

# THE TERM OF “RELEVANT MARKET”, AS ELEMENT OF DOMINANT POSITION PROVIDED BY ART. 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

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## Abstract

*The term of relevant market was used for the first time in the Sherman Act of 1890, condemning monopolies or monopoly attempts. The term of relevant market is analyzed as being the place where demand and supply of products or services, interchangeable with each other, are confronting; however, the term of "relevant market" is much more complex than that, being characterized by fundamental dimensions in connection with the term of product (service) market and geographic market, both in close connection.*

**Keywords:** *relevant market, monopolies, product market, geographic market, dominant position*

## 1. Terminology issues

The term of relevant market was used for the first time in the Sherman Act of 1890, condemning monopolies or monopoly attempts which can lead to higher prices and lower production than under normal competition conditions.

Currently, the term of relevant market is defined by art. 102 TFEU (former art. 82 EC), as a primary source of the European Union law<sup>1</sup>, which provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

In what concerns the term of undertakings, we should note that, although the term is used by art. 101 para. 1 TFEU, a definition of the term cannot be found. The EU courts and authorities in the field of competition adopted a broad concept of the term. In case *Hofner*, the European Court of Justice noted that the term of enterprise covers any entity engaged in an economic activity, regardless of its legal status and the way it is financed.<sup>2</sup>

In essence, art. 102 TFEU concerns the control of market power by either one company or a number of companies under certain conditions. Within this regulation, not the market power itself is prohibited. What is condemnable in the TFEU view is the abuse of power in the market, therefore, the intention of the European lawmaker is to encourage competition and, in this way, the most efficient participants break apart from others in the market as a result of consumers' choices in relation to the goods or services proposed.

This article aims to analyze the term of relevant market, as well as the term of market power, determined by the dominant position of a participant to the economic life.

The relevant market is defined as the place where demand and supply of products or services, interchangeable with each other, are confronting. In the economic literature, the relevant market can also be called pertinent market, reference market, sectoral market etc. Global market and relevant market can be distinguished locally, nationally, regionally.

Defined as the place of confrontation between the demand of supply of products and services which are considered by the buyers as interchangeable with each other, but not interchangeable with other goods or services offered, the relevant market is the place where effective competition between economic operators takes place.

Therefore, the term of relevant market is particularly complex, being characterized by three fundamental dimensions: product (service) market, geographic market, both in close connection, as well as time aspect. The dominant position held by an economic agent within the domestic market, position that can affect trade between the Member States, must be assessed in connection with the three elements referred above.

The definition assigned to the term of product market is in close connection with the term of “product”. Product analysis must take into account both demand and supply issues. On the demand side, products must be interchangeable, from the point of view of the buyer. The interchangeable nature of products, from the demand perspective, involves checking cross elasticity of product<sup>3</sup>. It is deemed that cross elasticity of product is high if the increase of the

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<sup>2</sup> Case C-41/90, *Hofner și Elser/Macroton GmbH* (1991) ECR I-1979

<sup>3</sup> Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Hamangiu Publishing House, Bucharest, 2017, p. 1188

price of the product makes a great number of buyers choose another product of the same type. The existence of cross elasticity reveals that the products are, actually, part of the same market.

From the perspective of the supply, the market includes only sellers who manufacture the relevant product or who can easily change their production to provide substitution or related products. Therefore, even if certain companies manufacture different products, it can be easy at a certain point in time for a company to adjust its equipment in order to produce the goods manufactured by a competitor on the market. Under these terms, the two products can be deemed part of the same market.

## 2. The view of European case law on the relevant market term

From the perspective of the case law, the term of relevant market of the product is analyzed in case *Clearstream Banking AG and Clearstream International SA*. The statement of reasons provides that, as resulting from Commission Notice on the definition of relevant market for the purposes of Community competition law<sup>4</sup>, “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”. In order to define relevant market, we can also take into account the supply-side substitutability, in cases where it would have effects equivalent to those of demand-side substitution in terms of efficiency and immediate level. This means that the suppliers are able to reorient their production to relevant products and market them on short term without significant additional costs or risks, in response to small but permanent variations in relative prices. In this respect, the Commission does not make a manifest error of assessment in holding that there is a specific market for primary clearing and settlement services for securities issued in accordance with the German law, different from the secondary service market, since, due to the fact an undertaking holds a monopoly in fact on the market and is therefore an unavoidable partner for those primary services, there is no substitutability either on the demand side nor on the supply side of those services. Therefore, a secondary market with specific features in terms of the demand and the supply and supplies products or provides services which occupy an essential place and which are not interchangeable on the more general market to which it belongs, must be regarded as a distinct market of goods or services. In this background, it is sufficient for a potential, even hypothetical market to be identified, a situation which occurs when the goods or services are indispensable for

the exercise of a particular activity and where there is an effective demand for them from the undertakings pursuing that activity. Therefore, the possibility of identifying two different production stages associated with the fact that the upstream product is an indispensable element for the supply of the downstream product is decisive.<sup>5</sup>

Apparently simple, this definition of the product market raises some issues. First of all, it is necessary to identify the factors that are taken into account in the analysis of the relevant product market.

These were presented as the degree of physical resemblance between the products (services) concerned; the price differences between two products; the cost of switching between two competing products; consumers' preferences for a particular type/category of product to the detriment of another type/category of product; similar or different classifications of the large industry. Secondly, an important element in defining the relevant market is the structure of products demanded by consumers. Therefore, products with the same physical structure are interchangeable (i.e.: butter and margarine). In many situations, consumers may regard certain products as substitutable and therefore classified in the same relevant market, even if they differ in their materiality.

A particular issue is the segment of branded products that typically have a higher price than other less well-known similar products. There are situations where the consumers consider that the products which do not benefit from a reputed brand as substitutes for them, but it should be noted that this will not happen for any type of product. For example, high quality wines are part of the same relevant market, while ordinary table wines will not be in the same category. Therefore, an increase in the price of a high-quality wine cannot lead buyers to move towards a lower quality wine, although it may cause them to buy another high-quality wine. In case *France Telecom*, the Court of First Instance held that markets of low-speed internet and high-speed internet are distinct, since the possibility of reciprocal replacement of products is insufficient between them.

Therefore, in order to analyze the dominant position of an undertaking in a particular sectoral market, the possibilities of exercising competition must be assessed within the market which groups all the products or services which, depending on their features, can meet constant needs and are hardly substitutable to other products or services. Furthermore, since the definition of the relevant market serves to assess whether the concerned undertaking has the power to prevent effective competition from being maintained and to behave independently from its competitors and service providers, the limitation to the analysis of the objective features of the services in question is not possible, but it is also necessary to take account of the

<sup>4</sup> The European Commission, *Notice on the definition of relevant market for the purposes of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997, vol 003, p 60-6

<sup>5</sup> T-301/04, *Clearstream Banking AG and Clearstream International SA/Commission* (2009) ECR II-3195

competition conditions and of the structure of the market demand and supply.

If a product is likely to be used for different purposes and in case these different uses respond to certain economic needs, also different, it must be accepted that the respective product may, where appropriate, belong to different markets, which may have different characteristics, both from the point of view of the structure and the competition conditions. This finding does not justify the conclusion that such a product can form a single market, the same with all the other products which, in the various uses which it may have, may substitute it and compete with it.

The concept of relevant market entails, indeed, that effective competition may exist between the products which are part of this market, which implies a sufficient degree of substitutability for the same use among all the products on the same market.

The Commission Notice on the definition of relevant market for the purposes of Community competition law provides that “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”. According to this notice, the assessment of the substitutability of demand determines the set of products perceived as substitutable by the consumer.

Therefore, with regard to the internet access sector, as there is not just a difference in comfort or quality between high-speed and low-speed internet, these differences in usage, specificity and performance are supplemented by an important price difference between the two, and even though high-speed and low-speed internet have a certain degree of substitutability, it functions asymmetrically, the migrations of customers from high-speed internet offers to low-speed internet offers is negligible compared to migration in the opposite direction, the Commission was right to find that a sufficient degree of substitutability between high-speed and low-speed access did not exist and to define the market in question as that of high-speed internet access for residential customers.<sup>6</sup>

### 3. The geographic market, part of the relevant market notion

The relevant geographic market comprises the area of the economic agents specialized in the production and supply of the products included in the product market. It is a territory where all traders operate under identical or sufficiently homogenous competition conditions in connection with relevant products or

services. The homogeneity of market conditions is not a concept to be viewed in absolute terms. It is not necessary for the objective competition requirements between economic operators to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous<sup>7</sup>. Therefore, it cannot be considered that only areas where the objective conditions of competition are heterogeneous constitute a uniform market<sup>8</sup>. The establishment of this territorial area takes into account the consumers' behavior regarding the possibility of replacing products manufactured in different geographical areas.

The elements that the Commission considers relevant to define the geographic market<sup>9</sup> in case of a litigation generated by the dominant position within the market, concern, first of all, the aspects in connection with *past evidence of diversion of orders to other areas*. In some cases, evidence could be available in connection with the fact that some price fluctuations between different areas have led to customers' feedback. Generally, quantitative tests used to define the product market can also be used to define the geographic market. However, it should be borne in mind that some price comparisons at an international scale may be more complex as a result of certain factors, such as exchange rate movements, taxation and product differentiation.

Another relevant aspect in defining geographic market is represented by the *basic demand characteristics* for the relevant product, which can determine the dimension of the geographic market. Certain factors, such as national preferences or preferences for national brands, language, culture and lifestyle, as well as the need for local presence, have a great potential to limit the geographical scope of competition.

Furthermore, where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their *views* on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

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

<sup>6</sup> Case T-340/03, *France Telecom SA/Commission* (2007) ECR II-107, confirmed in second appeal case C-202/07 P, *France Telecom SA/Commission* (2009) ECR I-2369

<sup>7</sup> Judgment of the Court of February 14<sup>th</sup>, 1978, *United Brands and United Brands Continentaal/Commission*, 27/76, Rec., p. 207, items 44 and 53, and Judgment of the Tribunal of November 22<sup>nd</sup>, 2001, *AAMS/Commission*, T-139/98, Rec., p. II-3413, item 39

<sup>8</sup> Judgment of the Tribunal of October 21<sup>st</sup>, 1997, *Deutsche Bahn/Comisia*, T-229/94, Rec., p. II-1689, item 92

<sup>9</sup> The European Commission, *Notice on the definition of relevant market for the purpose of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997, vol 003, p 60-64

When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on *trade flows* might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, *barriers* isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national.

The clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labor costs or raw materials).

If they exceed a certain profitability threshold, then the cost of transport becomes a major factor in separating distinct relevant markets. The relevant geographic market does not entail the production of economic goods in the same area or locality, but the accessibility to the buyers. In this connection, in case *Napier Brown-British Sugar*<sup>10</sup>, the Commission decided that, in order to establish if a British company was holding a dominant position in the production and sale of sugar, the relevant market was Great Britain, since imports were very limited and functioned as a supplementation for British space, not as an alternative.

Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

The third element that should be taken into account when defining the concept of relevant market is the time factor. By analyzing the time element of the

markets, an undertaking, under art. 101 TFEU, may hold a dominant position on the market at some point in the year. This is possible when competition from other products is reduced due to their seasonality.

Furthermore, technological progress and changes in consumer's habits change the boundaries between the markets<sup>11</sup>, thus giving a time dimension to the concept of product market.

In this respect, in case *Elopak Italia Srl/Tetra Pak*<sup>12</sup>, the Commission considers that the analysis used to define a market should cover only a short period, due to the fact that over a long period, during which technological progress may occur and consumer habits evolve, structures will change and the very boundaries between the various markets shift. A short period corresponds more to the economic operative time during which a given company exercises its power on the market and, consequently, on which one must concentrate in order to assess that power. In connection to the case, the replacement on the market of one type of packaging material by another is essentially the result of changes in consumer habits, changes that are the result of a long-term process.

The Commission does not deny that producers can, to a certain extent, hasten or delay the evolution of consumer habits through measures aimed at influencing the consumer in his choice of packaging but, this is a costly and long-term process, the outcome of which remains uncertain.

#### 4. Conclusions

It is unanimously accepted at European level that art. 102 TFEU seeks to protect consumers and not certain competitors. This goal requires the protection of the competition process against market foreclosure phenomenon. Although the practice in the field is rich, the settlement of a case based on art. 102 TFEU entails difficult issues in defining relevant market, establishing domination and the notion of abuse.

The limits of the special liability of the dominant companies are not yet clear in the case-law, making it difficult for the dominant company to know what is allowed and what is not. The approach based on the legal form of art. 102 TFEU must be supplemented by the analysis of the economic effect entailed by the liability under this article.

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<sup>10</sup> 88/518/EEC: Commission Decision of July 18th, 1988, *Napier Brown c. British Sugar*, published in Official Journal L 284, 19.10.1988, p. 41

<sup>11</sup> Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Hamangiu Publishing House, Bucharest, 2017, p. 1193

<sup>12</sup> Decision 92/163, *Elopak Italia Srl/Tetra Pak* (1992), published in Official Journal L72/1 of 18.03.1992, p. 0001 - 0068

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