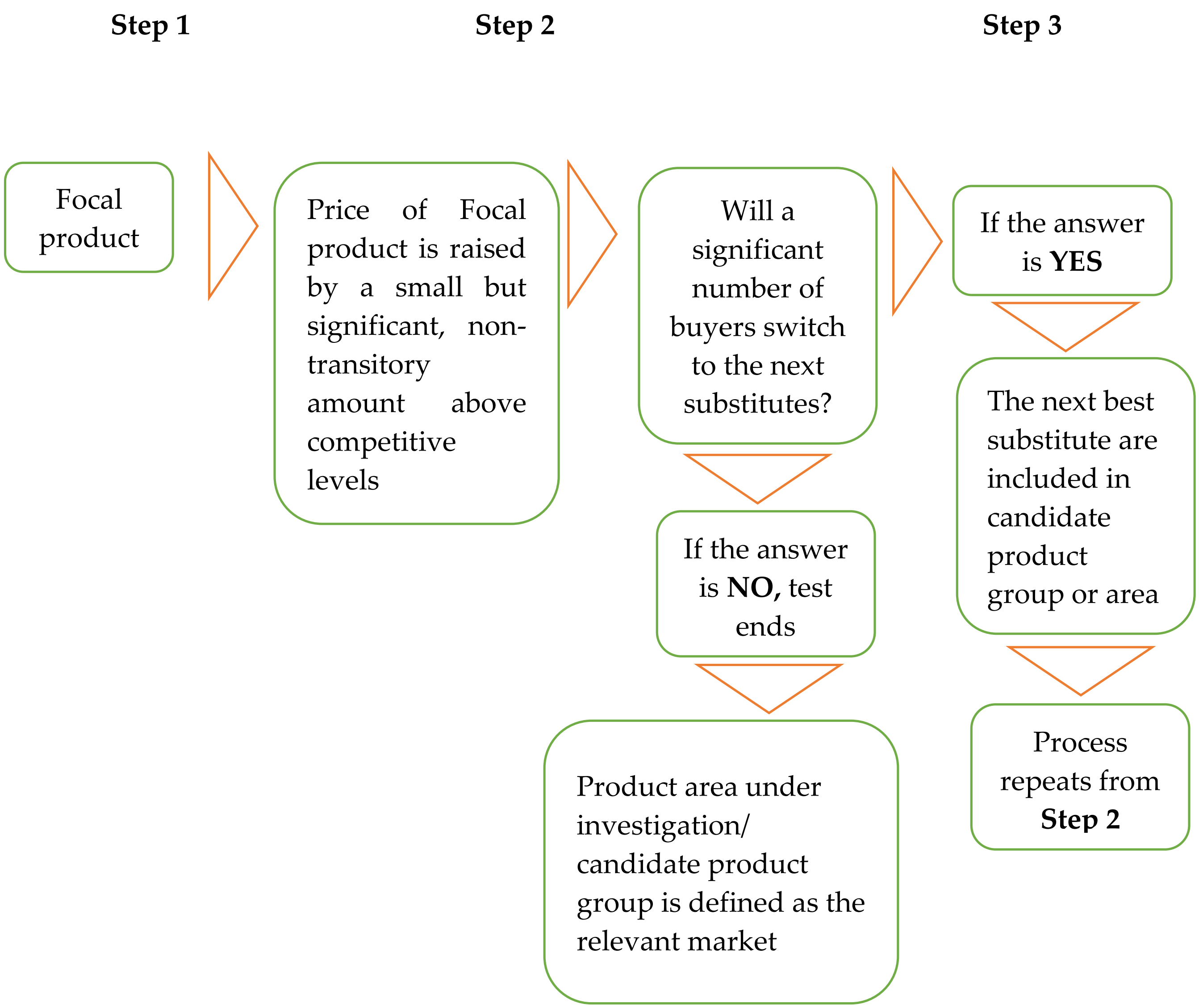
Step 2: Identify the Substitutes to the Product

a) Establish the closest substitute to the focal product. The EU proposes the use of a Hypothetical Monopolist Test framework (the HMT)[2] in identifying the substitute. The substitute products are the most immediate competitive constraints on the behaviour of the undertaking supplying the focal product.

b) Both the demand side and supply side substitution must be taken into consideration while carrying out market definition. With substitution possibilities considered in regards to; product, geographic options in regards to the focal area, and functionality of the focal product

c) Apply Hypothetical Monopolist Test

[2] The HMT employs what is commonly referred to as the SSNIP test. It involves selecting the type of products which may form the relevant market and subjecting it to a small but significant non-transitory increase in the price. If the scenario would enable a hypothetical monopolist to operate profitably, then that is the relevant market. However, if profitability cannot be achieved, then the candidate market is widened by adding more products into the pool and running the test again until a hypothetical monopolist behavior is achieved.


Step 1
Step 2
Step 3
Focal product
Price of Focal product is raised by a small but significant, non-transitory amount above competitive levels
Will a significant number of buyers switch to the next substitutes?
If the answer is NO, test ends
Product area under investigation/ candidate product group is defined as the relevant market
If the answer is YES
The next best substitute are included in candidate product group or area
Process repeats from Step 2

C. PRODUCT MARKET DEFINITION

19. Defining relevant product market involves determining which products would be regarded by buyers as substitutes for the focal product on the demand side and then determining, on the supply side, who currently supply such products and also who could potentially supply them at short notice by, for example, switching production from other products.

Demand-side substitution approach

20. Demand-side substitution occurs when an increase in price makes a product less affordable to customers who therefore decide to purchase less of it and more of substitute products. The question to answer is whether customers would switch to readily available substitutes or suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%), but permanent relative increase in price of the products- SSNIP Test. If substitution would be enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes are included in the relevant market. This would be done until the set of products is such that small but permanent increases in relative prices would be profitable.

21. A practical example of this test can be provided from the wines sector where the issue to examine would be to decide whether different flavours of wines belong to the same market. In practice, the question to address would be if consumers of flavour A would switch to other flavours when confronted with a non-transitory price increase of between 5-10% of flavour A.

22. If a sufficient number of consumers would switch to, say, flavour B to such an extent that the price increase for flavour A would not be profitable due to the resulting loss of sales, then the market would comprise at least flavours A and B. The process would have to be extended in addition to other available flavours until a set of products is identified for which a price rise would not induce a sufficient substitution in demand.

The Type of Evidence Relevant to a Demand Side Evaluation of the Product Market

Product characteristics and intended use

23. An analysis of the focal product characteristics and its intended use allows the Authority, as a first step, to limit the field of investigation of possible

substitutes. However, product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. Conversely, differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.

Evidence of substitution in the recent past

24. In certain cases, it is possible to analyse evidence relating to recent past events or 'shocks' in the market that offer actual examples of substitution between two products (or between two buyers, in the case of buyer market definition). When available, this sort of information is fundamental for market definition. If there have been changes in relative prices in the past (all else being equal), the reactions in terms of quantities demanded will be determinant in establishing substitutability. Launches of new products in the past can also offer useful information, when it is possible to precisely analyse which products have lost sales to the new product.

Views of customers and competitors

25. The Authority will contact the main customers and competitors of the companies involved in its enquiries, to gather their views on the boundaries of the product market as well as most of the factual information it requires to reach a conclusion on the scope of the market. Reasoned answers of customers and competitors as to what would happen if relative prices for the candidate products were to increase in the candidate geographic area by a small amount (for instance of 5 % to 10 %) are taken into account if they are sufficiently backed by factual evidence.

Consumer preferences

26. In the case of consumer goods, it may be difficult for the Authority to gather the direct views of end consumers on substitute products. Marketing studies that companies have commissioned in the past are used by the companies in their own decision-making as to pricing of their products and/or marketing actions may provide useful information for the Authority's delineation of the relevant market.

27. Consumer surveys on usage patterns and attitudes, data on consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors are taken into account to establish whether an economically significant proportion of consumers consider two products as substitutable, also taking into account the importance of brands for the products in question.

28. The methodology followed in consumer surveys carried out ad hoc by the undertakings involved or their competitors for the purposes of a merger procedure will usually be scrutinized with utmost care. Unlike pre-existing studies, they have not been prepared in the normal course of business for the adoption of business decisions.

Barriers and costs associated with switching demand to potential substitutes

29. There are a number of barriers and costs that might prevent the Authority from considering two demand substitutes as belonging to one single product market. It is not possible to provide an exhaustive list of all the possible barriers to substitution and of switching costs. These barriers or obstacles might have a wide range of origins, and include the need to incur specific capital investment or loss in current output in order to switch to alternative inputs. other factors include; location of customers, specific investment in production process, learning and human capital investment, retooling costs or other investments, uncertainty about quality and reputation of unknown suppliers, and others.

Chains of substitution

30. Sometimes a product under investigation will be part of a long and unbroken chain of substitutes. For example, five products namely A-E differentiated by their perceived quality are considered. The closer the two products are in the alphabet, the more substitutable they are from the point of view of customers. Thus consumers whose favourite product is C consider B and D to be very good substitutes for C but consider A and E to be poorer substitutes for C. Even though all products in the chain are substitutes, this does not mean that the whole chain is the relevant market.

Patterns in price changes

31. This can provide good evidence when combined with other data. For example, two products showing the same pattern of price changes, for reasons not connected to costs could be strong evidence that they are close substitutes.

Equally, price divergence over time, without significant levels of substitution, provides evidence that the two products may be in separate markets. However, if the absence of substitution could be explained by a divergence in both price and quality, the products could still be in the same market.

Supply-side substitution approach

32. Supply side substitution may also be taken into account when defining markets in those situations in which its consequences are effective and immediate. The Authority considers whether it is feasible to incorporate supply-side substitution in definition of the market or whether it will define the market based on the demand side only.

33. Analysing supply-side substitution raises similar issues to the analysis of potential new entry. In both cases, the question is to whether undertakings would start supplying a particular product if there is a price rise. The difference is typically one of timing and/or investment; supply-side substitution occurs in the short-run with little or no investment required, whereas new entry is likely to occur over a longer period and may require more significant investment. Therefore, any significant investment or set-up costs, especially those which firms consider as unlikely to be recoverable, reduces the likelihood of supply-side substitution. Therefore, the response should, normally, be likely to occur within a year of the price rise although the exact time period depends on the nature of the market considered.

34. An example of supply side substitutability can be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality paper to be used for instance to publish books. From demand point of view, different qualities of paper cannot be used for a specific use i.e. an art book or a high quality publication cannot be based on lower quality papers. However paper plants are prepared to manufacture the different qualities of paper and production can be adjusted with negligible costs and in a short time frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore to compete for orders of the various qualities, in particular if orders are passed with a sufficient lead time to allow modifying production plans. Under such circumstances, the Authority cannot define a separate market for each quality of paper and their respective usage. The various qualities of paper are included in the relevant markets, and their sales added up to estimate total value and volume.

The Type of Evidence Relevant to a Supply Side Evaluation of the Product Market

35. Evidence from undertakings active in the market and their commercial strategies may also be useful. For example, company documents may indicate which products the undertakings under investigation believe to be the closest substitutes to the focal product. Company documents such as internal communications, public statements, strategic plans, presentations prepared for the board and marketing documents, and studies on buyer preferences or business plans may provide other useful evidence.

36. The following are examples of the types of information that can be useful, when available, in the analysis of supply-side substitution:

- Information on past supply-side substitution (for example, information on the extent to which supply-side substitution has resulted from variations in price differentials);
- Information on the willingness of customers (or new suppliers) to switch to new supplies following a SSNIP or SNDP;
- Information on the size of adjustment costs for potential entrants;
- Information on the production processes involved;
- The extent of spare capacity within the industry;
- The business plans of potential suppliers and the assessment of their competitive threat by firms in the market;
- Assessment by independent technical consultants and interested third parties of the likelihood and feasibility of supply-side substitution; and
- Information on supply-side substitution in similar markets in other countries. However, this may be constrained by other factors such as regulatory differences.

D. THE GEOGRAPHIC MARKET DEFINITION

37. The geographic market refers to the area over which substitution takes place in an event of a SSNIP or SSNDP. A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous. If buyers will travel further afield to buy products when their local prices are increased, then the geographical spread of the market is wide and vice versa. If sellers from afar supply to local markets because the local

price has risen, then the geographic market is also wider than the situation where only local sellers are willing to supply.

- The geographic scope of the market can be defined using the same framework used to analyse the product market, while putting emphasis on three particular categories of issues: Demand-side issues (usually for defining retail markets);
- Supply-side issues (usually for defining wholesaling and manufacturing markets); and
- Imports.
- Transportation cost

38. Where necessary, a further check on supply factors is carried out to ensure that those undertakings located in different areas are not precluded or hampered from supplying (or buying) products in the geographic market as a whole. This analysis includes an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc.

39. In short, the Authority identifies possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration.

Demand-Side

40. The process for defining the geographic market begins by looking at a relatively narrow geographic area, which normally refers to the area supplied by the parties to an agreement or the subject of a complaint, by asking if a 5%-10% increase in the price of a product in one area would lead to buyers switching to sellers in neighbouring areas. If a significant number of buyers are likely to switch to other sellers, this would restrain the ability of a hypothetical monopolist to charge higher prices in its area. These neighbouring areas would be included in the market definition. This process will continue until a group of locations is identified over which a hypothetical monopolist could profitably impose a SSNIP.

41. Chains of substitution can also be an important factor in geographic markets, particularly retail markets. Consumers in any one location might not be willing to travel more than a certain distance to purchase a particular product, but there may be a chain of substitution creating a much larger geographic market. Not all of the neighbouring areas may be included in the geographic market (depending on the case). There could be areas where the chain of substitution is broken.

42. The evidence used by the Authority to define geographic markets on the demand side is usually similar to that used to define the product market. An additional consideration is the value of the product. Generally, the higher the value of a product, the greater the willingness of customers to travel further in search of cheaper supplies. The mobility of buyers (whether buyers have the ability to travel to buy cheaper supplies) is also considered.

Supply-Side

43. Apart from the willingness of buyers to switch to sellers from neighbouring areas in response to a price increase, the Authority considers the potential for undertakings in neighbouring areas to supply to buyers. As in the product market definition, these sellers are considered if they can respond in the short run, (for example, within one year). Supply-side substitution may not be possible within one year if undertakings need to spend significant costs in terms of advertising or marketing, or if distribution channels are foreclosed

44. The Authority considers the costs of transportation. If buyers and sellers face high transportation costs, then the geographic market is smaller than when transport costs are low. The higher the costs of transportation, the smaller the geographic market is likely to be.

Imports

45. The Authority will consider imports exceeding 10% of the market share to be significant. Significant imports of a particular product may indicate that the market is wider than Kenya. If imports come solely from the international operations of domestic sellers, they may not act as an independent constraint on domestic undertakings. Also, in order to import on a larger scale, international sellers may require substantial investments in establishing distribution networks or branding their products in the destination country. These factors may mean that sellers of the relevant product located outside

Kenya would not provide a sufficient constraint on domestic sellers to be included in the relevant geographic market.

46. On the other hand, a lack of imports does not necessarily imply that the market could not be a regional or a wider international market. The potential for imports may still be an important source of supply-side substitution should prices rise. This possibility could constrain the exercise of market power by existing sellers.

Transportation cost

47. Transport costs are clearly relevant and indeed are found to be important in limiting geographic market definition. Transportation is particularly important in market area analysis because it impacts on the location of economic activities as well as their accessibility. Transportation costs are compared variously with average selling price, gross margin, total cost or the difference in costs between domestic suppliers and potential imports.

NB// *Where appropriate, the Authority will contact the main customers, suppliers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market*.

The Type of Evidence Relevant to Geographical Market Definition

Basic demand characteristics.

48. The nature of demand for the relevant product may in itself determine the scope of the geographical market. Factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographical scope of competition.

Views of customers and competitors.

49. Where appropriate, the Authority contacts the main customers and competitors of the parties in its enquiries, to gather their views on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

Current geographic pattern of purchases.

50. An examination of the customers' current geographic pattern of purchases provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the country on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the country submit bids, usually the geographic market will be considered to be nationwide.

Barriers and switching costs associated to divert orders to companies located in other areas.

51. The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, barriers isolating the national market are identified before it is concluded that the relevant geographic market in such a case is national. Perhaps the clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products.

52. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labour costs or raw materials). Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area.

53. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

54. The paragraphs below describe the factors which might also be relevant to define markets. This does not imply that in each individual case it will be necessary to obtain evidence and assess each of these factors. Often in practice the evidence provided by a subset of these factors will be sufficient to reach a conclusion.

Other issues in Defining the Market

Temporal dimension

55. Another dimension that may be relevant in some markets is time. Examples of how timing in the production and purchasing of products can affect markets include:

- Peak and off-peak services (for example, bus fares during peak hours and off-peak hours)
- Seasonal variations (for example, umbrellas which have a significantly higher demand during rainy seasons
- Innovation/Inter-generational products (for example, hand phones and computers): Consumers may choose to defer expenditure on present products because they believe innovation will soon produce better substitutes or they may own an earlier version of the product, which they consider to be a close substitute for the current generation.

56. Temporal dimensions may be appropriate when:

    - It is not possible for customers to substitute between time periods. For example, peak customers might not view peak and off peak bus fares as substitutes, and
    - Suppliers' capacity varies between time periods. For example, capacity to supply umbrellas varies according to the season.

    To some extent, the time dimension is simply an extension of the product dimension: i.e. the product can be defined as the supply of bus services at a certain time of day.

Functional dimension

57. The production, distribution and sale of a product typically occur through a series of functional levels e.g. manufacturing, wholesale and retail levels. It is often useful to identify the relevant functional level in describing a market as the conduct or merger being considered may affect one level but not others. Generally, the Authority will identify separate relevant markets at each functional level affected by the conduct or merger being considered and assess the impact on each.

Multi-sided markets

58. Multi-sided markets are platforms that coordinate the demand of distinct groups of customers whose presence in the market enables the supply of the product in the first instance. In multi-sided markets, distinct user groups (i.e. distinct demand systems) interact with each other through a common platform and the participation of at least one of these groups impacts the value of participation for other group(s).

59. Multi-sided markets are very common and are present in many markets including: stock exchanges, internet portals, payment card systems, advertisement platforms such as; newspapers, television broadcasters, directories, smartphones, mobile and fixed telecommunication networks and estate agents (Andrea Amelio, Liliane Karlinger and Tommaso Valletti, 2017).

60. Typically, market definition and market power analyses that focus on a single side will lead to analytical errors; since pricing and production decision are based on coordinating demand among interdependent customer groups, The Authority shall consider the multi-sided market approach to market definition in platforms. Additionally, it will refer to precedencies from other jurisdictions that have dealt with similar cases in carrying out market definition and analysing competitive effects.

Non-Price Markets

61. Currently, market definition is based on the SSNIP Test or Hypothetical Monopolist Test. However, platform markets often consist of at least one free platform, at least in the short run. In these instances, the conducting of the he SSNIP or HMT test may not be entirely suitable.

62. The Authority is likely to consider the provision of free content on the internet and/or newspapers to be a feature of a non-price platform market. While such platforms could attract customer payments once they acquire a certain threshold of users, whether payments are required or not will not be the definitive consideration for the Authority when determining the relevant market.

63. Non-price markets enable users to engage in multi-homing practices. This is where a single platform, since it's a free access hosts another platform within itself such that a user can easily switch between platforms. Entry barriers are significantly low in this market and the platforms compete on attracting the most traffic by increasing quality of content, reliability and accessibility.

Digital markets

64. Increasingly, the physical interaction between buyers and sellers is being replaced by virtual markets. Virtual markets enable the market players to meet in an artificial market place where they are able to carry out the process of buying and selling.

65. The Authority shall consider substitutability of the products being offered by these virtual market and identify if there exists a constraint from competing virtual and/or physical markets.

66. Most of the digital markets are multi-sided in nature. The Authority shall consider substitutability at one side of the market in contact with the wider market for the basic products. Additionally, this section shall be read in conjunction with Multi-sided markets and Non-price markets sections.

E. MARKET DEFINITION FOR AFTER MARKETS

Complements and Secondary Markets

67. Complements are groups of products that are consumed or produced together. They are included in the same market when competition in the supply of one product constrains the price charged for the other. This is most common in secondary markets, also known as after markets.

68. Secondary products are products that are only purchased if the buyer has already purchased the primary product. This situation often arises in the case of durable products which need to be maintained. For example, the market for spare parts, accessories, and components for motor vehicles can only be used for a particular vehicle brand. Sellers of durable products sometimes have a monopoly or high market share in the supply of secondary products or services and might be perceived as exploiting this dominant position in the secondary market. However, as any exploitation of a seller's market power in the secondary market could affect its position in the primary market, the secondary market alone may not be the relevant market. For example, an increase in the price of spare parts for a vehicle or machinery might affect a buyer's decision whether to buy that particular brand. So the seller might be constrained in exercising its market power in the secondary market.

69. There are three possible ways in which markets could be defined when primary and secondary markets are involved:

- **A system market** – including the primary and secondary products.
- **Multi-sided markets** – where there is one market for the primary product but separate markets for secondary products for each brand of primary product.
- **Dual markets** – one for the primary product and one for all brands of secondary product.

70. Determining the market for secondary products depends on the facts of the case. A system market may be appropriate when buyers take into account the whole-life cost of the product before buying. This means that the buyer will look at both the price of the primary product and the secondary product before deciding which product to buy.

71. Where the conditions for a system market do not apply, a multiple markets or a dual markets definition may be appropriate. The former is likely where, having purchased a primary product, buyers are locked in to using only a restricted number of secondary products that are compatible with the primary product. A dual markets definition is appropriate where secondary products are compatible with all primary products (and are so perceived by buyers[3]).

72. Another factor to consider is how often the primary product is to be replaced and whether there are any costs involved from changing sellers. If replacement is infrequent or switching costs are high, there may be a significant number of secondary product buyers who are captive. Depending on the relative size of the primary market, the seller may find it profitable to exploit these captive buyers, even though new buyers may take a whole-life approach in evaluating the cost of the product. This would thus imply that secondary products would be in a separate market.

73. Sellers of the primary product may reduce prices below cost in order to increase the profits from future sales of secondary products. However, this behaviour might be considered undesirable by sellers as it may lead to an over-supply of the primary product and an under-supply of the secondary product. It may be appropriate to treat the two products as separate markets, instead of defining the market to include both products, and consider whether the undertaking's behaviour in either market might be an abuse of dominance under the section 24 of the Act.

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[3] The following are some of the factors that influence a buyer's decision to consider the whole-life cost of the product:

- Price proportion: Buyers are more likely to adopt a whole-life costing approach if the secondary product is a higher proportion of the primary product's price.
- Size of purchase: Large companies may be better able to do whole-life costing than smaller companies or final consumers.
- Availability of information: Whole-life costing will be more difficult if buyers lack specialized information on the costs of spare parts and servicing, and the reliability of products.
- Uncertainty: It would be difficult to adopt a whole-life costing approach if there is uncertainty about how often spare parts or servicing would be required.

Appendix

The SSNIP Test - (Small but Significant Non-transitory Increase in Price)

74. In competition law, before deciding whether undertakings have significant market power which would justify government intervention, the test of Small but Significant and Non-transitory Increase in Price is used to define the relevant market in a consistent way.

75. The SSNIP-test is designed to avoid ad hoc debates about what products compete with each other, based for example on product characteristics. Regulation and litigation can thus proceed on firmer ground.

76. The SSNIP test defines a relevant market as "something worth monopolizing." The relevant market consists of a 'catalogue' of goods and/or services which are considered substitutes by the consumer. Such a catalogue is worth monopolizing because if only one single supplier provided it, that supplier could profitably increase its price without its customers turning away and choosing other goods and services from other suppliers.

77. The SSNIP test seeks to identify the smallest relevant market within which a hypothetical monopolist or cartel could impose a profitable significant increase in price. The application by the Authority of the test involves talking to people who make buying decisions. It asks whether such a monopolist or cartel could profit from a price increase of 5% - 10% for at least one year (assuming that "the terms of sale of all other products are held constant"). If sufficient numbers of buyers are likely to switch to alternative products and the lost sales would make such price increase unprofitable, then the hypothetical market should not be considered a relevant market for the basis of litigation or regulation. Another larger basket of products is proposed for a hypothetical monopolist to control and the SSNIP test is performed on that relevant market.

78. A simple three-step process setting out the SSNIP test appears below:

    Step 1: Identify the Focal Product, that is;

    a) What are the features, attributes, and characteristics of the product that is the subject of the merger, arrangement or conduct?

    b) Who uses it, how is it used and where is it used?

    c) What is the production process involved? and

d) What is the distribution process involved?

Step 2: Identify the Substitutes to the Focal Product

a) Establish the closest substitute to the Focal Product. The substitute products are those products that exercise the most immediate competitive constraints on the behaviour of the undertaking supplying the Focal Product.

b) Both the demand side and supply side substitution must be taken into consideration when defining markets with substitution possibilities considered in relation to the Focal Product and its functionality and the geographic market

c) Apply the Hypothetical Monopolist Test.

Step 3: Interpret the SSNIP or Hypothetical Monopolist Test

79. A hypothetical price increase of about 5% to 10% above the competitive price is generally used for the conducting of the test. However, the actual percentage to be used will depend on the particular facts of each case

The Hypothetical Monopolist Test (HMT)

80. In determining the relevant market, especially under Horizontal Mergers, a Hypothetical Monopolist Test (HMT) is used to test whether the market has been correctly defined. The test assumes that the market has only one existing player with a single product.

81. Hypothetically, if the player increases market prices in a SSNIP manner, and is able to successfully remain profitable, then it is concluded that the market has been correctly defined. However, in the event the HMT fails, it is concluded that the market has been narrowly defined and must be expanded to a point where the HMT can successfully yield positive outcomes.

82. The test is mainly applicable in cases where a market player has been accused of exercising market power.