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JUDr. Katarína Michrinová

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List of Abbreviations

ATC	Anatomical Therapeutic Classification
The Commission	The European Commission
ECJ	The European Court of Justice
ECMR	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)
EEC	European Economic Community
EU	The European Union
OTC	Over the Counter Medicines
SSNIP	Small but Significant and Non-transitory Increase in Price
TEC	The Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union

Introduction

This study focuses on a definition of the relevant market from EU competition law's point of view. The study is systematically divided into five chapters which are further divided into subchapters.

The relevant market definition is significant for Community competition law, as this is the first step prior the Commission decides whether a particular undertaking impeded competition.

For purposes of this thesis, it is necessary to understand that competition law's understanding of the market does not fully comply with the economists' one. The economists understand the market as a place where a supplier meet a customer. Within that place, competitors try to gain the highest possible profit and "win a fight for customers" over other undertakings whom they compete with. However, competition law takes a more specific approach in the relevant market definition due to a character of competition within which competitors may compete only on the defined market.

So far, there has not been concluded a general approach how to define the relevant market that could be applied in every single case. However, the Commission Notice on the definition of relevant market for the purposes of Community competition law gives a view on factors that the Commission takes into consideration while defining the relevant market. All of those factors do not need to be necessarily applied every time when the Commission defines the relevant market. For the reason that, the relevant market has to be considered individually in every case.

As the relevant market is defined individually, for a proper understanding of the process of the relevant market definition, one needs to be aware of a case law that clarifies what kind of questions need to be answered, which aspects need to be taken into account and which evidences may prove that the relevant market was defined correctly. For that reason, the thesis contains many references on the case law of the Commission and the Court of Justice.

The relevant market cannot be considered as a purely problem of the law. The final definition of the relevant market is a comprehensive result of more fields, and thus except of the law, economical and marketing approaches are taken into account as well. The reason for such a multidisciplinary approach is that it would be impossible to define the relevant market only on a ground of the law, since, inter alia, reaction of consumers and undertakings shall be analysed for a proper market definition, too. With such kind of analyses, a help of other fields of science is required. Results are further considered and elaborated according to provisions stipulated by the law, into the final definition of the relevant market.

This thesis tries to clarify the relevant market as a term as well as the process of its definition. Within the thesis, the relevant market's explanation is based mainly on the case law and analysis of the Notice on the Market Definition and other relevant legislation. For a proper understanding of the relevant market, firstly, it is necessary to know meaning of basic aspects that are defined in the first chapter of this study. The relevant market has two dimensions. The relevant product and geographical market dimension are discussed in detail in the second and the third chapter. Despite of the fact that the Community competition law does not consider time as the third dimension of the market, the fourth chapter of the study tries to explain when it is necessary to involve time as an aspect which can influence the market definition. The last, fifth chapter, focuses on the special relevant markets where their unique character causes some deviations in the market definition.

I. Basic Facts for Proper Understanding of Community Relevant Market Definition

For right understanding of a problem of the relevant market definition, it is necessary firstly to explain basic issues and terms that characterize it.

1.1 Competition

The United Kingdom Government in the text of its White Paper Productivity and Enterprise illustrated meaning and significance of a proper functioning of competition as follows:

‘The importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentive for the efficient organisation of production. As such, competition is central driver for productivity growth in the economy.’¹

That is to say that competition is a guarantee of an efficiency and of a positive influence on a competitiveness of the economy as well as its stability. It is also an integral legal and economic category of a market. Competition is an instrument of a natural regulation of effective conduct of competitors and at the same time it leads to an appropriate use of resources of economy. Effective competition constitutes a prerequisite for business rivalry of consumers, resulting into more favorable prices and an improvement of the quality of goods and services.²

Despite mentioned benefits which an effective competition offers, businesses sometimes commit, with a view of better profits, unlawful conducts, such as Unfair Competition or Unlawful Restriction of Competition. Before Unlawful Restriction of Competition is punished, it is necessary, inter alia, to determine the relevant market.

1.2 Notion Undertaking

EU competition law is mentioned in a relation with anti-competitive practices committed by undertakings and therefore it is necessary to define what competition law precisely understands as an undertaking.

Definition of the undertaking cannot be found in the Treaty on European Union. However, the ECJ adopted the definition of the undertaking in the case *Hofner and Elser v Macrotron GmbH* where stated that ‘the concept of an undertaking encompasses every

¹ Mark Furse, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006) 1.

² Tomáš Britvík, Daniela Šramelová, ‘Unfair Competition vs. Unlawful Restriction of Economic Competition’ (2011) 4 *Justičná revue*, 532, 532.

entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed'.³

The terms that are used in a translation of the Treaties to other languages of EU Member States, indicate that it is another expression for firms, businesses or enterprises.⁴ A position of the undertaking can therefore have any partnership, sole partnership or natural person performing commercial activities.

The business activities of undertaking have to involve economic services that are conducted for payment. The undertaking usually, however, not necessarily has to have as an object to make a profit. Such business activities must take a certain time. From the commercial activities, solely social activities are excluded as well as an exercise of a sovereign power such as, execution of government instructions.⁵

1.3 Notion Relevant Market

According to Mark Furse, the relevant market is “where consumers and suppliers of product or services interact.”⁶ In other words, relevant market is the place where customers react on a purchasing condition set up by suppliers, and oppose, suppliers set up the conditions as the reaction on customers’ purchasing behaviour and also competitive behaviour of rivals of undertakings – other undertakings acting their business on the same relevant market.

The notion of the relevant market in a meaning of competition law has to be understood differently than the market in an economic perspective. From the economic point of view “the market is the place where supply meets demand”.⁷ Competition law considers relevant market specifically, due to an assumption of competition: undertakings can compete just within a concrete market. Putative distortion of competition can be scrutinized just in relation with a determined relevant market, for the reason that, only undertakings with similar interests and objectives imply a rivalry into competition between them to “*win a fight*” for customers. Such rivalry between undertakings could lead to anticompetitive practices against which law considers to be a necessary to protect competition.⁸

³ Mark Furse, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006) 21 - 22.

⁴ Lennart Ritter, W. David Braun, Francis Rawlinson, *EEC Competition Law: a practitioner’s guide* (Kluwer Law and Taxation Publishers 1991) 31.

⁵ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 45.

⁶ Mark Furse, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006) 15.

⁷ Cristina Cucu, ‘The Undertaking and the Relevant Market: key concepts in the analysis of anticompetitive practices’ (2013) 62 *Challenges of the Knowledge Society. Legal sciences* 339, 348.

⁸ *ibid* 348.

1.4 Importance of Relevant Market for EU Competition Law

A concept of the relevant market is closely connected to objectives of Community competition policy. One out of the objectives is to protect the effective competition against its significant distortion in a substantial part of common market. EU competition law tries to meet this objective, inter alia, by a controlling of certain type of competition's behaviour and structural changes in supply of products or services.⁹ Therefore, the market definition is the "essential first step" in an analysis of such anticompetitive behaviour of undertakings. Before a decision concerned to infringement of competition is made, it is necessary to define the relevant market.¹⁰

Market definition have a significant role in competition analysis in EU competition law, specifically, regarding Article 101 TFEU, Article 102 TFEU and the EC Merger Regulation.¹¹ All of these instruments relate to dominance. During the last period, when the Commission and the Court of Justice applied one of these elements, they deemed to be necessary to define the relevant market nearly in every case.¹²

The Court of First Instance also emphasized a necessity of the relevant market definition in the case *European Night Services*¹³ where ruled out:

'In the absence of any analysis of the relevant market by the Commission, it was unable to make any findings as to whether the alleged restrictions had an appreciable effect on competition and annulled the Commission decision for the reason.'¹⁴

Treaty on the Functioning of the European Union prohibits anticompetitive practices of undertakings, specifically, agreements, decisions and concerned practices between two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition, stipulated in the Article 101¹⁵ and an abuse of a dominant position stipulated in the Article 102.¹⁶

Under the Article 101, the market definition plays a fundamental role in specification the potential anticompetitive effects of agreements on the market defined. The Article 101 cowers agreements between undertakings, concerned to horizontal co-operation between

⁹ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 10, 12.

¹⁰ Safinaz Mohd Hussein, Nazura Abdul Manap, Mahmud Zuhdi Mohd Nor, 'Market Definition and Market Power as Tools for the Assessment of Competition.' (2012) 13 IntlJ of Business and Society 163, 169-170.

¹¹ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 132.

¹² Francis Fishwick, 'The Definition of the Relevant Market in the Competition Policy of the European Economic Community' (1993) *Revue d'économie industrielle* 174, 174.

¹³ Case T-374/94 *European Night Services and Others v Commission* [1998] ECR II – 3141.

¹⁴ Lennart Ritter, W. David Braun, *European competition law: a practitioner's guide* (3rd edn, Kluwer Law International 2004) 24.

¹⁵ ex Article 81 TEC.

¹⁶ ex Article 82 TEC.

them. On the one hand, horizontal co-operation may lead to competitions' benefits such as a shared risk, quantitative and qualitative improvement of products and others economic advantages. On the other hand, such co-operation may have its ill effect for competition, for instance, agreements that relate to price fixing or market allocation. The Commission's task is to recognise the benefits of horizontal co-operation and has to ensure that effective competition will be maintained.¹⁷

If the negative effects outweigh the positive ones and thus competition is disguised, then the Commission has to take measures stipulated in the Article 101. However, if the market share of parties involved in a particular anti-competitive agreement are small, then the effect of the agreement on competition may not be sufficient enough for fall within the Article 101 (1).¹⁸

Competition law, usually, applies different rules on requirement to define a market in a connection with agreements depending whether a particular agreement has a negative anticompetitive effect on competition or it is an object of that agreement. On the one hand, assessing of the anticompetitive effects mentioned in article 101, is usually subject to the definition of the relevant market as well as, a subject of proving that the agreement could have a negative effect on competition. On the other hand, this rule will not apply on agreements with the anticompetitive object, due to a fact that the relevant market definition is not the requirement for finding an infringement of competition. The definition of the relevant market will be considered as obligatory during the process of determination of the undertaking's turnover in a relation to conferring of a fine prescribed by law.¹⁹

Regarding the Article 101(1), it is also necessary to define the relevant market due to a consideration whether an agreement between undertakings appreciably restricts competition because agreements with an insignificant effect on the market falls outside of the scope of the Article 101. Tests of Minor Importance are particularly stipulated in the Notice on Agreements²⁰. A horizontal agreement, will be *de minimis* where the market share of the parties is exactly 10 per cent or less than 10 per cent; and a vertical agreement will be *de minimis* where parties' market share is exactly 15 per cent or less than 15 per cent.²¹

An undertaking has a dominant position when it possesses a significant market power. If “a significant market power” is fundamental for analysing competition issues, then it is

¹⁷ Commission Guidelines 2011/C 11/01 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para 2-4.

¹⁸ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 132.

¹⁹ Cristina Cucu, ‘The Undertaking and the Relevant Market: key concepts in the analysis of anticompetitive practices’ (2013) *Challenges of the Knowledge Society. Legal sciences* 339, 348-349.

²⁰ Commission Notice 2014/C 291/01 on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1.

²¹ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 28.

unavoidable to understand a correct meaning of the market or the relevant market for the competition's purpose. It is essential to define the relevant market for the proper determination whether an undertaking have a dominant position within a concrete market.²² The definition of the market allows not just to identify and assess the undertakings' position within that defined market, but it makes an analysis of the market's structure possible as well.²³

For a purpose of the EC Merger Regulation, the intention of the relevant market definition is to determine the products that belong to the relevant market and then calculate the market share of such identified products. It is a precondition for an assessment of anticompetitive effects which merger under investigation may cause in the defined relevant market.²⁴

1.5 Dominant Position

As was already mentioned, a restriction or a distortion of competition under the Articles 101, 102 and ECMR, when the Commission needs to define the relevant market, are mainly connected with dominant position of undertakings. The ECMR, with a reference to the Regulation (EEC) No 4064/89, provides that 'a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.'²⁵ Even though, it is not expressly mentioned in the Article 101 agreements and concerned practices between undertakings, falling under the Article, may also create or strengthen their dominant position, and thus significantly impeded common market.

The method how to determine whether a particular area is extended enough to be considered as the substantial part of the common market is not stated in the Notice on the Market Definition since such term has a dynamic nature and is likely to change. For its correct definition, it is necessary to interpret it separately in every single case because an area which would be considered as substantial when the Community is formed by six Member States may not be counted as substantial in the case of the Community extension to twenty-eight Member States, and for that reason, the older case law may not serve as an appropriate guide to the next determinations.²⁶

The necessity of individual definition of the substantial part of the common market in every single case is confirmed by attempt to develop a common approach how the

²² Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 133.

²³ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 386.

²⁴ Javier Elizalde, 'A theoretical approach to market definition analysis' (2012) 34 *Eur J Law Econ* 449, 449-450

²⁵ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395, para 24.

²⁶ Mark Furze, *Competition Law of the EC and UK* (5th edn, Oxford Univeristy Press 2006) 269.

substantial part shall be defined, discussed below, what brought an uncertainty of its accuracy.

The ECJ has tried to give general conditions according to which the substantial part may be defined in the case *Suiker Uni versus Commission*²⁷, where the Court held that:

‘For the purpose of determining whether a specific territory is large enough to amount to a substantial part of the Common Market...the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.’²⁸

In that case, the Court explained a meaning of its approach how to determinate the substantial part of the common market when it took into consideration figures of a sugar production and also of its consumption in Belgium and a ratio to sugar production and consumption of the whole Community. ‘In the year 1971/72 sugar production in the Community as a whole stood at 8,100,000 tonnes, and Belgian production at 770,000 tonnes (9.6 per cent of the total). Consumption in Belgian stood at 350,000 tonnes, compared to 6, 500,000 tonnes in the Community (5.4 per cent in total).’²⁹ Therefore, the Court stated that such market shares, were sufficient enough to consider the Belgo-Luxembourg market as a substantial part of the common market.³⁰

However, Advocate General Warner has questioned this test because he assumed it as *de minimis* rule. The Advocate General stated in the opinion *BP v Commission*³¹ that ‘the fact that BP’s customers in the Netherlands took less than 5 % of the motor spirit supplied in the common market did not prevent them from amounting to a substantial part of the common market.’³² He considered that the limitation of a substantial part has to be based on a geographic assessment, provided that other aspect which divides costumers exists.³³

Moreover, in some cases related to transport services only the small area was defined as the substantial part. In the case *Sealink/ B&I Holyhead: Interim Measures*³⁴ the Commission stated:

‘...The port of Holyhead constitutes a substantial part of the common market because it is a port providing one of the main links between two Member States; more especially, it

²⁷ Case C-61973J0040 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR I - 1975 -01663.

²⁸ *ibid* para 7.

²⁹ Mark Furse, *Competition Law of the EC and UK* (5th edn, Oxford Univeristy Press 2006), 270.

³⁰ *ibid* 270.

³¹ Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission of the European Communities* [1978] ECR I – 01513, Opinion of AG Warner.

³² Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (8th edn, Hart Publishing 2004) 114.

³³ *ibid* 114.

³⁴ *Sealink/ B&I Holyhead: Interim Measures* (Case IV/34.174) Commission Decision 94/19/EC [1992] OJ L15.

provides the direct link between Great Britain and the capital city of Ireland. It should also be noted that this is, at least for passengers and cars, the most popular ferry route between Ireland and Great Britain.³⁵

From economist's point of view, the undertaking holds a dominant position when it has a power over prices. However, a legal definition of the dominant position differs from the economic one. Legal concept of dominance has been developed by the Commission's and Courts' jurisdiction. The ECJ has introduced a definition of a dominant position in the *United Brand's* judgment. According to the judgment the dominant position is:

'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.'³⁶

That is to say that undertakings possess the dominant position if they may set up their business strategies which do not need to be necessarily influenced by a current situation of the market. A position like this usually occurs when undertaking or group of undertakings have a significant share of the supply within given market provided that other factors that are analysed (such as entry barriers, capacity of customers to react, etc.) also confirm this.³⁷

Economic concept of dominance is based on the undertaking's possibility to freely set up prices of its products and services. However, the legal concept differs from the economic one. The difference between economic and legal concept is that a law assesses a dominance not just on the power over prices, but also on the undertaking's ability to foreclose other undertakings out of the relevant market what the ECJ also confirmed in the case *United Brands*³⁸ when held that the United Brands hold a dominant position in the market, however, it lost a price fight with its competitor. The dominance of the United Brands resulted from its power to prevent dealers to buy bananas sold in the ports of entry and subsequently to sell them. This conclusion was based on a fact that the dominance prohibited by the Article 102 is rather a matter of buyer power than selling power.³⁹

³⁵ Alison Jones, Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (4th edn, Oxford University Press 2011) 268.

³⁶ Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (8th edn, Hart Publishing 2004) 94.

³⁷ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 10.

³⁸ Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. - Chiquita Bananas* [1978] ECR I – 00207.

³⁹ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, 94-95.

1.5 The Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law

As a result of a previous criticism of the Commission due to its non-transparent way in the relevant market definition, in 1996, the Commission published the Commission notice on the definition of relevant market for the purposes of Community competition law, providing, a framework on how the Commission determines and applies the relevant market into an enforcement of Community competition law.⁴⁰ Moreover, it was deemed to identify the main constraints that undertakings face in competition.⁴¹

The Commission Notice has not been changed for almost two decades, even though some changes within European, global economies as well as in other areas of enforcement of a competition have occurred.⁴²

As it is only the Commission Notice, it is not a legally binding instrument. Nonetheless, the EU Courts have followed it in many cases and thus showed their consent to the Notice.⁴³

The Notice on the Market Definition is applied for analysis of conducts, falling under the Article 101, the Article 102, ECMR and the European Economic Area Agreement.⁴⁴ In the Notice on the Market Definition, the Commission explains the methods that apply in the relevant market definition adopted to cases incurred in competition. Relevant evidences which the Commission is dependent on while defining the relevant market are also a part of a content of the Notice on the Market Definition.

In the Notice on the Market Definition, the Commission has introduced the SSNIP test as a core of the market definition. The Commission admitted that for the reason of different nature of competition cases being examined, the relevant market definition may be still different. However, the certain principles introduced in the Notice are applicable in all competition cases.⁴⁵

The Notice on the Market Definition provides an explanation why it is necessary to define the relevant market as follows:

⁴⁰ Alison Jones, Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (6th edn, Oxford University Press 2016) 59.

⁴¹ Lennart Ritter, W. David Braun, *European competition law: a practitioner's guide* (3rd edn, Kluwer Law International 2004) 25.

⁴² Amelia Fletcher, Bruce Lyons, *Geographic Market Definition. A study for DG Competition* (Centre for Competition Policy 2016) 7 <http://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 12 October 2016.

⁴³ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 36.

⁴⁴ Mark Furze, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006) 261.

⁴⁵ *ibid* 261.

‘Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.’⁴⁶

It is apparent that the Commission shall firstly define the relevant market and just subsequently may assess whether competition was impeded by players of competition – undertakings. This statement also declared the ECJ in the case *Kali und Salsz AG and Kali – Chemie AG v Commission*⁴⁷ in which it was stated that “a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition”.⁴⁸

However, the ECJ’s decision stresses an importance of the relevant market definition, EU competition law does not provide the exact guidance on the market definition that can lead to the same relevant market definition applicable to every single competition’s case. The relevant market definition is only an intermediate step allowing, inter alia, an assessment of market shares or concentrations. Thus, the relevant market is not defined, but its role is to identify an existence of products and services substitutes, which means a significant constraint for an undertaking supplying products and services.⁴⁹

Even though the criteria for delineation of the relevant market have been uniformed, the Commission must apply them according to the nature of a certain anticompetitive behaviour. Anticompetitive agreements and abuse of dominant position have to be assessed only on a ground of present and past market conditions. However, this rule does not apply to mergers between undertakings that lead to structural changes. Those kind of mergers have to be assessed on a prospective analysis as well.⁵⁰

⁴⁶ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 2.

⁴⁷ Joined Cases 19 and 20-24 *Kali und Salsz AG and Kali – Chemie AG v Commission* [1975] ECR I – 0499.

⁴⁸ John Cook, Christopher Kerse, *EC Merger Control* (5th edn, Sweet & Maxwell 2009) 215.

⁴⁹ Safinaz Mohd Hussein, Nazura Abdul Manap, Mahmud Zuhdi Mohd Nor, ‘Market Definition and Market Power as Tools for the Assessment of Competition.’ (2012) 13 *IntlJ of Business and Society* 163, 170.

⁵⁰ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 25.

II. Relevant Product Market

As stated in the Notice on the Market Definition, the relevant market definition is based on two dimensions: relevant geographic market and relevant product market.

2.1 Relevant Product Market Definition

The Court of Justice, in the case *Europemballage Corpn and Continental Can Co Inc. v Commission*⁵¹, related to the first appeal on the application of the Article 102, stated that it is a crucial to delimitate the relevant product market before a determination of a dominant position was made. The Court of Justice has reported this rule in many other occasions.⁵²

In the wording of the Notice on the Market Definition, the definition of the relevant product market is set up. According to the Notice on the Market Definition:

‘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.’⁵³

The Court of Justice applied that definition in the *Hoffmann La Roche*⁵⁴ case when it concluded that:

‘The concept of the relevant market ... implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned.’⁵⁵

It appears on that ground that a crucial factor is a so called products' interchangeability or substitutability with other products from the consumers' point of view, usually known as “demand-side substitutability” or “substitution”. However, the substitution can also occur on a producers' side when producers are able to switch their production as a response to changes that has occurred on a market. This kind of substitution is referred as “supply-side substitutability”.⁵⁶ The Notice on the Market Definition recognizes also a “chain substitutability” as a last form of the substitutability.

⁵¹ Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR I - 1973 -00215.

⁵² Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 29.

⁵³ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 7.

⁵⁴ Case *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR I - 1979 -00461.

⁵⁵ Lennart Ritter, W. David Braun, *European competition law: a practitioner's guide* (3rd edn, Kluwer Law International 2004) 26.

⁵⁶ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 388.

2.1.1 Demand-Side Substitutability

As mentioned, the demand-side substitutability expresses the degree of products' substitutability from customer's point of view. Demand-side substitutability is one of three main constraints that undertakings have to face in competition.⁵⁷ This factor of market definition, has the most effective and direct influence on suppliers in relation to a determination of prices.⁵⁸

"To prove substitutability one need not show that all customers would seek substitutions when faced with an increase in price in a relatively short period of time, but that sufficiently large number of customers would do so."⁵⁹ As is stated, products are considered as substitutable when the answer of more consumers on an increase of prices of products is that they switch their purchase to another supplier within a short time. However, it is not expressly stated what is considered as a sufficiently large number of customers, an amount of money for which a price has to be increased and what is considered as a short period of time.

The United States authorities have stated in their guidelines that a price has to be increased for small (five per cent) amount of money and the consumers have to react within one year. Notwithstanding, this rule seems to be doubtful. For example in a case of alcoholic beverages the price increase for five per cent may be significant for customer's purchasing behaviour. However, when more expensive products are sold, consumers barely notice such a change.⁶⁰

Moreover, the one year period has different implications in each sector. For instance, the food markets vary from the aircraft one as, the food customers make their decisions on buying food within relatively short period of time, but aircrafts' orders are placed a couple of years ahead.⁶¹

The Commission did not establish such precise rules in its Notice to avoid these kind of misunderstandings and it relies on more criteria and evidences when determines the demand-side substitutability of products concerned.

⁵⁷ According to the Commission Notice on the definition of relevant market for the purposes of Community competition law para 13, Firms are subject to three main sources or competitive constraints: demand substitutability, supply substitutability and potential competition.

⁵⁸ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 13.

⁵⁹ Ariel Ezrachi, *EU Competition Law – An Analytical Guide to the Leading Cases* (3rd edn, Hart Publishing 2012) 33, Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 95.

⁶⁰ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 95-96.

⁶¹ *ibid* 96.

In the case *ABB/Daimler-Benz*⁶², the Commission held that:

‘Established practise in defining the relevant product market is to consider the functional substitutability of the relevant products in relation to a specific use from the customer’s point of view. The key criteria here are **the properties, prices and intended use of the products**.’⁶³

Such criteria for determination of the relevant product market criteria are step-by-step explained within this subchapter as follows:

1. Characteristics of Products

Firms could hold the dominant position and have the market power only in supply of certain products and services. The narrower the product market is defined, the simpler it is to decide if an undertaking hold the dominant position under the Article 102. For that reason, undertakings tend to argue that the Commission defined a product too narrow. Therefore, it is necessary to support the market definition with relevant arguments. The Commission and The Court of Justice usually base the relevant market definition on a fact, whether products and services are interchangeable.⁶⁴

If a consumer considers two products as substitutable and interchangeable, then the products are likely to be a part of the same relevant product market. During analysis whether products fall within the same relevant market, it is substantial to consider the level of products’ interchangeability. The relevant product market is formed from highly interchangeable products. Though, it does not mean that substitutability has to be perfect to consider products as a part of the same relevant product market. However, the substitutability of the products concerned cannot be only a very limited.⁶⁵ The products with a low level of interchangeability are unlikely to be a part of the same relevant market.⁶⁶

According to L. Ritter and W. D Braun, ‘homogeneous products normally are easily interchangeable, such as basic chemicals. Products which satisfy different needs belong to distinct markets, such as pharmaceuticals having different therapeutic effect, spices, or plant species (seeds).’⁶⁷ Nonetheless, product’s appearance is not of so high importance as their functional characteristics, in a connection with the market defining. Hence, for example, bottles may be a part of the same beverage container market and

⁶² *ABB/Daimler-Benz* (Case No IV/M.580) Commission Decision 97/25/EC [1995] OJ L 011.

⁶³ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 388.

⁶⁴ Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) 1012.

⁶⁵ Lennart Ritter, W. David Braun, Francis Rawlinson, *EEC Competition Law: a practioner’s guide* (Kluwer Law and Taxtion Publishers 1991) 273.

⁶⁶ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 135-136.

⁶⁷ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 27.

pharmaceuticals which look differently from each other but have the same therapeutical effect may be a part of the same market.⁶⁸

There has to be also a sufficient degree of the same functional characteristics between products, what was ruled in the case *Nestlé/Perrier*⁶⁹ where the Commission had to decide whether mineral waters form part either of a separate market or they constitute a market commonly with other soft drinks. The parties of the case argued that function of all soft drinks, including miner water, is to quench thirst and, therefore, they have to form part of the same relevant market. However, the Commission did not follow this argument and held that:

‘...a limited substitutability in terms of functionality alone is not sufficient to establish substitutability in competition terms. In the present case, if the only criteria to establish substitutability was to be quenching thirst, many products of very different nature which fulfil that function would have to be considered as belonging to the same market (tea, milk, beer, certain fruits, etc.).’⁷⁰

The Commission in its survey conducted by the undertakings figured out that consumers in France buy mineral water mainly because of its health benefits and ecological image while they purchase other non - alcoholic beverages because of their taste. Thus, the Commission came to the conclusion that mineral water and other soft drinks are not substitutable from a consumers’ point of view.⁷¹

2. Price of Products

In conditions of a free market economy, products prices are a result of the relationship between the level of the product’s demand and the level of the product’s supply. If the level of supply is higher than the level of demand, then the price of product will be lower and vice versa.⁷²

Products that form part of the same relevant market should in general have a comparable prices. The same products’ prices may also be caused by other factors, for example use of the similar raw materials. For that reason, the price parallelism must be examined during a longer period of a time.⁷³ If within the same relevant geographic market are sold products with extensively different prices, then it is unlikely that these products are deemed to be the close substitutes.⁷⁴

⁶⁸ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 27.

⁶⁹ Case IV.M.190 *Neslé/Prrier* [1992] ECR II- L 356.

⁷⁰ *ibid* para 9.

⁷¹ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 97.

⁷² Mark Furse, *Competition Law of the EC and UK* (5th edn, Oxford Univeristy Press 2006) 13.

⁷³ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 391.

⁷⁴ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 28.

For determining the demand-side interchangeability and substitutability between products, it is necessary to investigate a cross-elasticity of the products. The cross-elasticity is on a high level if a rising of the price, for example for chicken, will lead customers to purchase another kind of meat. When the high level of cross-elasticity occurs, it indicates a likelihood that the products form the same relevant market.⁷⁵

A famous case is associated in relation to the cross-elasticity of products – *United Brands Company and United Brands Continental BV v Commission*⁷⁶. The Commission found out that United Brands abused its dominant position in the bananas' market, and thus infringed the Article 102 TFEU as a result.⁷⁷ United Brand brought an appeal to the ECJ because United Brand claimed, inter alia, that its bananas were a part of a wider product market of fresh fruit and that there was a high level of cross-elasticity between United Brands' bananas and other kinds of fruit.⁷⁸ However, the ECJ has come to the conclusion that United Brands' bananas (Chiquita) formed a part of the separate market because the cross-elasticity of the bananas was low, since the bananas were available all around the year in sufficient amount⁷⁹ and 'has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enables it to satisfy the constant needs of an import section of the population consisting of the very young, the old and the sick'⁸⁰, what are important characteristics for constitution of the significant part of the diet of these consumers and, therefore, it was hard to accept other kinds of fruit as a banana's substitutes.⁸¹

Besides "cross-price elasticity of products", the Commission focuses also on "own-price elasticity of demand". When an increase of product's price will result in a reduction of demand, then the demand is considered as elastic. On the other hand, when the demand of product in question is not elastic, an increase of price does not have a significant impact on the product's sales. The Commission found out that there was the low price-elasticity of consumer's demand for platinum in the case *Gencor/Lonhro*⁸² and, therefore, deduced that the platinum formed part of the independent product market.⁸³

⁷⁵ Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) 1012.

⁷⁶ Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*. - *Chiquita Bananas* [1978] ECR I – 00207.

⁷⁷ Ariel Ezrachi, *EU Competition Law – An Analytical Guide to the Leading Cases* (3rd edn, Hart Publishing 2012) 32.

⁷⁸ Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) 1013.

⁷⁹ Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*. - *Chiquita Bananas* [1978] ECR I – 00207, para 23.

⁸⁰ *ibid* para 31.

⁸¹ Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) 1013.

⁸² *Gencor/Lonhro* (Case IV/M.619) Commission Decision [1997] OJ L11.

⁸³ Ulrich Schwalbe, Daniel Zimmer, *Law and Economics in European Merger Control* (Oxford University Press, 2009) 106.

When the Commission determines the relevant product market, it takes into a consideration, inter alia, also the “*mixed flexibility of demand*”. The mixed flexibility of demand is possible to test on the ground of the hypothetical SSNIP⁸⁴ test.⁸⁵

2.1.1.1 SSNIP Test

The SSNIP test has been developed in the United States. The United States competition authorities have formulated such price test in merger guidelines.⁸⁶ Later, the European Union has adopted this test into its legislation. The SSNIP test is also known as a “*hypothetical monopolist test*” because the test assumes that a firm exists that is in a monopoly position and has a power to coordinate prices of given products and thus can implement the price increase.⁸⁷

The SSNIP test is a thought experiment purpose of which is to find out the smallest group of products, a part of which is also the relevant product, which the price increasing would be collectively profitable for. The theory is that the group of products within the certain relevant market are the most likely to be a competitive constrain for the product under SSNIP test’s examination.⁸⁸

The SSNIP test can be explained on example when a supplier small but significantly and permanently increases a price of a CD player A. If consumers switched their purchase to the CD player B or if they prefer to buy MP3 players as a result of the change of a price and thus make the price increasing unprofitable, then the CD players and the MP3 players form part of the same relevant product market.⁸⁹ If consumers stay loyal to the producer of the CD player A and conducted price rising is profitable, then there will be a market just for the CD player A.

This process will be repeated until such small, significant and permanent relative rise of prices of a group of products would be profitable. During such assessment, it will be vital to take into consideration aspects like the possible cost switch that may influence the consumers’ ability to switch their purchase from one product to another. Moreover, the hypothetical switching has to be realized quickly to establish efficient competitive constrain on the price increase made by a supplier. The time limit within which the

⁸⁴ Small Significant Non-transitory Increase in Price.

⁸⁵ Daria Kostecka-Jurczyk, ‘Determination of the relevant market as a criterion of assessment of concentration effects in the practise of antitrust authorities’ (2013) 2:2 Wroclaw Review of Law, Administration & Economics 129, 132

⁸⁶ Edurne Navarro and others, Merger Control in the EU. Law, Economics and Practice (2nd edn, Oxford University Press 2005) 94.

⁸⁷ Marc Ivaldi, Sabolsz Lorincz, ‘A full Equilibrium Relevant Market Test: Application to Computer Servers’ (University of Toulouse 2005) 5. <http://idei.fr/sites/default/files/medias/doc/conf/csi/papers_2005/ivaldi.pdf> accessed 16.10.2016

⁸⁸ Øystein Daljord, Lars Sørsgard, ‘Single-product versus uniform SSNIPs’ (2011) 31 International Review of Law and Economics 142, 142.

⁸⁹ Jean-Francois Bellis and others, Competition Law of the European Community (4th edn, Kluwer Law International 2005) 137.

hypothetical switch has to be realized will depend upon the type of the products concerned and their consumers.⁹⁰

According to the Notice on the Market Definition, the scale of the price rising from producers' side is between 5 per cent and 10 per cent. The price that is taken into account in the market definition when the SSNIP test is used is the prevailing market price.⁹¹

In the United States, the SSNIP test is usually used for mergers purposes, however, in EU competition law, the SSNIP test is applied more broadly regarding to cases under the Articles 101, 102 and the ECMR. In cases of an abuse of a dominant position under the Article 102, "the fact that the prevailing price might have been already substantially increased will be taken into account."⁹²

The SSNIP test may be more than just a hypothetical exercise as sales data could provide more information. For example, if unexpected hot weather occurs in autumn time what will lead to increase of sales of ice cream, then it could be possible to designate whether suppliers of cold canned drinks have suffered losses – which might signify a certain level of substitutability between such products.⁹³

However, in some circumstances the SSNIP test may bring inaccurate results, particularly, in a case of investigation whether an undertaking abused its dominant position. In such misconduct, the market test should not be based on the hypothetical question whether anticipated monopolist can small but significantly raise prices compared to current prices, but to competitive ones. If the SSNIP test was established on the current prices, then the relevant market could be defined too broadly because of a dominant position of the undertaking under an investigation. Monopolist position allows to a firm to set its prices on a highest possible level and, therefore, the further rising above the current price level would not be profitable.⁹⁴

This phenomenon is known as "*Cellophane Fallacy*" and it occurred in the case *United States v EI du Pont Nemour and Co.*⁹⁵ The Court reached such wrong conclusion because it took into account prices that had been already increased and "the existence of the high cross elasticity of demand between cellophane (sold by Du Pont) and other flexible wrapping materials"⁹⁶ what led to the wide market definition.

To avoid the Cellophane Fallacy, the Commission has to be careful in applying the SSNIP test regarding to the Article 102. Moreover, in these cases, it is necessary to rely on

⁹⁰ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 137.

⁹¹ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 17, 19.

⁹² Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 32.

⁹³ Mark Furze, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006) 16.

⁹⁴ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 105.

⁹⁵ *United States v EI du Pont Nemour and Co* 351 U.S. 377 (1956).

⁹⁶ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 105.

different methods for control of the robustness of another market definitions. In cases of alleged abuse of a dominant position, the Competition Appeal Tribunal settled, that it has to be taken into consideration a market which would exist if there were normal competitive conditions. Distortive effects created by the conduct of the dominant undertaking will not be taken into account in such cases.⁹⁷

3. Intended Use of Products

The Commission as well as the Court of Justice are responsible to decide whether the intended use of products are comparable enough to be part of the same relevant market. Such decision should be based on a ground of the demand's structure. This decision process may cause that the relevant product market will be defined either narrowly or widely than would be expected from the products' inherent characteristics. Thereby, different relevant product markets may be defined for the same products which are, however, used in a different way. For instance, a pharmaceutical that are intended for human and a pharmaceutical that are intended for veterinary use could serve as a good example.⁹⁸

In some cases the demand and supply structure may cause that the relevant product market will be defined separately, even if according to physical characteristics, functionality and product's price, the opposite could be expected. Such a situation has occurred in the case *Varta/Bosh*⁹⁹. In the case, the Commission stated that there was a need to distinguish relevant product markets for a supply of the original car batteries and a supply of car batteries intended for the replacement market.¹⁰⁰ The Commission argued that:

‘In general terms the distinction between the two product markets is not mainly based on the difference in the product itself or on the function of the product. It resides mainly in the fact that conditions of competition differ significantly on the two markets as a consequence of which the producers have to adapt their commercial and entrepreneurial policies to the different requirements of the two sales markets.’¹⁰¹

Even though, the products are the same, the different consumers, contractual relationship, supply chain and commercial can change conditions of competition to that extent that the same relevant product market cannot exist.¹⁰²

⁹⁷ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 32-33.

⁹⁸ Lennart Ritter, W. David Braun, *European competition law: a practitioner's guide* (3rd edn, Kluwer Law International 2004) 29-30.

⁹⁹ *Varta/Bosh* (Case No IV/M012) Commission Decision 91/595/EEC [1991] OJ L320.

¹⁰⁰ John Cook, Christopher Kerse, *EC Merger Control* (5th edn, Sweet & Maxwell 2009) 222.

¹⁰¹ *ibid* 222.

¹⁰² *ibid* 222.

2.1.2 Supply-Side Substitutability

The supply substitutability is a factor which causes that products which are not currently on the market are taken into account in the market determining if other conditions analysed in this subchapter will be fulfilled.

The US antitrust polices have considered both demand-side and supply-side substitutability as equal in the market definition after the Merger Guideline was adopted. However, EU competition law did not have the same approach in the market definition and preferred to determine the relevant market on a ground of the demand substitutability.¹⁰³ But in some cases, the Commission has realized that the relevant product market is broader because of possible existence of the supply-side substitutability¹⁰⁴ and therefore it has started to take the supply substitutability into account.

The reason why supply substitution shall be also a ground on which the relevant market is defined is obvious. The new production which is marketed within short period of time would bring an unwanted competitive behaviour of undertakings that supply similar products due, concern of a decreased demand for their product and profits if clients decide to switch their purchase to undertakings that are supply substitutes.¹⁰⁵

In spite of the Commission's new approach in defining the relevant product market that involved also the supply substitutability, the Notice on the Market Definition expressly states in para 7 that the relevant product market is comprised of products and services that are interchangeable and substitutable from customers' point of view. The demand substitutability priority seems to be consistent with a practice of the market definition made by the Commission. Bishop and Walker have adopted a position to the Commission's inclination to the demand substitutability, which supported the statement mentioned above. They claim: 'When defining the relevant product market, the past practice of the Commission appealed to ... four factors. These relate exclusively to the demand side: (a) physical characteristics of the product/service, (b) intended-end-use, (c) product prices, and (d) consumer preferences.'¹⁰⁶

According to the Notice on the Market Definition, the supply-side substitutability may be taken into account while determining a relevant market in case when effects of the supply-side substitutability are equivalent to effects of the demand-side substitutability in a meaning of effectiveness and immediacy.

¹⁰³ Francis Fishwick, 'The Definition of the Relevant Market in the Competition Policy of the European Economic Community' (1993) *Revue d'économie industrielle* 174, 174.

¹⁰⁴ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 392.

¹⁰⁵ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 115.

¹⁰⁶ Atilano George Padilla, *European Commission Report for DG Enterprise A/4 - The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control* (National Economic Research Associates 2001) 31.

To make it happen, the following conditions have to be fulfilled:

- **Suppliers have a capacity to switch their production to the relevant products;**
- **suppliers are able to market such products in a short period of time;**
- **suppliers incur neither additional costs nor risk as the reaction to small and permanent changes in relative prices.**¹⁰⁷

For a better understanding when the conditions, mentioned above, are met, it is reasonable to refer to an explanation stated by P.M. Roth. The supply-side substitution ‘takes place where in response to a price rise in product B, manufactures of product A are able to switch their production with minimal cost and, in relatively short-term, to make product B, and therefore increase the supply of product B to the market. This potential additional production accordingly acts as a restraint on the conduct of the original manufactures of product B. In those circumstances, products A and B may be considered to be part of the same market.’¹⁰⁸

The conditions may be usually fulfilled by suppliers which produce the same products with different quality or grades (for example, certain cosmetics with different quality of their ingredients or paper with different quality). Even though consumers do not evaluate particular products with different quality, respectively grades, as substitutable, such products may be part of the same relevant product market under a condition that most suppliers are able to offer all of the different grades in a short period of time and without a suffering from significant additional costs.¹⁰⁹

In a Commission’s view, the supply-side substitution effectively constrains competition only if undertakings that operate within one market are able to penetrate into another market sufficiently fast and with low costs. This depends on whether the undertakings operating on other markets poses, or can quickly gain a possession to assets necessary for producing the goods that are subject to a price increasement. Moreover, it is also necessary that undertaking is able to effectively readjust the assets to the production of the new goods. If the conditions are fulfilled, then such undertakings will be involved to the market definition.¹¹⁰ When the supply substitution is taken into consideration, then the relevant market is usually defined broader.¹¹¹

¹⁰⁷ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 20.

¹⁰⁸ P.M. Roth (ed), European Community Law of Competition (5th edn, Bellamy & Child 2001) 392.

¹⁰⁹ Jean-Francois Bellis and others, Competition Law of the European Community (4th edn, Kluwer Law International 2005) 138-139.

¹¹⁰ Atilano George Padilla, European Commission Report for DG Enterprise A/4 - The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control (National Economic Research Associates 2001) 32-33.

¹¹¹ Lennart Ritter, W. David Braun, Francis Rawlinson, EEC Competition Law: a practioner’s guide (Kluwer Law and Taxtion Publishers 1991) 274.

The Court of Justice in the case *Mischelin v Commission*¹¹², had not recognised the fulfilment of all conditions, mentioned above and therefore decided about an absence of the supply substitutability. The Court argued as follows:

‘There is no elasticity of supply between tyres for heavy vehicles and car tyres owing to significant differences in production techniques and in the plant and tools needed for their manufacture. The fact that time and considerable investment are required in order to modify production plant for the manufacture of light-vehicle tyres instead of heavy-vehicle tyres or vice versa means that there is no discernible relationship between the two categories or tyre enabling production to be adopted to demand on the market.’¹¹³

2.1.3 Potential Competition

According to the Notice on the Market Definition, the third source of competitive constraints is the potential competition. According to the Commission’s Guidelines on Horizontal Co-operation Agreements, ‘a company is treated as a potential competitor of another company if, in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.’¹¹⁴ Nevertheless, an ability of company to enter a market has to be real, only theoretical possibility is not sufficient to consider a company as a potential competitor.¹¹⁵

Potential competitors are not taken into account in a process of the first market determining. This is so, because the conditions under which the potential competitor creates the actual restriction of competition depends on the analysis of specific factors and circumstances related to the markets’ entry conditions. If such analysis is required, it is usually carried out at a later stage of the investigation, usually when undertakings’ position on the particular relevant market is identified as a source of a possible distortion of competition.¹¹⁶

Therefore, in some cases, the potential competition could have its place in the relevant market definition. However, as was already mentioned, it happens only at the later stage when it is assessed whether undertaking’s position within the defined market constitute a dominant position under the Article 102 of TFEU and inclined to impede significantly competition, by the reason of dominance’s creation or its strengthening under the Article

¹¹² Case C- 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR I – 03461.

¹¹³ *ibid* para 41.

¹¹⁴ Commission Guidelines 2011/C 11/01 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para 10.

¹¹⁵ *ibid* para 10.

¹¹⁶ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 24.

2 of ECMR, or allows undertaking in question, to eliminate competition as regards to the substantial part of the relevant product under the Article 101 para 3 of TFEU.¹¹⁷

The Court of Justice took into account the potential competition in the case *Continental Can v Commission*¹¹⁸. The Court stipulated that a dominant position on a market for light metal containers is not decisive even if it has been proved that other competitors operating their businesses on different sectors of market related to light metal containers are not able to enter the market in question, by a simply adoption which, however, is strong enough to make from the competitors a real counterweight.¹¹⁹

‘The Commission tends to consider potential competition only at the subsequent stage when assessing the parties’ market position although the customer’s ability to start producing their own requirements or to switch to potential sources of supply, such as from electricity to gas, or to the suppliers’ ability to switch production to other qualities or grades or other fields of use, to increase capacity or production to other qualities or grades or other fields of use, to increase capacity or production output, or to sell part of their captive production on the market, may have a disciplinary effect on the competitive behavior of the companies involved and determine the relevant market rather than the assessment of the market position.’¹²⁰

2.1.4 Chain Substitutability

In the Notice on the Market Definition, the third form of substitutability is also mentioned. It can occur when products which are not direct constrains to each other may form part of the same relevant market. Such situation may arise when products are indirectly connected by a continuous’ substitution chain.

Chain substitutability can be understood as a chain where products on the opposite sides of that chain can be potentially indirect constrains for each other.¹²¹ This abstract definition may be explained by a following practical example. ‘Chain substitutability occurs where it can be demonstrated that although products A and C are not directly substitutable, product B is a substitute for both product A and product C and therefore

¹¹⁷ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 36.

¹¹⁸ Case C- 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR I – 00215.

¹¹⁹ *ibid* para 33.

¹²⁰ Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 37.

¹²¹ Jason Aproske, Siobhan Lynch, ‘The Chain of Substitution in Market Definition: Pitfalls in Application’ (Competition Commission South Africa 2012) <<http://www.compcom.co.za/wpcontent/uploads/2014/09/Aproskie-and-Lynch-Chain-of-substitution-in-market-definition-Competition-Conference-2012.pdf>> accessed 24 September 2016.

products A and C may be in the same product market since their pricing may be considered by the substitutability of product B.¹²²

To avoid an excessively winding of the relevant product market, there should be showed price interconnection at the ends of the chain. Moreover, it has to be proven that the substitutability among the products is sufficiently strong.¹²³

2.2 Evidences Relevant for Definition of Product Market Dimension

Already introduced SSNIP test, constitutes a principal tool for the relevant market definition. However, it is also important to know what kind of other evidences could be useful for the market determination. If there were numerous market research organisations that ask the SSNIPs' questions to customers, then the relevant market would be defined really scientifically. But, the real world does not work like this and different techniques have been incorporated to the market determination process on a ground of economists' recommendations. In the Notice on the Market definition, there are settled evidences which may be convenient, however, it needs to be mentioned that a test which may be appropriate for one industry may be completely inappropriate for another.¹²⁴

According to the Notice on the Market Definition, only product characteristic and its intended use are not sufficient enough to prove that two products are substitutable from the demand point of view.¹²⁵ Therefore, it logically flows that there have to be other evidences which the Commission relies on while defining the relevant product market.

As the Commission further stipulates in its Notice on the Market Definition, there is a framework of evidences, according to which it is possible to asses a level of likelihood that substitution could take place. Designation whether a certain kind of evidences are determinant to an individual case should be based on the characteristic and particularity of every industry and product or service that are examined. However, the evidence suitable for one case cannot be suitable for another one at all. Usually, the Commission and the Court of Justice have to consider a lot of criteria and various kind of evidences for final determination of the relevant product market. 'The Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases. The Commission does not follow a rigid hierarchy of different sources of information or types of evidence.'¹²⁶

¹²² Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 139.

¹²³ *ibid* 139.

¹²⁴ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 34.

¹²⁵ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 36.

¹²⁶ *ibid* para 25.

The Commission relies on the following evidences, when determines whether the examined products are demand – side substitutes:

- **Evidence related to existence of product substitution in the recent past.** A market examination concerned to recent events which offer evidence of demand – side substitutability of particular products, changes of their prices and following consumers’ switching to other suppliers or their reaction to new products that were launched on the market can serve as a useful information in determination of the product market. Such sources help to recognise reaction of consumers to changes of product prices.¹²⁷
- **Quantitative evidence.** The Commission also recognises the worth of concrete quantitative methods for an assessment of substitution. ‘Such methods may consist of:
 - i. economic and statistical approaches to elasticity and cross-price elasticity;
 - ii. an analysis of similar price movements over time;
 - iii. an analysis of causality between price series; and
 - iv. an analysis of similar price series and their convergence.’¹²⁸

These include so called “*price coloration analysis*”. The price coloration analysis is based on an idea, that when two products are parts of the same relevant market and a positive price coloration exists between them, then an increase of a price of one of the products will cause a reaction of a price increase of the second one.¹²⁹ Thus, evidence of totally different prices between products may indicate that the products do not form part of the same relevant product market.¹³⁰

- **Competitors’ and costumers’ view.** Before the Commission adopts a decision about product market’s boundaries it usually directly contacts consumers and competitors of the investigated undertakings to gather information concerning how those consumers and competitors define the product market from their point of view.¹³¹ The Commission also requires from them reasoned answers based on

¹²⁷ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 139-140.

¹²⁸ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 394.

¹²⁹ Ulrich Schwalbe, Daniel Zimmer, *Law and Economics in European Merger Control* (Oxford University Press, 2009) 83.

¹³⁰ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 394.

¹³¹ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 40.

factual evidences related to their behaviour as a respond to the small increase of prices.

- **Consumer preferences.** The Commission admitted in para 41 of its Notice on the Market Definition, that it is sometimes difficult to acquire information directly from consumers, mainly, if it is a question related to consumer goods. In such a case, marketing studies commissioned and used by undertakings for the purpose of making products pricings' decisions, may be helpful for the Commission to determine the relevant product market. The Commission considers as useful also 'consumer surveys on usage patterns and attitudes, data from consumer's purchasing patterns, the views expressed by retailers and more generally, market research studies submitted by the parties and their competitors'¹³², when it makes the decision about substitution of two products.
- **“Barriers and costs associated with switching demand to potential substitutes.”**¹³³ There are various type of barriers and costs related to switching demand and it is not possible to provide an exhaustive list of such obstacles. This could include regulatory barriers or different type of state intervention, special investments in manufacturing, learning and human resources investments, investments in machinery equipment, wonders resulting from unknown suppliers' quality and character and others.¹³⁴
- **Various categories of consumers.** Once all the products that are part of the relevant market has been identified, the Commission will scrutinise whether the products are sold to various categories of consumers. In this context, the Commission pays a special attention whether captive consumers exist.¹³⁵ According to Edurne Navarro: 'Captive clients can be defined as a group of consumers that have no opportunity of transferring their demand to a substantive product, although such a substitution may be possible for remaining consumers.'¹³⁶ Different kind of consumers on the relevant market may cause a

¹³² Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 41.

¹³³ *ibid* para 42.

¹³⁴ *ibid* para 42.

¹³⁵ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 110.

¹³⁶ *ibid* para 110.

narrower market when these consumers can fall under a price discrimination. This might happen when the following conditions are simultaneously fulfilled:

1. The group to which a particular consumer belongs, may be certainly identified at the time of the selling of the relevant product to this consumer;
 2. a trade between consumers, as well as arbitrage conducted by third party is impossible.¹³⁷
- **Industry classification.** P.M Roth states that “classification established in the relevant industry can sometimes provide very important evidence in assessing product markets.”¹³⁸ Such industry classification played a role in the product market definition in the case *Swissair/Sabena*¹³⁹ where the Commission has ruled that:

‘The substitutability between routes depends on a number of factors such as the distance between the point of origin and the point of destination, the distance between the different airports situated on each side of the route and the number of frequencies available on each route.’¹⁴⁰

According to Oana Mihaescu and Nikolas Rudholm, the relevant product market can be defined as “the area within which the price of a good tends to uniformity, allowance being made for transportation and transaction costs.”¹⁴¹ Under these circumstances, movements of prices will significantly interact. When one undertaking changes a product’s price and other undertakings will follow his behaviour, then it will lead to a positive demand’s cross-price elasticity. This could be also applied on a product space in a case of imperfect substitutes. When a change in a price of one substitute, will resulted in a change of a price of another substitute, then these products could be considered as competitors on the relevant product market.¹⁴²

¹³⁷ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 140.

¹³⁸ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 394.

¹³⁹ *Swissair/Sabena* (Case IV/M.616) Commission Decision 95/404/EC [1995] OJ L 239.

¹⁴⁰ *ibid* para 19.

¹⁴¹ Oana Mihaescu, Niklas Rudholm, (2013) ‘Defining Relevant Product Markets for Pharmaceuticals’ 4 <https://www.researchgate.net/publication/268376128_Defining_relevant_product_markets_for_pharmaceuticals> accessed 28 November 2016

¹⁴² *ibid* 4.

III. Relevant Geographic Market

The definition of the relevant geographic market, as the second market dimension, is also deemed to be necessary for a determination of the undertaking's market power. The objective of the relevant geographic market definition is to identify the undertakings selling those products that form part of the relevant product market within a certain area and which are simultaneously competition for the concentration under an investigation, and therefore influence their competitive behaviour.¹⁴³

3.1 Relevant Geographic Market Definition

‘Geographic market definition serves two functions. Firstly, it facilitates an initial screen by allowing the construction of market shares. Secondly, and ultimately more importantly, it should reflect the economic model of competition by identifying the core players within the market, who may reasonably be expected to constrain the competitive behaviour of the merging parties.’¹⁴⁴

Some kinds of products can be easily supplied throughout the European Union's territory or worldwide. However, there are also products which could rather be supplied just within a narrower market, for the reason that technical, practical or legal barriers make it impossible to be supplied within a broader area (for example: costs of products transportation, legal controls).¹⁴⁵

The purpose of the relevant geographic market delimitation is to gain useful information about other undertakings which represent competitive constraints for an undertaking under an investigation.¹⁴⁶

According to the Notice on the Market Definition, the relevant geographic market is defined as an **area** in which:

- 1. firms concerned are involved in the demand and supply;**
- 2. conditions of competition are adequately homogenous;**
- 3. can be differentiated from another areas because conditions of competitions in those areas are evidently different.**¹⁴⁷

¹⁴³ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 125.

¹⁴⁴ Amelia Fletcher, Bruce Lyons, *Geographic Market Definition. A study for DG Competition* (Centre for Competition Policy 2016) 12 <http://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 12 October 2016

¹⁴⁵ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 39.

¹⁴⁶ *ibid* 39.

¹⁴⁷ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 8.

These relevant geographic market characteristics may be in general described as a territory within which all “objective conditions of competition used for specific products must be the same for all merchants.”¹⁴⁸ Also the Court of Justice supported this definition in the case *United Brands versus Commission*¹⁴⁹ where the Court held that:

‘The condition for the application of article 86 to an undertaking in a dominant position presuppose the clear delimitation of the substantial part of the common market in which it may be able to engage in abuses which hinder effective competition and this in an area where the objective conditions of competition applying to the product in question must be the same for all traders.’¹⁵⁰

When the Commission determines whether a level of homogeneity of conditions of competition is sufficiently, it examines several basic factors, such as:

- the type of suppliers;
- suppliers’ market shares;
- the character of a relationship between suppliers and their customers;
- language;
- distribution’s channels to end users;
- the character of the market, including demand trends and products’ and services’ prices;
- the customs duties;
- the reaction of national preferences;¹⁵¹
- the transport costs;
- trade flow;
- broadcasting transmission capacity;
- differences in market strategies and others.¹⁵²

It is also important to take into account a market dynamicity. The European single market, Monetary Union and public procurement regime of European Community were responsible for some changes that have already started to transform characteristics of national markets. Manufacturing process, and a technological development have made plants’ operation easier, what led to a possibility of suppliers to supply their goods broader, not just to the vicinities of their firms.¹⁵³ Due to the single market concept, the relevant geographic market has been becoming wider. Theoretically, there is no logical

¹⁴⁸ Daria Kostecka-Jurczyk, ‘Determination of the relevant market as a criterion of assessment of concentration effects in the practise of antitrust authorities’ (2013) 2:2 Wroclaw Review of Law, Administration & Economics 129, 134.

¹⁴⁹ Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*. - *Chiquita Bananas* [1978] ECR I – 00207.

¹⁵⁰ *ibid* para 44.

¹⁵¹ John Cook, Christopher Kerse, *EC Merger Control* (5th edn, Sweet & Maxwell 2009) 224.

¹⁵² Lennart Ritter, W. David Braun, *European competition law: a practitioner’s guide* (3rd edn, Kluwer Law International 2004) 40.

¹⁵³ John Cook, Christopher Kerse, *EC Merger Control* (5th edn, Sweet & Maxwell 2009) 224-225.

reason which could impend relevant geographic market to become worldwide.¹⁵⁴ The Commission reflects these factors, while analysing the relevant geographic market.

In the Notice on the Market Definition, such process of the relevant geographic market delineation is composed of three steps. During the first step, the Commission preliminary assesses basic factors, namely the market share's distribution and differences in prices that occurred between different Member States. The second step is based on an application of the same analyses' tools as are applied in the product market definition, particularly the application of the SSNIP test. And the last third step, includes an investigation of practical impediments and barriers that may lead to a market's isolation.¹⁵⁵

The SSNIP test in a relation to the geographic market dimension has a following scheme: would be a price increase, for example, of a wine by 5-10 per cent profitable for a supplier of all Austrian wines? If there is a positive answer, then the relevant geographic market will be delineated only as Austria. If such increase in prices would not be profitable, for example, because there is an expected import from Spain to render that price increasing unprofitable, as a significant part of customers demand Spanish wine, then the SSNIP test should be made again with the inclusion of Austrian and Spanish wines.¹⁵⁶ Usually, this scheme can be generally applied regarding all products and geographical areas.

The same sources of constrain to which undertakings have to face in competition that was mentioned in a context to the relevant product market can be found also in a relation with the relevant geographic market delineation. These are specifically: demand-side substitutability, supply-side substitutability and potential competition. Moreover, the chain substitutability also occurs in the case of geographic market dimension.

3.1.1 Demand-side Substitutability and Supply-side Substitutability

The Commission considers as useful the same factors which are used for determination of the product market dimension, while determining the geographic market dimension.

In relation to the geographical scope of the market, the level of the demand substitution is also defined according to already mentioned SSNIP test. The SSNIP test, in a meaning of the relevant geographic market, is based on a hypotheses, that the price theoretically increased will make customer switch their purchase to suppliers located elsewhere in the short period of time and with negligible costs.

Regarding to the relevant geographic market, the supply substitution focuses on whether as a consequence of a small but permanent relative price increase of a certain product sold

¹⁵⁴ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 40.

¹⁵⁵ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 395.

¹⁵⁶ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 113-114.

in Area A, suppliers located in Area B will switch their production and supply customers situated in Area A to the extent that such increase in price stayed unprofitable.¹⁵⁷

3.2.2 Potential Competition

As mentioned in a context to the relevant product market, the potential competition has also an influence when the relevant geographic market is defined. The potential competition is likely to be taken into account when a seller who reaches a particular minimum size is able to supply its products and services not just within a home market of the seller, but also has a capacity to supply neighbourhoods' market in a position either as a direct exporter or supplies that markets indirectly with a local intermediaries' help under a condition that the supplier does not have to spend significant transport costs.¹⁵⁸

Thus, the Commission has considered the agreements concerning market shares between undertakings that operate within the same relevant product market which have not already sold their products into each other's geographic markets as anti-competitive behaviour falling under the Article 101 (1) of TFEU. However, cases when suppliers operating within a territory of one Member State made an agreement that they will only jointly sell in territory of another Member State, the Commission has considered as infringement of the Article 101 (1), moreover the Commission has refused to apply an exemption stated in the Article 101 (3).¹⁵⁹

3.1.3 Chain Substitutability

A situation when two products could be indirect constrains to each other¹⁶⁰ also occurs regarding to geographic market dimension.

The chains substitutability, in a context to relevant geographic market, covers a situation when certain products which require high transport costs for supply of further parts of the market. For this reason, a transport of such products from given manufactory is limited to its surroundings.¹⁶¹ 'However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market.'¹⁶²

¹⁵⁷ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 141-142.

¹⁵⁸ *ibid* 77.

¹⁵⁹ Lennart Ritter, W. David Braun, *European competition law: a practitioner's guide* (3rd edn, Kluwer Law International 2004) 77-78.

¹⁶⁰ Further explanation in the subchapter 2.1.4 Chain substitutability.

¹⁶¹ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 57.

¹⁶² *ibid* para 57.

The influence of the chain substitutability has to be proven on a ground of real evidences, as was mentioned in the context to the chain substitutability of the relevant product market. Furthermore, if the level of prices in the extreme of chain is comparable, then there is a likelihood that products are part of the same relevant market.¹⁶³

3.2 Evidences Relevant for Definition of Geographic Market Dimension

Similar to the product market dimension, the relevant geographic market definition is also a result of an assessment of different types of evidences, conducted by the Commission. The evidences which the Commission relies on, when determines boundaries of the geographic market, are stipulated in Articles 45 – 52 of the Notice on the Market Definition and can be summarised as follows:

- **Evidence from the past, proving the redirection of orders to other areas.** In certain cases, there could be available evidences providing information about prices changes between different areas and how customers on such changes subsequently responded. The Commission recalls that such attention is necessary during an international comparison of prices when exchange rate movements, a different taxation and big differences in products that exists between areas can occur.¹⁶⁴
- **Basic characteristics of demand.** The demand's character of the product in question can determine the boundaries of the relevant geographic market. For instance, consumers' preferences for national products or language differences may restrict the geographic extension of competition.¹⁶⁵ When consumers prefer to purchase products of national brands, it causes a dual effect. Firstly, it limits product's substitutability supplied by firms in other Member States. Secondly, undertakings from other Member States consider it as a barrier to entry to a national market due to a fact that they have to invest in advertising before a selling their products in such Member State to make their brands appealing for consumers. A language may determine a level of demand substitution, for instance, in a sector of the mass media or publishing.¹⁶⁶
- **Competitors' and consumers' view.** The Commission uses the same kind of procedure as it does in the defining the product market dimension. The Commission gathers opinions of the main consumers and competitors of the undertaking under an investigation on the geographic scope of the market when it

¹⁶³ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 58.

¹⁶⁴ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 41.

¹⁶⁵ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 142.

¹⁶⁶ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 127-128.

considers as appropriate. When such opinions are based on factual evidences, the Commission asks customers and competitors for their submission.¹⁶⁷

- **“Current geographic pattern of purchases.”**¹⁶⁸ During this step, the Commission analyses the location where the customers presently buy products or services. If they purchase within the territory of the EU, then this would be an indication that the relevant geographic market is EU-wide.¹⁶⁹
- **Trade flow and shipment’s pattern.** The Commission relies on such evidence, in cases when there are so many consumers that it is impossible to obtain a picture of their geographic pattern of purchase, as it was mentioned on the previous point. For that reason, the Commission has to seek for an alternative evidence such as trade flows’ information, however, this evidence can be used only under a condition that the trade statistics provide a detailed data of the relevant product. Even though, the trade flow provides the picture of the scope of the relevant geographic market, the definition of the market cannot be based only on that ground.¹⁷⁰ According to the decision of the Commission, it appears that the Commission considers “that a 10 per cent level of imports provides support for a wider geographic market.”¹⁷¹ However, in the case *Nestlé/Perrier*¹⁷², the Commission decided reversed and stated that even if the France exported more than ten per cent of its domestic production, the relevant geographic market was still national because products that had been exported could not be cost-effectively sent back to France if the price would increase there. The Commission relied on the minimal import’s level to justify such national market delineation.¹⁷³ In a connection with the shipment pattern, there exists also so called *Shipment Tests*. The test lies on two basic components. The first one is based on establishing whether there occurs “*little in from inside*”, which means that imports present a small part of whole locale consumption, and under the second one, it is assessed an existence of “*little out from inside*” in a meaning that exports present a small part of whole local production. The idea of the test is that a particular geographical area is considered as the relevant geographic market when the both mentioned tests’ components are satisfied what means that within the given market is a little products’ movement to and from another geographical areas.¹⁷⁴
- **Barriers and switching costs related to a diversion of orders to undertakings which are located in different areas.** Barriers which are responsible for isolating of national market have to be identified before the conclusion that the relevant

¹⁶⁷ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 47.

¹⁶⁸ *ibid* 48.

¹⁶⁹ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 41.

¹⁷⁰ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 49.

¹⁷¹ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 399.

¹⁷² Case IV.M.190 *Neslé/Prrier* [1992] ECR II- L 356.

¹⁷³ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 339.

¹⁷⁴ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 114.

geographic market has only a national dimension is made.¹⁷⁵ The most obvious barriers are costs that customers have to spend on a transport and transport restriction arisen from legislation or characteristics of a product under an investigation.¹⁷⁶ Under some circumstances such barriers will be responsible for the narrow geographic market definition. ‘Consider for instance a merger between food retailers in a given city. It would make little sense to define the market beyond the city borders, as transportation costs (which in this case include time spent by customers travelling to a shop) would prevent most citizens from going to neighbouring cities to do their shopping.’¹⁷⁷ Moreover, quotas and tariffs may also isolate the national market. Transport costs are the most significant for bulky and products with a low-value. Switching costs depend on a character of products.¹⁷⁸

Even though, a price in a relation with geographic market definition is not expressly mentioned in the Notice on the Market Definition, price of products and services may also serve as a useful information necessary for a definition of the scope of the relevant geographic market. A way how the Commission evaluates such criterion, in regard to geographic market definition, corresponds to a fact that the price is used for definition of products market dimension. However, a comparison between international prices may be problematic because of different reasons, which are: exchange rate fluctuations, various regimes of taxes or differentiation of products in Member States. Particularly, when there are stable differences in prices of the identical products and no parallel imports, then there is a big likelihood of existence of a narrow geographic market.¹⁷⁹

The Commission defines the relevant geographic market after it gathered and assessed the mentioned evidences and might come to a conclusion that the market has a regional, national or global level, what was also confirmed in previous decisions of the Commission and ECJ.¹⁸⁰ Nonetheless, Amelia Fletcher and Bruce Lyons in its geographic market study found that because ‘European Member States vary enormously in their size, their borders are sometimes not a good guide to economic boundaries. However, the Commission’s geographic market definition is nearly always a Member State, or a group of Member States or wider. It is very rarely smaller than a Member State’¹⁸¹ Opposed to,

¹⁷⁵ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 50.

¹⁷⁶ Amelia Fletcher, Bruce Lyons, Geographic Market Definition. A study for DG Competition (Centre for Competition Policy 2016) 10 <http://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 12 October 2016

¹⁷⁷ Massimo Motta, Competition Policy: Theory and Practice (Cambridge University Press 2004) 114-115.

¹⁷⁸ *ibid* 114-115.

¹⁷⁹ Edurne Navarro and others, Merger Control in the EU. Law, Economics and Practice (2nd edn, Oxford University Press 2005) 133.

¹⁸⁰ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 51.

¹⁸¹ Amelia Fletcher, Bruce Lyons, Geographic Market Definition. A study for DG Competition (Centre for Competition Policy 2016) 17 <http://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 12 October 2016

a National Competition Authorities, which defines the geographic market also as a regional or sub-national.¹⁸²

Even though, the Commission provides an extensive list of the evidences that are relevant for the market definition, it does not mean that in every single case it will be necessary to gather all the mentioned evidences to define the relevant geographic market. Usually, in practice it will be enough to gain and asses only a subset of these evidences to be able to define the market.¹⁸³

Despite of, an existence of the evidences and tests that allow to define the relevant market, the European Court of Justice recalls in its decision that ‘in any case, it must be noted that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings and services markets or other geographic markets at different times.’¹⁸⁴

¹⁸² Amelia Fletcher, Bruce Lyons, Geographic Market Definition. A study for DG Competition (Centre for Competition Policy 2016) 17 <http://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 12 October 2016, 17-18.

¹⁸³ Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5, para 52.

¹⁸⁴ Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-3155, para 55.

IV. Time as Factor in Relevant Market Definition

The European Union legislation recognises officially only two market horizons – the geographical and the product. Even if, it is not stated in the Notice on the Market Definition, the Commission in its publications and proceedings defines boundaries of the relevant time market as well.¹⁸⁵

Also, law theorists from some EU Member States' jurisdictions, for instance the Czech Republic or the Slovak republic, incline to include the third time's horizon, when they define the relevant market. For instance, the Slovak republic legislation defines the relevant market as the geographical and temporal concurrence of supply and demand of such products, performances, works and services which are from the consumers' point of view identical or substitutable.¹⁸⁶ In a meaning that undertakings, inter alia, need to exercise their businesses during the same period of time to be constrains for each other and thus form part of the same relevant market. If products and services of two undertakings were supply and demand substitutable, however, one of them was active on the market fifty years before, they would not logically form part of the same relevant market because they would not influence each other competitive behavior and for that reason they need to meet in the time as well.

4.1 Situations when “Relevant Time Market” is Defined

The Commission and the Court of Justice consider the market as a dynamic sector which is influenced by time and, therefore, it takes also time into account, when defines the relevant market. It is really rare for the temporal market to be considered as an important feature when the market is analysed¹⁸⁷ but since the relevant market definition has to be considered in every single case individually, the Commission has to think about a possibility that the time factor should be also taken into account in the market definition.

The time aspect may have an influence on the delineation of the relevant market, however, it is the least important market dimension and the Commission usually relies on the product and geographic dimensions of the market. However, on a ground of the timing, it is possible to distinguish between temporal markets (for example markets of sessional works) and permanent markets which exist during the whole year.

The Notice on the Market Definition does not separately discuss the relevant time market, nevertheless, it is stated in the para 12 that the different time horizon can lead to the

¹⁸⁵ Daria Kostecka-Jurczyk, 'Determination of the relevant market as a criterion of assessment of concentration effects in the practise of antitrust authorities' (2013) 2:2 Wroclaw Review of Law, Administration & Economics 129, 130.

¹⁸⁶ Zákon č. 136/2001 Z. z. Zákon o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov (SVK), § 3 ods. 2

¹⁸⁷ Mark Furse, Competition Law of the EC and UK (5th edn, Oxford University Press 2006, 260.

definition of two distinct geographic markets for the same products, depending on whether the Commission is examining changes on the supplier's structure, for example concentration between undertakings or cooperative joint venture, or examining only the steps already taken, such as past behavior on the market.

Time might influence the market definition in a way that is not a priori noticeable. For example, restaurants and cafeterias might form part of the same relevant market during the lunch time when people are interested in a meal which can be served quickly during the short lunch break, although, during the dinner time people's meal interests are totally different. In the evening, people visit restaurants because they want to enjoy their time in nice and calm premises. Therefore, it is not really likely that sandwiches that are sold in cafeterias would be considered as a suitable substitute for a better meal served in restaurants.¹⁸⁸

As mentioned above, it is necessary to define the relevant market for the purpose of judge an anti-competitive behavior of the undertaking. For instance, when a dominant position of the undertaking within a particular market is examined, it has to be based on a period of time when the undertaking abused its dominance. If the behavior of the undertaking had features of the abusive behavior, however, the undertaking was not in the dominant position on a particular market, the undertaking cannot be punished even though it will later gain such a position.

In practice, it may be a situation when the undertaking enjoys a dominant position only for a short period of time and thus is a temporal competitive constrain for other competitors acting within the same relevant market. This short-term market power may, for instance, arise when emergency situation will occur and it can lead to a temporarily increase of dependence of customers on their usual supplier.¹⁸⁹

Such situation occurred during the oil crisis, when the Commission took into account that one of the consequences of the crisis was a creation of numerous temporarily recognized separate markets for a benefit for suppliers because customers were not able to switch their purchase to other suppliers, for the reason, that supplies of oil were rationed from suppliers side and they made them available just to their traditional clients. Even though the parties brought an appeal and the Commission lost the case for another reasons, the Court of Justice did not change the temporal argument.¹⁹⁰

Nevertheless, under ordinary conditions the market has to be examined during a longer time. It was confirmed in the case *Michelin*¹⁹¹ where "the ECJ excluded from its consideration the possibility of other firms entering the market to supply heavy tires

¹⁸⁸ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 110.

¹⁸⁹ Lennart Ritter, W. David Braun, Francis Rawlinson, *EEC Competition Law: a practitioner's guide* (Kluwer Law and Taxation Publishers 1991) 278.

¹⁹⁰ Mark Furse, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006, 260.

¹⁹¹ Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR – 3461.

because it takes too long to build a factory.”¹⁹² Economists from Europe and the United States of America also take the view that competition works within a long period of time and they based their statement on an argument that it takes a time to build the production facilities necessary for running their business.¹⁹³

Another example when time might be a reason for a different market definition is a timing of a fruit supply as it was also shown in the important case *United Brands*¹⁹⁴. In this case, it was stated that because bananas are available during the whole year and for instance oranges are principally available during winter these two kind of fruit might be part of the same relevant market during winter but they are in different relevant markets during other seasons.¹⁹⁵ However, the change in demand resulting from different seasons, was not be considered as satisfactory enough to involve the bananas to a wider fresh fruit relevant market¹⁹⁶, because, as mentioned in a relation with this case, other factors were significant for the relevant market definition.¹⁹⁷

¹⁹² Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (8th edn, Hart publishing 2004) 18.

¹⁹³ *ibid* 18.

¹⁹⁴ Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*. - *Chiquita Bananas* [1978] ECR I – 00207.

¹⁹⁵ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 110.

¹⁹⁶ Lennart Ritter, W. David Braun, Francis Rawlinson, *EEC Competition Law: a practioner’s guide* (Kluwer Law and Taxtion Publishers 1991) 278.

¹⁹⁷ See the subchapter 2.1.1 Demand-Side Substitutability.

V. Special Markets

In special circumstances, it is necessary to determine the impact of a certain agreement as well as, certain conduct or a merger between undertakings in a relation to special sectors of the market.

5.1 Spare Market or After-Market

When firms manufacture not only products but also spare parts and consumables for such products, it may be questionable whether spare parts are also part of the same relevant product market as the primary product or they are part of a special separate relevant product market. Basically, how such issue is solved will depend on the circumstances of every individual case. ‘According to the Commission, this will depend to a large extent on factors such as price and life-time of the primary product, transparency of prices of secondary product, prices of secondary products as a proportion of the primary product value and information costs,...’¹⁹⁸

The SSNIP test may be also used in the definition of the after-market. Essential question that needs to be answered is whether a hypothetical monopolist supplying the primary and secondary product would be capable to increase prices profitably and significantly. Note that if some customers have already purchased the primary product they do not have an opportunity to buy secondary products being sold by a different supplier because they are not interchangeable. However, potential new customers that are thinking to buy such primary product may buy a different brand of primary product due to the overall life-time cost of the primary product, including the primary product’s price and the estimated costs of the secondary product (service, spare parts, etc.). If the secondary product is significant for the overall estimated cost of the primary product and numerous customers will base their purchase behaviour according to this fact the hypothetical monopolist will not be able to profitably increase the price in the small but significant way, then the relevant market will be defined as a common market for the both products – primary and

¹⁹⁸ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 148.

secondary.¹⁹⁹ Therefore, when the after-market delineation is made it is necessary to consider the awareness of customers, related to consumables pricing when they purchase the primary products and their possible costs of a switching their purchase to another firm supplying an alternative primary product.²⁰⁰

Situation when purchasers of the same products will need later to buy spare parts of such products is not rare²⁰¹ and for that reason it is necessary to define the spare market correctly.

There can also be a situation when an undertaking does not enjoy a dominant position within the ‘primary market’ but it might have power over the ‘secondary market’. Often, only the secondary product designed by a particular brand fits to a certain primary product. The certain brand of the primary product requires a special type of the secondary product that are not suitable for other brands. If the producer of the primary product produces also such secondary product, definition of the relevant market for the secondary product might result into a conclusion that the producer is dominant on the secondary market, even if the producer has not enjoy that position on the primary market.²⁰²

Such situation has occurred in the case *Hugin versus Commission*²⁰³ where the Court of Justice was dealing with adequate delineation of the market for the spare parts. Hugin was a supplier of cash registers and the Commission imposed a fine to him for a reason of a refusal to supply cash register’s spare parts to Liptons – a company that did not provide its business within the distribution system of Hugin. To find an answer to a question whether spare parts are a part of the wider market, it is important to define what kind of customers require spare parts. Since there was a demand for Hugin’s spare parts by independent undertakings that needed those products for their business (maintenance services and repair of the cash registers), because such parts were not interchangeable

¹⁹⁹ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 111.

²⁰⁰ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 148.

²⁰¹ Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 37.

²⁰² Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 111.

²⁰³ Case C-22/78 [1979] ECR I – 3 CMLR 345.

with spare parts of other brands. Therefore, the Court of Justice held that Hugin's spare parts formed the narrow relevant product market.²⁰⁴

However, the Court of Justice has reached a different conclusion in the case *CEAHR versus Commission*²⁰⁵ where the Court held that:

'The spare parts market for primary products of a particular brand will not form a separate relevant market when [1] it is possible for a consumer to switch to spare parts manufactured by another producer, or [2] it is possible for the consumers to switch to another primary product in order to avoid a price increase on the market for spare parts.'²⁰⁶

In such a case, the Court of Justice depended mainly on the demand - side substitutability and customers' possibility to switch their purchase, when the Court made its decision related to the spare market. From the Court of Justice's practise, it is obvious that for an appropriate determination of the relevant product market for spare products and services it is necessary to assess the certain level of substitutability and interchangeability of such products and services as well as it is in a case of the definition of the primary market.

5.2 Technology Market

In certain situations, the Commission shall also define the emerging market or market which a product innovation is significant on. For that reason, the Commission enacted a procedure of the definition of the technology markets in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (Horizontal Guidelines).²⁰⁷

According to the Horizontal Guidelines, the technology market has to be defined when "intellectual property rights are marketed separately from the products to which they

²⁰⁴ Ariel Ezrachi, *EU Competition Law – An Analytical Guide to the Leading Cases* (3rd edn, Hart Publishing 2012) 44.

²⁰⁵ Case T-427/08 [2011] ECR I – 4 CMLR 14.

²⁰⁶ Ariel Ezrachi, *EU Competition Law – An Analytical Guide to the Leading Cases* (3rd edn, Hart Publishing 2012) 46.

²⁰⁷ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005) 138.

relate.”²⁰⁸ Technology markets are composed of the intellectual property which is licensed and the technologies that consumers may consider as close substitutes to the licensed intellectual property.²⁰⁹

As stated in the Horizontal Guidelines, the procedure of the technology market definition consists of the same principles as used for the relevant product market definition, being presented in the Notice on the Market Definition. Regarding to the technology market, the first step that is taken is an identification of the licensed technology marketed by undertakings under an investigation and subsequently there is a need to identify those technologies which the consumers would switch their purchase to, if a price of a technology under an investigation was small and non-transitory increased.²¹⁰ In such analysis, for a demand-side substitutability assessment, the functional substitutability plays a fundamental role.²¹¹

After the identification of all technologies that form part of the relevant market, it is possible to calculate market shares as follows: the licensing income gained by undertakings under an investigation has to be divided by a total income of all licensed technologies gained by all licensors acting their business on the defined market.²¹²

The Commission examined the technological innovation and its influence on the market in the case *Tetra Laval/Sidel*.²¹³ In the past, the Commission had recognised that a carton as a material used for aseptic packaging formed the separate market. However, a technological development lead to a using of PET containers that were economically and technologically suitable for milk’s and juice’s aseptic packaging. But, the Commission concluded that these two packaging materials did not form part of the same relevant market, because their cross-price elasticity was not sufficient enough. Even though carton and PET containers were becoming more and more substitutable, they were still not effective and prompt enough to consider that these two products belong to the same relevant market. Nonetheless, the Commission stated that defined boundaries of the relevant market might be different in the future.²¹⁴

In another case *PO Video Games, PO Nintendo Distribution, Omega-Nintendo*²¹⁵ the Commission decided about the technology market as well. The Commission figured out that static game consoles and hand-held game ones form part of different markets. The

²⁰⁸ Commission Guidelines 2011/C 11/01 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para 116.

²⁰⁹ *ibid* para 116.

²¹⁰ *ibid* para 117.

²¹¹ Jean-Francois Bellis and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005) 147.

²¹² Commission Guidelines 2011/C 11/01 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, 117.

²¹³ *Tetra Laval/Sidel* (Case COMP/M.2416) Commission Decision [2004] OJ L43/13.

²¹⁴ Edurne Navarro and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005, 139.

²¹⁵ *PO Video Games, PO Nintendo Distribution and Omega* — Nintendo (Case COMP/35.587, COMP/35.706, COMP/36.321) Commission Decision 2003/675/EC [2002] OJ L 255.

Commission argued that the products in a question differed in a need of users (portability of the products). Static game consoles were much more technically capable and their price was five times higher than a price of hand-held game consoles.²¹⁶ Moreover, the technology innovation in game consoles was still pending and had an influence on a sale of old versions of static consoles what was confirmed by the Commission when it stipulated that:

‘Competition among suppliers of static consoles is characterised by the fact that every three to four years, a new generation of static consoles with more advanced technology is introduced onto the market. With the introduction of a new generation of static consoles, sales of less advanced static consoles decline. This phenomenon has not been visible in respect of hand-held game consoles’²¹⁷

For all mentioned reasons, consumers and suppliers did not consider the products as substitutable and, therefore, they did not belong to the same relevant technology market.

Nowadays, when the Internet is an essential part of everyday life of people, it is natural that this sector accrues different market’s divisions. For instance, during the last years, there was a significant development in consumer communication’s services. Initially there were offered only for personal computers, however, such services gradually have become available for smartphones or tablets as consumer communication applications.

In this context, a question has arose whether the consumers’ communication applications form part of the same product market with traditional electronic communications services. The Commission assessed this question in the case *Facebook/WhatsApp*²¹⁸, and according to its investigation, it stated that each of those two services are parts of separate markets. However, even if a lot of consumers considered the two services as substitutable, there were some aspects that had to be taken into account.²¹⁹

Firstly, consumers’ communication applications are usually provided without any need of payment by users, though the traditional electronic communication services, such as SMS or MMS and others, require a payment by telecom operators. Secondly, the applications provide border functionalities, such as a possibility to see whether their contacts are writing, regardless whether they are online or when last access was made to the application. Thirdly, the telecoms operators consider the communication applications as a constrain to their services²²⁰ due to a fact that the customers have started to prefer using the applications, since, they are free-of-charge and thus profit of the telecom operators has declined as a result.

²¹⁶ *PO Video Games, PO Nintendo Distribution and Omega* — Nintendo (Case COMP/35.587, COMP/35.706, COMP/36.321) Commission Decision 2003/675/EC [2002] OJ L 255, para 27-29.

²¹⁷ *ibid* para 31.

²¹⁸ *Facebook/WhatsApp* (Case M.7217) Commission Decision [2014] OJ L – 2985.

²¹⁹ *ibid* para 28, 29.

²²⁰ *ibid* para 28-32.

5.3 Pharmaceutical Market

The definition of the pharmaceutical relevant market seems to be different to the definition of the market for other products, because it is difficult to apply the SSNIP test especially in a case of prescription of medicines. Moreover, when the pharmaceutical market needs to be defined, the Commission cannot always rely on the demand-side and supply-side substitutability as well.

The pharmaceutical market differs in a meaning that on the supply-side are subjects with different positions. “On the supply-side, there are two types of companies. So-called “originator” companies are active in research, development, manufacturing, marketing and supply of innovative medicines.”²²¹ Originator companies usually enjoy a patent protection. An expiration of patent protection means a losing of a right to exclusionary manufacture and sell their products, thus allowing generic companies, as the second kind of undertaking on the pharmaceutical market, to start to market their equivalent medicines to previous protected original ones.²²²

Competition between the undertakings is usually not based on products prices because prices of medicines are a subject to governments’ regulations. Hence, pharmaceutical firms cannot freely set up and increase their prices, even if it would be profitable for them. Therefore, it would be senseless to examine how a purchasing behaviour looks like, if the price of certain medicine small but permanent increased. However, undertakings are usually allowed to decrease prices in a case of strong competition.²²³

On a demand side, the pharmaceutical market omits a truly demand substitutability for the reason that patients as consumers are usually not in a position of direct decision makers and do not have right to choose a medicines but they buy drugs prescribed by their doctors. However, in the Slovak republic’s legislation²²⁴, a rule that obliges doctors in some cases to prescribe only an active ingredient helping to treat a particular diseases but without giving a name of a concrete drug.²²⁵ In that case patients have a right to choose a medicine partly according to their preferences (price, experience, etc.) and therefore the demand-substitutability could be helpful for defining of a product market.

²²¹ DG Competition Staff Working Paper, *Pharmaceutical Sector Inquiry. Preliminary Report* [2008] art 1.1.

²²² *ibid* art 1.1.

²²³ Charles River Associates, ‘Market Definition in the Pharmaceutical Sector’ <http://ecp.crai.com/publications/Market_Definition_Pharma.pdf> accessed 24 November 2016.

²²⁴ Zákon č. 362/2011 Z. o liekoch a zdravotníckych pomôckach a o zmene a doplnení niektorých zákonov (SVK).

²²⁵ Such an obligation relates only to active substances stated in the Appendix 1 of the Zákon č. 362/2011 Z. z. o liekoch a zdravotníckych pomôckach a o zmene a doplnení niektorých zákonov.

Furthermore, the patients do not usually directly pay a product price, since it is paid by a national health authority. Such special market conditions result into a limited price sensitivity.²²⁶

The Commission in its first case related to the pharmaceutical market²²⁷, settled a basic difference between prescription medicines and over the counter medicines (“OTC”)²²⁸ and thus split the pharmaceutical market into two categories. The Commission also stated that within such categories the Anatomical Therapeutic Classification (ATC) of medicines is a good tool to use for a practical market definition, what can be used instead of the SSNIP test.

“The ATC system is a hierarchical and coded four - level system which classifies medicinal products according to their indication, therapeutic use, composition and mode of action.”²²⁹ The first group – ATC1 divides medicals into 16 anatomical groups. The second group – ATC2 is so called a pharmacological and a therapeutic group. The ATC3 categorises medicals on the ground of their specific therapeutic indications and the ATC4 is characteristic by its detailed medical classification. The last level of the chemical substance is known as the molecule level. According to the Commission decisions related to mergers, the Commission decided that the ATC3 level is the starting point that should be used for the relevant product market definition. However, the Commission later discovered that ATC3 level is not appropriate for the market definition in a meaning of the Notice on the Market Definition and thus stated that ATC4 and the molecule level composed of molecules, potentially group of the molecules that are interchangeable, will be used when the pharmaceutical market is defined.²³⁰

In the case *Teva/ Ratiophara*²³¹, the Commission specified the usage of the ATC classification for a market definition and held that:

‘In a certain number of cases, however, a group of molecules can be considered interchangeable for a wide range of applications and the relevant market in this case should be defined on the basis of all molecules which are so interchangeable. Such a definition may in principle coincide with the ATC3 or even a higher level, but more commonly it is not wider than ATC4 and may be confined to a subset of molecules within the ATC4 class.’²³²

Despite of the ATC system, the Commission stated that ‘it is inevitable that any workable market definition will involve a certain amount of arbitrariness, because, in the final resort,

²²⁶ DG Competition Staff Working Paper, *Pharmaceutical Sector Inquiry. Preliminary Report* [2008] art 1.1.

²²⁷ *Sanofi/Sterling Drug* (Case M.072) Commission Decision [1991] OJ C 156.

²²⁸ OTC - pharmaceuticals which can be used by the general public without any need of a prescription because of their safety and effectiveness.

²²⁹ *Mylan/Meda* (Case M.7975) Commission Decision [2016] OJ C 207, para 11.

²³⁰ *ibid* para 11.

²³¹ *Teva/Ratiophara* (Case COMP/M.5865) Commission Decision [2010] OJ C95.

²³² *ibid* para 14.

substitutability among medicines may not only depend on the intrinsic characteristics of the drug itself but also their intended use, taking into account the patient's overall condition²³³

The Commission has also concluded that when the pharmaceutical relevant market is defined, a scrutiny of medicines which are just in a process of a development but still have not been marketed (pipeline medicines), cannot be omitted.²³⁴ In this relation the Commission held:

‘As regards the geographic dimension of pipeline pharmaceuticals, in line with its previous practice, the Commission considers that since pipeline products need to be assessed with reference to the R&D in a given area and to the extent that R&D for the relevant products is normally global, the geographic scope of the market should global or at least be EEA-wide.’²³⁵

During the previous years, cases and studies related to differences in demand for originator - brand medicines and generic medicines have occurred. There are differences in demand for those types of medicines even if the drugs are bioequivalent. Such situation occurs mainly in countries where generic medicines are less marketed and customers prefer to buy branded products. Nonetheless, the generics are produced to compete with originator drugs and under normal circumstances they present the closest substitute to the brand ones.²³⁶

According to studies concerned to a relation between prices of generic and brand medicines and an increase of level of consumers' information conducted by Frank and Silver, “an increase in the number of consumers informed about the availability of cheaper generic alternatives would lead to lower brand name pharmaceutical prices.”²³⁷ Such a price interaction confirms that these two categories of drugs belong to the same relevant product market.

Within the market with pharmaceuticals, different markets can be recognised divided on a ground of various characteristics of pharmaceuticals.

The first dividing relates to a prescription of medicines and this market is assessed on the basis of medical viewpoint that is characteristic for a need to cure a particular sickness. The doctors choose among various suitable medicines that exist. Within this market, suppliers have a logistical role. There is a connection between medical producers and

²³³ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 403.

²³⁴ *ibid*, 403.

²³⁵ *Novartis/GlaxoSmithKline Oncology Business* (Case M.7275) Commission Decision [2015] OJ L-2985, para 32.

²³⁶ *Mylan/Meda* (Case M.7975) Commission Decision [2016] OJ C 207, para 13.

²³⁷ Oana Mihaescu, Niklas Rudholm, (2013) ‘Defining Relevant Product Markets for Pharmaceuticals’ 2 <https://www.researchgate.net/publication/268376128_Defining_relevant_product_markets_for_pharmaceuticals> accessed 28 November 2016.

pharmacies and their responsibility is to physically deliver the medicines. Herein, when the Commission assesses an influence of merger, it considers whether there will be a possibility of a restriction of a choice of the doctors caused by merger under an investigation, if one competitor offers two medicines competing on the same market that were up to now offered only by independent companies.²³⁸

The Commission has also found a difference between drugs that national health services fully or partly finance and drugs which are not reimbursed by such organisation. The Commission has also stated that medicines sold by wholesalers and those which are sold from laboratories do not form part of the same relevant market.²³⁹

Regarding to the geographic scope of the relevant market, the Commission used to incline to recognise only national character of the pharmaceutical market since it operates within a national legislation. It argued that the medicines' development and the last decision whether medicines can be marketed is still in a power of particular Member State. Moreover, the prices of prescribing drugs and OTC drugs are regulated by national laws as well.

The Commission also claimed that wholesale pharmaceutical market had either a national or only a regional level. However, in the case *Glaxo/Wellcome*²⁴⁰, the Commission has admitted that because of the community harmonisation of authorisation process, the national relevant market could change.²⁴¹

Such a change was visible in the latter case of the Court of First Instance²⁴² where the court has recognised the European-wide market within which all prescription drugs are marketed. On that market, the wholesalers purchase and sell pharmaceuticals among different Member States. When wholesalers are in a position of parallel traders, mentioned therapeutic categories are not relevant for them. For the wholesalers, it is not even important whether a certain pharmaceutical has alternatives or what the pharmaceutical's therapeutic effect is, but they only care whether between Member States are differences between prices, and which medicines will allow them to reach the best profit. If a price gap is not sufficient enough, they will start to trade other pharmaceuticals.²⁴³

²³⁸ Ioannis Lianos, Ioannis Kokkoris (ed), *The Reform of EC Competition Law. New Challenges* (Kluwer Law International BV 2010) 403.

²³⁹ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 403.

²⁴⁰ *Glaxo/Wellcome* (Case IV/M.555) Commission Decision (1995) OJ L-2985.

²⁴¹ P.M. Roth (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001) 403.

²⁴² Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] CFI I – 02969.

²⁴³ Ioannis Lianos, Ioannis Kokkoris (ed), *The Reform of EC Competition Law. New Challenges* (Kluwer Law International BV 2010) 403, 404.

5.4 Transport Market

As a need to travel has become people's daily routine, different means of travel have been developed to facilitate such an activity. In a relation with competition law, such development has brought a necessity to assess different factors, particularly, to consider which transport sectors are constrained to another ones and thus form part of the same relevant market.

From the demand point of view, when the consumers decide what kind of mean of travel would be the most suitable for them to get from one place to another, they take into account different aspects, for instance: the costs, a precise route, a duration and a safety of the particular mean of travel. Those factors influence what kind of means of travel will be considered as interchangeable and substitutable from the consumers' point of view.

One out of the cases related to the transport market was the case *Night Services*²⁴⁴ where the Commission clarified what needs to be taken into an account when the transport market needs to be defined. The Commission held:

‘In the case of passenger transport, then, the mere fact that different modes of a transport are technically substitutable does not suffice to show that they belong to one and the same market. It must be considered to what extent the different modes of transport are sufficiently interchangeable in the eyes of users.’²⁴⁵

In that case, two markets for services were recognised depending on a position and preferences of the customers. One of the markets was created by business travellers who were interested to a speed of the traveling and its comfort but the price was not influential for their decisions. Leisure travellers created the second market. On the other hand, for those customers, the price was a decisive factor.²⁴⁶

In general, different forms of transport form part of separate markets, however, in some cases, the Commission decided that alternative transports' forms are substitutable to each other and are part of the same relevant market what was also the Commission's conclusion of that case, when the Commission stated:

“The market in the transport of leisure travellers, for whom substitute services may well include economy-class air travel, train, coach and possibly private motor car.”²⁴⁷

²⁴⁴ *Night Services* (Case IV/34.600) Commission Decision (1994) OJ L259/20.

²⁴⁵ *ibid* paras 18, 19.

²⁴⁶ *ibid* paras 21, 22.

²⁴⁷ *ibid* para 27.

Concerned to the geographical scope of the relevant market, the case *Ilmailulaitos/Luftfartsverket*²⁴⁸ showing how the Commission tends to define it. Particularly, the Commission held that:

“The airports with international traffic are inter-changeable only to a limited extent and each can therefore be regarded as a distinct geographic market.”²⁴⁹

In another case *FAG - Flughafen Frankfurt/Main AG*²⁵⁰, the Commission considered only Frankfurt airport as the geographic market, for the reason that other airports were located more than 300 kilometres away and thus the demand substitutability was insufficient. It also held that competition between different airports were important for the market definition only when an airport is used as a hub²⁵¹. However, it was not the case of Frankfurt airport, because only an insignificant part of non-direct passengers presented the total traffic of the airport.²⁵²

²⁴⁸ *Ilmailulaitos/Luftfartsverket* (Case IV/35.76) Commission Decision (1999) OJ 69/24.

²⁴⁹ *ibid* para 29.

²⁵⁰ *FAG - Flughafen Frankfurt/Main AG* (Case IV/34.801) Commission Decision (1998) OJ 72/30.

²⁵¹ The hub is used as a stop-over point before passengers get to final destinations.

²⁵² *FAG - Flughafen Frankfurt/Main AG* (Case IV/34.801) Commission Decision (1998) OJ 72/30, para 56.

Conclusion

Nowadays, a purchasing of goods and services by consumers shows increased tendency. Such a consumerism lifestyle has resulted into a very active competition between various undertakings. Sometimes, when lot of subjects try to achieve the same target, natural response is to resort to practices that could impede competition and make it ineffective what can be detrimental for consumers, economic and the future development. EU competition law realises that a maintaining of an effective balance of competition is not only for a general benefit but also for a positive development of the common market. Thus, the Law tries to protect a competitive environment against anti-competitive practices of undertakings.

Competition can be distorted either by agreements, decisions and concerned practises between two or more undertakings, or when undertakings abuse their dominant position. The relevant market plays a fundamental role in a punishment of subjects that destroyed competition, because it is necessary to firstly define the relevant market before the Commission decides whether conditions stipulated in a wording of the EC Merger Regulation, the Article 101 of TFEU and the Article 102 of TFEU have been fulfilled.

Undertakings are also concerned how the relevant market within which they exercise their business is defined. They want to be conscious about actual and potential constrains which they face to in competition to know how to set and modify their business strategy. Definition of such constrains is main purpose of the market definition what is expressly stated in the Notice on the Market Definition. The Notice on the Market Definition, adopted by the Commission, serves as a tool for the market definition, where principles which the Commission usually relies on when it defines the market, are summarised.

Every case, when the boundaries of relevant market need to be defined, has to be considered individually, since, so far, there has not been adopted a general same approach which could be applied in every single case. One out of the reasons for such individualism is that provisions that relate to the relevant market definition contain some indefinitely terms that are taken into account in the market definition, such as: short term, sufficient number of customers and substantial part of common market. These terms are not further explained and can have different thresholds, depending on the circumstances of a particular case.

According to the Notice on the Market Definition, the relevant market includes product and geographical dimension. The relevant product market is formed by products that constrain each other. For determining which products belong to the same relevant product market, the demand - side substitutability and supply - side substitutability need to be examined. To answer which products consumers consider as interchangeable and substitutable, price of products, their characteristics and intended use are analysed.

The most significant tool that helps to define the relevant market is so called SSNIP test. The SSNIP test presupposes that when the reaction of consumers on a supplier's small but significant and permanent increase of a price would be a switching their purchases to another supplier, then there is a possibility that these suppliers form part of the same relevant market.

The relevant geographic market is an area within which homogenous objective conditions exist for each undertaking involved. Such the area can be differentiated from others for a reason of different objective conditions prevailing in those areas. The same tools as are used for the product market definition can be also applied when the geographic market needs to be defined. As a result of the internationalisation and the single market, the relevant geographic market may have a national, a regional or a global extent.

The Notice on the Market Definition officially recognises only two mentioned market's dimensions, however, there could be situations when time plays an important role in the relevant market definition. As already mentioned, the relevant market has to be considered individually in every single case and thus time may create the third dimension in some of them, for example, when the market is influenced by seasons. This kind of dimension is recognised in some jurisdictions and can be found in some of decisions ruled by the Commission or the Court of Justice as well.

In some cases, various special sectors of the relevant market are defined, depending on particular character of the market. A process of the definition of those special market could be different, too.

One of them is the after-market or the spare market which is characterized in that the secondary products as spare parts of the primary products may form part of the separate market. The spare parts usually form part of the separate relevant market when only they are suitable for the primary product and cannot be replaced by products of different brand or producer.

A strong technological development, which is typical for this era, influenced the market to that extent that the technology market has to be also defined. For the definition of the technology market, a functional substitutability is fundamental. This is so, because intellectual property's rights and products with the help of which they are materialized, are marketed separately. The consumers consider as substitutable to the intellectual property those products which are close substitutes to the licensed intellectual property.

Significantly different approach in the market definition has to be taken in a relation to the pharmaceutical market. Such market definition cannot be based on a ground of the demand-side substitutability or supply-side substitutability and the SSNIP test cannot be applied here either. The reason is that the consumers on this market, being in a position of patients, are not free to make decisions about their purchase of the prescription medicines because they have to buy medicines following their doctors' prescriptions. As, the setting of drugs' prices are governed by states' regulation, the undertakings are not

allowed to set their prices up that are based on their decisions and thus the price elasticity cannot be analysed for a purpose of the market definition. However, the Commission has decided that the ATC system may be used for the pharmaceutical market definition instead of the SSNIP test.

The transport market, as the last of the special markets mentioned in the scope of this thesis, showed that the same purpose of the products (means of travel) do not necessarily mean that they belong to the same market. When the transport market is defined, the level of their interchangeability from the consumers' point of view is decisive. Passengers' decision about the interchangeability results from their travelling preferences. For the business travellers, it could be a fast of certain means of transportation, but for leisure travellers, costs of transport could be the main factor in their decision - making process.

Bibliography

Books:

Bellis J.F. and others, *Competition Law of the European Community* (4th edn, Kluwer Law International 2005)

Cook J, Kerse C, *EC Merger Control* (5th edn, Sweet & Maxwell 2009)

Craig P, Búrca G, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011)

Ezrachi A, *EU Competition Law – An Analytical Guide to the Leading Cases* (3rd edn, Hart Publishing 2012)

Furse M, *Competition Law of the EC and UK* (5th edn, Oxford University Press 2006)

Jones A, Sufrin B, *EU Competition Law: Text, Cases and Materials* (4th edn, Oxford University Press 2011)

Korah V, *An Introductory Guide to EC Competition Law and Practice* (8th edn, Hart Publishing 2004)

Lianos I, Kokkoris I (ed), *The Reform of EC Competition Law. New Challenges* (Kluwer Law International BV 2010)

Motta M, *Competition Policy: Theory and Practice* (Cambridge University Press 2004)

Navarro E and others, *Merger Control in the EU. Law, Economics and Practice* (2nd edn, Oxford University Press 2005)

Ritter L, Braun W.D, Rawlinson F, *EEC Competition Law: a practitioner's guide* (Kluwer Law and Taxation Publishers 1991)

Ritter L, Braun W.D, *European competition law: a practitioner's guide* (3rd edn, Kluwer Law International 2004)

Roth P. M (ed), *European Community Law of Competition* (5th edn, Bellamy & Child 2001)

Schwalbe U, Zimmer D, *Law and Economics in European Merger Control* (Oxford University Press, 2009)

Whish R, Bailey D, *Competition Law* (7th edn, Oxford University Press 2012)

Articles and Working Papers:

Britvík T, Šramelová D, *Unfair Competition vs. Unlawful Restriction of Economic Competition* (2011) 4 Justičná revue

Cucu C, *The Undertaking and the Relevant Market: key concepts in the analysis of anticompetitive practices* (2013) 62 Challenges of the Knowledge Society. Legal sciences

Daljord Ø, Sørgard L, *Single-product versus uniform SSNIPs* (2011) 31 International Review of Law and Economics

DG Competition Staff Working Paper, *Pharmaceutical Sector Inquiry. Preliminary Report* [2008]

Elizalde J, *A theoretical approach to market definition analysis* (2012) 34 Eur J Law Econ

Fishwick F, *The Definition of the Relevant Market in the Competition Policy of the European Economic Community* (1993) Revue d'économie industrielle

Hussein S. M, Manap N. A, Nor M. Z. M, *Market Definition and Market Power as Tools for the Assessment of Competition.* (2012) 13 IntlJ of Business and Society 163

Ivaldi M, Lorincz S, *A full Equilibrium Relevant Market Test: Application to Computer Servers* (University of Toulouse 2005)

Kostecka-Jurczyk D, *Determination of the relevant market as a criterion of assessment of concentration effects in the practise of antitrust authorities* (2013) 2:2 Wrocław Review of Law, Administration & Economics

Padilla A.G, *European Commission Report for DG Enterprise A/4 - The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control* (National Economic Research Associates 2001)

Case Law:

Night Services (Case IV/34.600) Commission Decision (1994) OJ L259/20

Case C-61973J0040 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities* [1975] ECR I - 1975 -01663

Case 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR I - 1973 -00215

Case IV.M.190 *Neslé/Prrier* [1992] ECR II- L 356

Case C-27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. - Chiquita Bananas* [1978] ECR I – 00207

Case C- 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR I – 03461

Case C- 6-72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR I – 00215

Swissair/Sabena (Case IV/M.616) Commission Decision 95/404/EC [1995] OJ L 239

Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-3155

PO Video Games, PO Nintendo Distribution and Omega — Nintendo (Case COMP/35.587, COMP/35.706, COMP/36.321) Commission Decision 2003/675/EC [2002] OJ L 255

Teva/Ratiophara (Case COMP/M.5865) Commission Decision [2010] OJ C95

Novartis/GlaxoSmithKline Oncology Business (Case M.7275) Commission Decision [2015] OJ L-2985

Ilmailulaitos/Luftfartsverket (Case IV/35.76) Commission Decision (1999) OJ 69/24

FAG - Flughafen Frankfurt/Main AG (Case IV/34.801) Commission Decision (1998) OJ 72/30

Facebook/WhatsApp (Case M.7217) Commission Decision [2014] OJ L – 2985

Mylan/Meda (Case M.7975) Commission Decision [2016] OJ C 207

Legislation:

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326

Commission Guidelines 2011/C 11/01 on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1

Commission Notice (97/C 372/03) 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5

Commission Notice 2014/C 291/01 on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/1

Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395

Zákon č. 136/2001 Z. z. Zákon o ochrane hospodárskej súťaže a o zmene a doplnení zákona Slovenskej národnej rady č. 347/1990 Zb. o organizácii ministerstiev a ostatných ústredných orgánov štátnej správy Slovenskej republiky v znení neskorších predpisov (SVK)

Zákon č. 362/2011 Z. o liekoch a zdravotníckych pomôckach a o zmene a doplnení niektorých zákonov (SVK)

Internet sources:

Aproske J, Lynch S, *The Chain of Substitution in Market Definition: Pitfalls in Application* (Competition Commission South Africa 2012)
<<http://www.compcom.co.za/wpcontent/uploads/2014/09/Aproskie-and-Lynch-Chain-of-substitution-in-market-definition-Competition-Conference-2012.pdf>> accessed 24 September 2016

Charles River Associates, *Market Definition in the Pharmaceutical Sector*
<http://ecp.crai.com/publications/Market_Definition_Pharma.pdf> accessed 24 November 2016.

Fletcher A, Lyons B, *Geographic Market Definition. A study for DG Competition* (Centre for Competition Policy 2016) 12
<http://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 12 October 2016

Mihaescu O, Rudholm N, (2013) *Defining Relevant Product Markets for Pharmaceuticals* 4
<https://www.researchgate.net/publication/268376128_Defining_relevant_product_markets_for_pharmaceuticals> accessed 28 November 2016

English Abstract

Competition would function ideally if all competitors conducted their business lawfully and fairly, resulting in benefits for their respective customers. However, we do not live in an ideal world and competition can be restrained by different forms of anti-competitive behaviour. To avoid a situation in which a lack of competition reduces the economic welfare of the European Union, the whole system needs to be regulated by EU competition law. The Law provides the legal means required to protect competition. However, before these legal means are applied, it is necessary to define the borders of the relevant market. Correct market definition is crucial due to its impact on other, subsequent decisions. Incorrect definition can even result in an appeal of the final decision. For these reasons, it is important to understand the relevant market issue both in terms of its meaning as well as the process of its definition. In the European Union, the relevant market definition is entrusted to the European Commission. The aim of the definition is to determine competitors that may cause constraints in the behaviour of the undertakings under investigation thus preventing them to behave independently from the competitive pressure. When the Commission defines both geographic and product scopes of the relevant market, different evidence and tools apply that are regulated in the Notice on the Market Definition. The relevant market in its both dimensions, product and geographical, could be defined as a territory where the products and services which are interchangeable and substitutable for the consumers are offered under the same objective homogeneous conditions. Sometimes a time aspect also needs to be accounted for in the final relevant market definition.

German Abstract

Wettbewerb würde dann ideal funktionieren und zu Vorteilen für die jeweiligen Kunden der Wettbewerber führen, wenn alle Wettbewerber ihre Geschäfte fair und unter Beachtung der geltenden Gesetze betreiben würden. Jedoch leben wir nicht in einer idealen Welt und Wettbewerb kann durch verschiedene Formen wettbewerbsfeindlichen Verhaltens eingeschränkt werden. Um eine Situation zu verhindern, in der ein Mangel an Wettbewerb den wirtschaftlichen Wohlstand in der EU reduziert, muss das ganze System durch EU-Wettbewerbsrecht reguliert werden. Das Recht bietet jene Werkzeuge, die notwendig sind, um Wettbewerb zu schützen. Bevor diese rechtlichen Werkzeuge jedoch eingesetzt werden können, ist es notwendig, die Grenzen des relevanten Marktes zu definieren. Die richtige Definition des relevanten Marktes ist entscheidend, da diese Einfluss auf andere, nachgelagerte Entscheidungen hat. So kann eine falsche Definition des relevanten Marktes sogar eine Anfechtung des finalen Urteils zur Folge haben. Aus diesem Grund ist es wichtig, sowohl die Bedeutung des relevanten Marktes als auch den Prozess seiner Definition zu verstehen. In der Europäischen Union liegt die Definition des relevanten Marktes in der Verantwortung der Kommission. Das Ziel der Definition ist es, die Wettbewerber zu bestimmen, die in der Lage sind, dem Verhalten der untersuchten Unternehmen Schranken zu setzen und sie daran zu hindern, abseits von Wettbewerbsdruck zu handeln. In ihrer Definition des geografischen und produktbezogenen Umfangs des relevanten Marktes, greift die Kommission auf unterschiedliche Kriterien und Werkzeuge zurück, die in der Bekanntmachung der Kommission über die Definition des relevanten Marktes geregelt sind. Der relevante Markt in seinen beiden Dimensionen Produktmarkt und geographisch relevanter Markt kann als Territorium definiert werden, auf dem für den Konsumenten austauschbare oder substituierbare Produkte oder Dienstleistungen unter denselben, objektiv homogenen Wettbewerbsbedingungen angeboten werden. In manchen Fällen muss in der finalen Definition des relevanten Marktes auch ein Zeitaspekt miteinbezogen werden