

Relevant market

Juan Ignacio Ruiz
October 2018

Relevant market

Training of National Judges
in EU Competition Law
Project DEFCOMCOURT 3
Valencia 18th, 19th and 20th October 2018

Juan Ignacio Ruiz Peris
Catedrático de Derecho mercantil

Concept of relevant market

- The concept of 'relevant market' is different from other definitions of market often used in other contexts.
- The name doesn't make reference to the area where a company sells its products in a subjective sense.
- Relevant market has an objective dimension.
- It doesn't refer no more broadly to the industry or sector where a company belongs belongs.

Relevant market in competition law

- Relevant market is the space where undertaking competition occurs including both sides offer and demand.
- It has three possible dimensions:
 - Product or service market (product market)*
 - Geographical dimension (geographical market)*
 - Temporal dimension (temporal market, in some cases)
- The relevant market is therefore established in general by the combination of the product and geographic markets.
- Only in a few cases temporal dimension results relevant.
- Market definition is relevant in all competition law fields from mergers, through dominance/monopolization to agreements (ODCE Report 2012)

Product market

- A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.
 - Regulation (EEC) No 4064/ 89 on the control of concentrations and COMMISSION NOTICE on the definition of relevant market for the purposes Community competition law.

Geographic market

- The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those area.
 - Regulation (EEC) No 4064/ 89 on the control of concentrations and COMMISSION NOTICE on the definition of relevant market for the purposes Community competition law.

Market definition is one of the most fundamental concepts underpinning essentially all competition policy issues

- Agreements (101 TFEU):
 - De minimis notice
 - Autoevaluation
 - Block exemption
 - Safe harbour quantitative criteria
 - Parallel networks in market
- Dominance (102 TFEU)
 - Dominant position in market
- Mergers (EU Mergers regulation):
 - Merger effects on market

Market delimitation methods

- **Hypothetical Monopolist Test (HMT)**
 - **Relevant market includes** all the products and regions in which an hypothetical monopolist that seeks maximize profits may impose an small but significant and non-transitory increase in price (**SSNIP**).
 - **SSNIP** takes account of:
 - Increase of prices – between 5 – 10 %-.
 - Reduction of sales
 - In many cases it is difficult to obtain enough data to analyze the demand elasticity or the cross elasticity.
 - The test is also expensive
 - The cellophane fallacy in cases in which dominant undertaking has yet increased to the máximo his prices and any ulterior increment only reduce the sales, leading the buyers to no substitutive products. The result is the inclusión of no substitutive products or services in the market diluting the market power position of the dominant undertaking.
- **Ad hoc or common sense test**
 - As is practiced by the EU Commission.

In general

- Basically, the exercise of market definition consists in identifying the effective alternative sources of
 - supply for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.
 - buy for the suppliers of the undertakings involved.
- The analysis of the Commission takes account of:
 - the recent past: in certain cases it is possible to analyze evidence relating to recent price variations, for example in terms of substitution between two products or in terms of the customer response;
 - the results of specific studies: elasticity of demand for a product can be assessed by conducting econometric and statistic tests. It is also useful to assess the geographic market in the light of a series of factors (such as culture, language, etc.) which impact on local preferences;
 - the views of customers and competitors: the Commission may contact the main customers and competitors of the firm in question with a view to gathering factual evidence and estimating their reaction in the event of price variations within the geographic area;
 - consumer preferences: the Commission may ask the firms in question to commission market studies before launching a product on the market or fixing its price. It may also contrast the purchasing habits of customers on the relevant market with those of other customers on a separate geographic market in so far as the conditions are the same;
 - barriers (regulatory or others) and costs associated with switching demand to other products or areas;
 - different categories of customer and price discrimination: a distinct group of customers may constitute a narrower, distinct market when such a group could be subject to price discrimination.
 - Correlation analysis *

Precedent

- However the relevant market analysis should be independent in each case EU Commission tends in practice to take into account the precedents and its delimitation of the relevant market.
- When precedent comes from another jurisdiction should be taken into account questions as the consumer different tastes or the different institutional frame on the market.
- But also when the precedent comes from the european jurisdiction may be problematic. It is needed to evaluate it in relation to:
 - changes in market
 - evolution of technology
 - legal change
 - change in consumer taste
 - new products in the market

Product or service substitutability

- demand-side substitutability *
 - Cross demand substitutability studies
 - Positive cross elasticity implies products are substitutable e.g. butter/margarine (+0,81 Global)
 - Negative cross elasticity implies products are complementary (-0,71 Global)
- supply-side substitutability**
 - When suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices - paper market -.

Some useful concepts in relation with relevant market

- Market shares
- Market power
- Market concentration
- Dominant position
- Market barriers

Market shares

- The definition of the relevant market in both its product and geographic dimensions allows the market operators (suppliers, customers, consumers) to be identified.
- On that basis, the total market size and the market share of each supplier can be calculated with reference to their sales of the relevant product in the relevant area.
- Relevant information may be found on:
 - companies' estimates
 - The Commission will usually ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares .
 - studies commissioned from industry consultants or trade associations
 - the companies' turnover

Market power

- Market power is the ability of a firm to maintain the market price of a good or service over the competitive level for a long period.
- Market competitors that have market power are therefore sometimes referred to as "price makers" or "price setters".

Market concentration

Herfindahl–Hirschman Index (HHI)

- HHI is a commonly accepted measure of market concentration.
- The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.
 - For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$).
- The HHI takes into account the relative size distribution of the firms in a market.
 - It approaches zero when a market is occupied by a large number of firms of relatively equal size and
 - reaches its maximum of 10,000 points when a market is controlled by a single firm.
- The agencies generally consider markets in which the HHI is
 - between 1,500 and 2,500 points to be moderately concentrated, and consider markets in which the HHI is
 - in excess of 2,500 points to be highly concentrated.
- Transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power under U.S. Department of Justice & FTC, Horizontal Merger Guidelines § 5.3 (2010)

Dominant position

- Under the Community's competition rules, a dominant position is such that a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers

Market Barriers

- access to distribution channels
- costs associated with setting up a distribution network
- need to incur specific capital investment or loss in current output in order to switch to alternative inputs
- presence of regulatory barriers
 - public procurement,
 - price regulations,
 - quotas and tariffs limiting trade or production,
 - technical standards,
 - monopolies,
 - freedom of establishment,
 - requirements for administrative authorizations,
 - packaging regulations

Product Market

- In most cases, a decision about the limits of the relevant product market will have to be based on the consideration of a number of criteria and different items of evidence.
 - Precedents
 - Cross demand substitutability studies
 - Dialogue with undertakings and customers, relevant professional associations, and companies active in upstream markets.
 - Written requests for information to the market players
 - relating to the perceptions of companies about reactions to hypothetical price increases and their views of the boundaries of the relevant market.
 - ask for provision of the factual information the Commission deems necessary to reach a conclusion on the extent of the relevant market.
 - visits or inspections to the premises of the parties, their customers and/or their competitors, in order to better understand how products are manufactured and sold

Relevant evidences

- Evidence of substitution in the recent past
- Quantitative tests which estimates of elasticities and cross-price elasticities for the demand of a product
- Views of customers and competitors
- Consumer preferences in the case of consumer goods (Marketing studies)

Geographical Market analysis

- It will take a preliminary view of the scope of the geographic market on the basis of broad indications as to
 - the distribution of market shares between the parties and their competitors
 - pricing and price differences at national and Community or EEA level
- This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.
- Exploration of the reasons behind any particular configuration of prices and market shares.
- Analyze whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.
- A further check will be carried out to ensure that those companies located in differing areas do not face impediments- barriers - in developing their sales on competitive terms throughout the whole geographic market.

Relevant evidences

- Past evidence
- Basic demand characteristics
- Views of customers and competitors
- Current geographic pattern of purchases
- Trade flows/pattern of shipments requiring detailed statistics
- Barriers and switching costs associated to divert orders to companies located in other areas