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Abstract

This Article focuses in part on what the approach to market definition in the EC reveals about its competition policy generally. There are additional reasons why lawyers should consider market definition issues. In the two sections of this Article, the EC approach to market definition will be examined. The treatment of market definition under Articles 85 and 86 is considered first, followed by a more detailed description and evaluation of cases under the Merger Regulation.

THE PROBLEM OF MARKET DEFINITION UNDER EC COMPETITION LAW

*Thomas E. Kauper**

INTRODUCTION

To U.S. antitrust lawyers, judges, and juries, market definition is a process dominated by economists who shape lawyers' arguments and engage in testimonial battles in court. The definition of relevant markets is often critical to outcomes, and a commensurately high amount is often expended on developing economic studies bearing on the issue. Because market definition is typically seen, at least today, as an economic issue, it is legitimate to consider whether a non-economist lawyer has, or should have, anything of consequence to say about the topic. Why, in short, should a lawyer, and a U.S. one at that, be addressing market definition in the European Community?

Simply put, the answer is that the manner in which markets are defined is often relevant to assessing the policies, not all of which are economic, underlying the development in any given system of competition policy standards. This Article focuses in part on what the approach to market definition in the EC reveals about its competition policy generally. There are additional reasons why lawyers should consider market definition issues. The application of precedent may be critical. A lawyer must at least understand the process sufficiently well to keep his or her economists within the legal bounds already established by judicial or administrative action. The role played by market definition in antitrust cases must also be fully understood. In U.S. antitrust law, liability often rests on how markets are defined. There are more subtle effects as well. The identity of companies that bear liability may depend in some cases on whether they are in or out of a market. Discovery may be limited to documents or even deposition testimony affecting identified markets. Also of considerable importance, relief will be aimed at eliminating anti-competitive conduct and effects within the market identified as relevant in the course of determining liability. These are not

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purely economists' issues, but issues that relate directly to and are affected by broader policies that should be brought to bear in competition policy analysis.

In the United States we tend to think of market definition as an economic issue because we think of antitrust policy itself solely in economic terms. Antitrust intervention in the economy is driven solely by concern over consumer welfare, or, more precisely, the sole goal of antitrust enforcement is to eliminate private arrangements among firms that restrict output and increase price, or at least threaten to do so.¹ Within this economic efficiency model of antitrust, the role of market definition is relatively clear-cut. Markets must be defined to assist in determining whether the firms whose conduct is being examined have market power, as in sufficient power individually or collectively to have adverse price and output effects. Market definition then comes into play when market power is relevant. Market share is a surrogate, imperfect to be sure, for proof of market power.² Proof of market power therefore requires, in most cases, that relevant markets must be defined in product and geographic terms. Market definition's function is to determine whether there are firms that will check the ability of those whose conduct is questioned to raise prices to noncompetitive levels.

Today, then, market definition in the United States is largely an element of economic analysis. But it was not always so. In the 1960s, for example, scant attention was paid to market definition in vertical cases. Markets were defined, if at all, in relatively narrow terms. Because the analysis in these cases did not generally rest on the consumer welfare model as we now know it, but focused instead on notions of fairness, protection of small business, and entrepreneurial independence, market definition was either completely irrelevant or employed for a differ-

1. The debate over whether the only goal of antitrust is economic efficiency still goes on, but is outside the scope of this Article. At the present time, the statement in the text reflects the approach of the U.S. Supreme Court. *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). Even those who do not accept all of the analysis of the so-called Chicago School would most likely agree that the goals of antitrust are economic, and that the identification of market power is an economic issue. *See* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 61-71 (1994) (discussing role of economics in antitrust, including development of Chicago School).

2. *See* PHILLIP E. AREEDA ET AL., *IIA ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 160-167 (1995) (defining market share).

ent purpose, such as establishing the dependence of distributors on their suppliers.³ The submarket concept commonly employed by the Supreme Court in merger cases of the 1960s and 1970s had little basis in economics and appeared to be used primarily as a vehicle for controlling mergers for reasons that did not always seem to reflect economic goals at all.⁴

Even today, proof of market power is not required in all American antitrust cases that apply the consumer welfare model. In these cases, markets need not be defined. The most obvious cases are cartel cases in which the classic *per se* rule, which by definition does not depend on proof of market power, is applied.⁵ The *per se* rule does reflect a direct concern over the price and output effects of cartel behavior, but is based also on the need efficiently to deter conduct thought to have adverse effects in almost all cases, and beneficial effects in virtually none, with a precise and unambiguous rule. Even in cases where proof of market power is essential to establishing liability, markets need not be defined where adverse price and/or output effects are directly established.⁶ In the U.S. system, however, direct proof of adverse price and output effects is seldom successful. U.S. courts are both skeptical of and uncomfortable with attempts to establish that challenged conduct has had adverse price effects.⁷ The European Commission ("Commission") and European Court of Justice ("Court of Justice") have had a far greater willingness to examine price effects and output directly.⁸ Logically, then, we might expect a larger number of European cases in which proof of effect is required but markets are not defined.

3. See, e.g., *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964).

4. The best example of gerrymandering of submarkets to find a merger unlawful is discussed in *United States v. Aluminum Co. of America (Rome Cable)*, where the Supreme Court, discussed in essence, made up a submarket of its own. 377 U.S. 271 (1964). Today, most scholars agree that the concept of submarkets is of little relevance. Any grouping of sales as to which prices can be significantly raised above competitive levels is a market, not a submarket. See HOVENKAMP, *supra* note 1, at 87-89.

5. The *per se* rule, which has been applied repeatedly and reaffirmed, first appears in its present form in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

6. See *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986); *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 109-10 (1984).

7. See Thomas E. Kauper, *Whither Article 86? Observations on Excessive Prices and Refusals to Deal*, in 1989 FORDHAM CORP. L. INST. 651, 656 (Barry Hawk ed., 1990).

8. This is primarily because excessive pricing may constitute an abuse of a dominant position under Article 86. See *id.* at 659-68.

Market definition is now an essential element in a broad range of U.S. cases. Indeed, one can plausibly argue that it is necessary in all but cartel and resale price maintenance cases. In virtually all vertical cases except those involving resale price maintenance,⁹ some proof of market power must be made, proof normally resting on market share. In tie-in cases, market power in the tying market must be shown.¹⁰ Substantial foreclosure of competitors from a downstream or upstream market is the critical element in finding an exclusive dealing violation. Foreclosure is normally measured by use of market share data.¹¹ Cases challenging non-price vertical restraints, such as territorial protections and customer restrictions, must get through a preliminary market power showing, a showing based on market share.¹² A similar market power screen is being utilized in a variety of non-cartel horizontal cases under Section 1 of the Sherman Act.¹³ Market share data has been the starting point of all litigation under Section 2 of the Sherman Act, at least since Judge Learned Hand came down from the mountain in the *Alcoa* case with his long familiar market share numbers chiseled in stone.¹⁴ All monopolization cases start with market definition as the first step in establishing that the defendant possesses monopoly power, an essential element in the proof of violation.¹⁵ Indeed, in many monopolization cases market share is more than a surrogate for market power. In such cases, the ability to dominate rivals is directly dependent on market share.¹⁶ Since the *Spectrum Sports* case,¹⁷ it is equally clear that the plaintiff must establish the relevant market in an attempt to monopolize cases under Section 2. Market definition has been the first step in merger litigation at least since the first major cases were brought

9. While the scope of the *per se* rule against resale price maintenance has been constricted in recent years, the rule, which does not require proof of market power, remains intact. See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

10. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).

11. See ABA ANTITRUST SECTION, *ANTITRUST LAW DEVELOPMENTS* 176-77 (3d ed. 1992).

12. *Id.* at 125.

13. See, e.g., *K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co.*, 61 F.3d 123 (2d Cir. 1995) (discussing non-cartel horizontal cases).

14. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

15. See ABA ANTITRUST SECTION, *supra* note 11, at 196-97.

16. See HOVENKAMP, *supra* note 1, at 245.

17. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

after the critical 1950 amendments to Section 7 of the Clayton Act.¹⁸

While market share data, and thus market definition, is a central element in each of these types of cases, it does not follow that market share data carries the same weight in each case. In a variety of Section 1 cases, for example, proof of market power is often used as a screening device to eliminate cases where there is no real likelihood that the conduct at issue could result in adverse price and output effects. Low market share in these cases provides virtually conclusive evidence that the defendant or defendants lack market power. Similarly, various guidelines of the Justice Department and Federal Trade Commission, most notably the 1992 U.S. Horizontal Merger Guidelines ("1992 Merger Guidelines"), establish market share and concentration levels below which the conduct in question is safe from challenge.¹⁹ Market shares are virtually the exclusive measure of these safe harbors. This makes good sense. These screens and safe harbors simply result either in the elimination of cases from the enforcement system or in the taking of the case to a more detailed analysis. They tend to be set conservatively at relatively low levels. Where the relevant data creates any real ambiguity, the case may proceed to the next stage, where market share data is simply the starting point and market power can be examined in the setting of a variety of other structural and conduct elements as well. It would be plausible to define markets in very narrow terms for the purpose of such screening, even though the same markets might be more broadly, and realistically, defined in subsequent proceedings or in the more detailed analysis that will follow for those cases that get past the screen. Some cases can be disposed of simply by assuming the narrowest possible market, a practice with which those who follow notifications under the EC Merger Regulation will be familiar. In cases that get past these preliminary screens or safe harbors, less weight may be given to

18. The analysis of mergers by both the United States Department of Justice and the Federal Trade Commission, for example, always starts with market definition. See U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.0 (1992) [hereinafter 1992 MERGER GUIDELINES] (discussing market definition).

19. *Id.* § 1.51. The 1996 Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust make similar use of market shares.

market shares, and other factors suggestive of market power are likely to be examined. While market share may be a critical independent factor in some monopolization cases, in merger cases market shares are simply the starting point.

The need to establish market shares, and thus to define markets, is somewhat less clear in EC competition policy. This is true, at least in part, because its policy is not entirely based on the economic efficiency model now prevalent in the United States. Under Article 86 market shares provide at least the starting point in determining whether a firm holds a dominant position.²⁰ Similarly, Merger Regulation cases invariably begin with market definition and a determination of the market shares of the parties. In both of these classes of cases, the role of market definition is similar to the role it plays in the United States under Section 2 of the Sherman Act, dealing with monopolization, and Section 7 of the Clayton Act, regarding mergers.

The need for and role of market definition and the determination of market shares under Article 85 is more difficult to describe. For certain types of agreements, proof of market power or actual competitive effects does not appear to be a necessary element in determining whether the agreement in question has as its "object or effect the prevention, restriction, or distortion of competition within the common market" and is therefore within the prohibition of Article 85(1). But even if market shares are not considered in the Article 85(1) analysis, they may be utilized in the same case in determining whether, under Article 85(3)(b), the agreement creates "the possibility of eliminating competition in respect of a substantial part of the products in question" and is thus not eligible for exemption. And in some cases, particularly those involving cartels, markets may be defined in determining the level of fines.²¹

Cartel agreements have generally been condemned without an evaluation of their actual effects because their "object" is the restriction of competition, although the decision of the Court of First Instance in *Societa Italiana Vetro SpA v. Commission*²² may cast

20. See, e.g., *Hilti AG v. Commission*, Case T-30/89, [1991] E.C.R. II-1439, ¶ 64, [1992] 4 C.M.L.R. 16, *aff'd*, Case C-53/92P, [1994] E.C.R. I-667; *Tetra Pak International SA v. Commission*, Case T-83/91, [1995] E.C.R. II-755, ¶ 91, [1997] 4 C.M.L.R. 726.

21. *Societe Cooperative des Asphalteurs Belges (Belasco) & Others v. Commission*, Case 246/86, [1989] E.C.R. 2117, [1991] 4 C.M.L.R. 96.

22. *Societa Italiana Vetro SpA v. Commission*, Joined Cases T-68/89, T-77/89 and

some doubt on whether market definition is a precondition of finding a violation even in such cases.²³ The case is also of interest because the Commission appeared to suggest that market definition plays a different role under Article 85(1) than under Article 86, and that the market in that case should be defined differently under Articles 85 and 86, a distinction that the Court of First Instance seemed to find puzzling.²⁴ Market definition and market shares have been a central feature of a variety of other horizontal agreement cases, both in determining the applicability of both Article 85(1) and Article 85(3).²⁵

In vertical cases, the need for market definition rests on the nature of the agreement. While the Commission's position on resale price maintenance has shifted over time from a relatively lenient approach to one that is much more severe, market definition and an assessment of market power do not currently appear to be a necessary element in finding a violation.²⁶ Restrictions on distributors, which have the effect of prohibiting parallel imports across national boundary lines, are flatly prohibited without any assessment of market structure or competitive effects, a rule predicated not on competitive concerns but on the fundamental goal of market integration.²⁷ The need for market definition and evaluation of market structure in exclusive purchasing cases under Article 85(1), as well as Article 85(3), is a complex subject that will not be pursued here.²⁸ In general, it can be said that in vertical cases, the Commission and EC courts

T-78/89, [1992] E.C.R. II-1403, [1992] 5 C.M.L.R. 302. See also *Groupement des Cartes Bancaires v. Commission*, Joined Cases T-39/92 and T-40/92, [1994] E.C.R. II-49, ¶ 94.

23. See Commission Decision No. 94/601/EEC, O.J. L 243/1, (1994), [1994] 5 C.M.L.R. 547 (*Cartonboard*) (reflecting conventional approach). "Given the manifestly anti-competitive object of the cartel, it is not strictly necessary . . . for the Commission to find that there was also an appreciable effect on market conditions." *Cartonboard*, O.J. L 243/1, ¶ 135, [1994] 5 C.M.L.R. 547.

24. *Id.* ¶ 363.

25. See, e.g., Commission Decision No. 94/815/EC, O.J. L 343/1 (1994) [hereinafter *Cement*] (dealing with Article 85(1)); Commission Decision No. 94/322/EC, O.J. L 144/20 (1994) (*Exxon/Shell*) (discussing Article 85(3)); Commission Decision No. 94/770/EC, O.J. L 309/1 (1994) (*Pasteur Merieux-Merck*) (relating to Article 85(3)).

26. See BARRY HAWK, 2 UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTI-TRUST 525-29 (1990).

27. This has been the case since the decision in *Consten and Grundig v. Commission*. Joined Cases 56 and 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418; see Commission Decision No. 92/154/EEC, O.J. L 66/1 (1992), [1993] 4 C.M.L.R. 42 (*Eco System/Peugeot*) (providing recent example).

28. See *Delimitis v. Henninger Brau AG*, Case C-234/89, [1991] E.C.R. I-935,

have placed greater emphasis on intra-brand effects than is currently the case in the United States. These effects can be measured without a full evaluation of markets.

Market definition may also be at issue in applying the Commission's Notice on Agreements of Minor Importance²⁹ ("Notice"), which provides that agreements "generally" do not fall within Article 85(1) if the goods and services that are the subject of the agreements, and their equivalents produced by the agreeing firms, do not exceed five percent of the total market for these goods and services "in the area affected by the agreement," and the annual turnover of the firms does not exceed 200 million ECU. The Notice specifically provides as follows:

The relevant product market includes besides the contract products any other products which are equivalent or identical to them The products in question must be interchangeable. Whether or not this is the case must be judged from the vantage point of the user, normally taking the characteristics, price, and intended use together. In certain cases, however, products can form a separate market on the basis of their characteristics, price, or intended use alone. This is true especially where consumer preferences have developed.³⁰

This provision is set forth in its entirety because its "characteristics, price, and intended use" formula appears regularly, in an almost ritualistic way, in other Commission regulations and decisions, including decisions under the Merger Regulation. This approach to market definition is based entirely on demand substitutability and could lead to relatively narrow product market definitions. Supply substitutability is excluded from consideration. Defining markets solely in terms of any one of the three elements set forth, characteristics, prices, and intended use, could result in the use of markets that a more detailed analysis would reject. This is particularly true if markets were to be defined in terms of prices alone, as discussed later.

The Notice further provides that the relevant geographic market is the area "within the Community where the agreement

[1992] 5 C.M.L.R. 210; *Langanese-Iglo GmbH v. Commission*, Case T-7/93, [1995] E.C.R. II-1533, [1995] 5 C.M.L.R. 602.

29. See Commission Notice, O.J. C 231/2 (1986) [hereinafter Notice on Agreements] (discussing agreements not covered by Article 85(1)).

30. *Id.* at 3.

produces its effects.”³¹ If the goods covered by the agreement are regularly bought and sold in the EU Member States, the market would be Community-wide. Areas where the contract products cannot be bought and sold, or where such purchases are irregular, are to be excluded. The market will be narrower than the whole Community where the characteristics of the contract products restrict their mobility. For example, when transport costs are high relative to the products’ value, or where movement of the products is hindered by barriers to entry resulting from legal or regulatory requirements imposed by Member States, the market will be narrower than the whole Community. However, this presumption ceases if these existing barriers can “be overcome by reasonable effort and at an acceptable cost.”³²

Under U.S. antitrust analysis, the area in which the parties sell is the starting point. Depending upon likely responses of firms outside the area to a significant price increase, the market may be broader. The Notice appears to exclude the possibility that the market could be broader than the Common Market. Under the Notice, therefore, geographic markets may be narrower than those identified using the conventional U.S. approach, and, indeed, than in some cases decided by the Commission itself, particularly under the Merger Regulation.

A number of the Commission block exemptions also call for the definition of markets. Under the regulation establishing the block exemption for specialization agreements, for example, such agreements are not exempted if the products involved exceed twenty percent of the market.³³ Market definition may also be necessary in applying the block exemptions for exclusive distribution agreements,³⁴ exclusive purchasing agreements,³⁵ and research and development agreements,³⁶ all of the which use the “characteristics, price, and intended use” formula of the Notice.

The market definition that uses the analysis described in the Notice and block exemptions may often result in narrow and in

31. *Id.*

32. *Id.*

33. Commission Regulation No. 417/85, art. 3, O.J. L 53/11, (1985).

34. Commission Regulation No. 1983/83, art. 3, O.J. L 173/1, at 3, *corrected version* in O.J. L 281/24 (1983).

35. Commission Regulation No. 1984/83, art. 3, O.J. L 173/5, at 8, *corrected version* in O.J. L 281/24 (1983).

36. Commission Regulation No. 418/85, art. 3, O.J. L 53/5, at 8-9 (1985).

some cases unrealistic markets is not a basis for condemnation. These are safe harbor provisions, and a cautious approach is expected. Cases above these various threshold levels are not unlawful. Their legality will turn on a much fuller inquiry. These provisions simply eliminate relatively easy cases from more formal, time-consuming, and costly study. It does not follow, however, that the same limited analysis should be applied to cases where full inquiry is required.

In the two subsequent sections of this Article, the EC approach to market definition will be examined. The treatment of market definition under Articles 85 and 86 is considered first, followed by a more detailed description and evaluation of cases under the Merger Regulation. The Articles 85 and 86 cases are important in themselves and also provide a background and a basis for comparison with the large set of notifications and decisions issued over a relatively short period of time under the Merger Regulation. With respect to Articles 85 and 86 cases, this study will be quite selective, focusing on a relatively small number of older, leading cases and on cases decided since 1989, the year in which the Merger Regulation was adopted.

I. MARKET DEFINITION UNDER ARTICLES 85 AND 86

Historically, market definition under Articles 85 and 86 was handled primarily by the Commission. While the Court of Justice set overall standards, it has generally deferred to the Commission on their application in particular cases. In cases referred to the Court of Justice by courts of Member States, cases that tend to present relatively general and very abstract questions under EC law, the Court of Justice has left questions such as the assessment of dominance, and, therefore, market definition, to those courts.³⁷ With the creation of the Court of First Instance, which is charged, among other matters, with responsibility for the review of Commission findings in competition cases, the handling of issues has changed. The Court of First Instance has examined market definition issues with care in a number of cases.³⁸ As what is effectively the court of last resort on these

37. See, e.g., *Bodson v. Pompes Funébres des Régions Libérées SA*, Case 30/87, [1988] E.C.R. 2479, [1989] 4 C.M.L.R. 984.

38. See generally *Tetra Pak* [1995] E.C.R. II-755, [1997] 4 C.M.L.R. 726; *Langanese-*

questions, its opinions carry considerable weight and serve as a significant restraint on the Commission.

Most significant market definition decisions, apart from those under the Merger Regulation, have come in Article 86 proceedings. As already noted, there are a variety of Article 85 cases in which analysis of market power and the measurement of effects is simply not relevant. In some Article 85 cases where power and effects are evaluated, markets are not formally defined, although many of the facts relevant to such a definition play a role in the Commission's competitive analysis.³⁹ Article 86, on the other hand, virtually invites the use of market share data in determining whether a firm is dominant, and markets are defined, and often contested, in virtually every Article 86 case. It is not unusual in cases charging that conduct violates both Articles 85 and 86 to find that the discussion of market definition is confined to the portion of the decision dealing with Article 86.⁴⁰

This dichotomy results from a perception that the role of market definition under these two Articles differs. In *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid & Ors v. Commission*,⁴¹ the Court of First Instance explained the difference as follows:

For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour . . . since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. For the purposes of applying Article 85, the reason for defining the relevant market is to determine whether the agreement . . . is liable to affect trade between Member States and has as its object or effect the prevention, restriction, or

Iglo, [1995] E.C.R. II-1533 [1995] 5 C.M.L.R. 602; *Hilti* [1991] E.C.R. II-1439, [1992] 4 C.M.L.R. 16.

39. See generally Commission Decision No. 90/410/EEC, O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832 (Elopak/Metal Box—Odin).

40. See *Societa Italiana Vetro SpA* [1992] E.C.R. at II-1403, [1992] 5 C.M.L.R. at 302; Commission Decision No. 92/262/EEC, O.J. L 134/1 (1992), [1993] 5 C.M.L.R. 322 [hereinafter French-West African Shipowners' Committees].

41. *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v. Commission*, Case T-29/92, [1995] E.C.R. II-289.

distortion of competition within the Common Market.⁴²

The applicants' objection to the Commission's market definition, therefore, was not to be considered as a matter apart from the assessment of competitive effects and the impact on interstate trade. To a U.S. lawyer, the meaning of this passage will seem obscure. At a minimum, it suggests that markets need not be formally defined in Article 85 cases, and that the facts underlying market definition will simply be assessed as part of the broader "objects/effects" inquiry. Does it also suggest that markets may actually be defined differently in the two types of cases? There is little to suggest that this has been the case.⁴³

A. *The Definition of Product Markets*

Issues of product market definition can arise in a variety of circumstances. Most often, the issue is whether the market should include products, other than that produced by those whose conduct is at issue, that may serve as substitutes to which at least some consumers would turn in the event of a significant price increase. In the United States, product market definition is based on a number of factors designed to measure the responses of both consumers, demand substitutability, and suppliers, supply substitutability, to such an increase. The market is expanded to include all products that, if controlled by one firm, could give that firm the ability to profitably increase price significantly. Included in the market are those firms not currently producing these products but likely to do so within one year and without significant sunk costs.⁴⁴ This broad substitutability standard requires the evaluation of a number of separate factors.

Product market definition includes a variety of other issues. When, if ever, should markets involving the same product be defined in terms of end use? The answer given by U.S. enforcement agencies is only when those buyers can be targeted for a price increase, that is, only when the seller can successfully price

42. *Id.* at II-317, ¶ 74; *see also* Opinion of Advocate General Mischo, *Belasco*, [1989] E.C.R. at 2117, ¶ 13, [1991] 4 C.M.L.R. at 101.

43. In *Societa Italiana Vetro SpA*, the Court of Justice seemed puzzled by the Commission's apparent definition of the market one way under Article 85 and another way under Article 86. *Societa Italiana Vetro SpA* [1992] E.C.R. at II-1549, ¶ 363, [1992] 5 C.M.L.R. at 405-06.

44. 1992 MERGER GUIDELINES, *supra* note 18, § 1.32.

discriminate.⁴⁵ Is so-called captive production, that portion of the production of a given product consumer internally by the firm, included in the market? In the United States, it is generally included.⁴⁶

Invariably, both product and geographic market definitions involve matters of degree and an element of arbitrariness. The process examines likely consumer responses when not all consumers are alike. The availability of data may bind the inquiry. Lines may be drawn in part simply because of elements of administrative convenience and predictability. The standards adopted may also reflect broad policy considerations that are not entirely economic, even when the analysis appears to be so. In measuring responses to a price increase, for example, the size of the projected increase first must be determined.⁴⁷ Similarly, market definition necessarily involves a time element, particularly when supplier response is at issue.⁴⁸ In both cases there are explicit or implicit assumptions about how much market power is to be tolerated and for how long. Every antitrust system must make these choices.

1. The Early Cases

The Court of Justice first addressed product market definition in a detailed way in the *Continental Can* case.⁴⁹ The Commission found that the firm in question was dominant in markets defined as "light containers for canned meat products," "light containers for seafood," and "metal closures for the food packaging industry." Most of its analysis focused on the inclusion in these markets of glass and plastic containers. Because of different physical characteristics of packaging materials and in the machines used for packaging, the market was confined to metal containers. The Court of Justice found fault with the Commission's analysis. The Commission's failure to explain how its three markets differed from one another, and therefore from a

45. *Id.* at § 1.12.

46. *See Aluminum Co. of America*, 148 F.2d at 416; AREEDA, *supra* note 2, ¶ 535e.

47. The current United States Merger Guidelines, for example, simply refer to a "small but significant" price increase, and suggest a figure of five percent. 1992 MERGER GUIDELINES, *supra* note 18, § 1.11.

48. *See id.* at § 1.32 (discussing firms that participate in relevant market through supply response).

49. *Europemballage Corp. v. Commission*, Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199 [hereinafter *Continental Can*].

broader light metals container market, was critical. Specifically, while the Court of Justice recognized that "limited interchangeability with other products" was insufficient to place them in the same market, the Commission failed to consider that manufacturers of other light metal containers might, "with simple adaptation," enter this market. It also found inconsistencies in the Commission's analysis of glass and plastic containers. At the very outset, the Court of Justice stressed supply substitutability, a factor that over time has tended to disappear from Commission decisions.

The emphasis shifted to demand substitutability in *United Brands*,⁵⁰ where the Court of Justice upheld the Commission's determination that the relevant market was bananas rather than all fresh fruit. Despite findings that at various times of the year sales of other fruits then in season exerted price pressure on bananas and reduced their volume of sales, the Court of Justice concluded that there was no long-term, apparently meaning year-long, cross-elasticity between bananas and other fruits. It explained this result in terms of physical characteristics such as taste, softness, ease of handling, and the availability over the entire year to a particular group whose need for bananas was constant, namely "the young, the old, and the sick." The decision has been criticized rightly by a number of commentators for its reliance on the needs of a particular subgroup of purchasers without evidence of the volume of their purchases or that United Brands could segregate their purchases and successfully impose a higher price on them.⁵¹ The decision can also be questioned because of its quick dismissal of the availability of apples and oranges throughout the year. The Court of Justice simply asserts, for example, that oranges are not interchangeable. But whatever the outcome, *United Brands* set the stage for a series of cases placing emphasis on the demand side, with physical characteristics of the products playing a leading role. In *Hoffman-LaRoche*,⁵² for example, thirteen categories of vitamins were characterized as separate markets based on their specific bionu-

50. *United Brands Co. v. Commission*, Case 27/76, [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

51. See, e.g., VALENTINE KORAH, *AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE* 72 (5th ed. 1994).

52. *Hoffman-La Roche & Co. v. Commission*, Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

tritive functions. With respect to these functions, vitamins were in a market separate from such things as food, even though food obviously performs the same functions. Of greater significance was the Court of Justice's rejection of the inclusion in the vitamin market of vitamins used for technological purposes, concluding that the two categories of use, nutritional and technological, were not interchangeable. The net result, as others have noted, was to place vitamins in two markets based on end use, again without any showing that separate prices could be successfully set for each.⁵³

The issues before the Court of Justice in *Michelin*⁵⁴ were more complex than in these other early cases. The Commission found that Michelin held a dominant position in a market defined as new replacement tires for heavy vehicles, a market that did not include the same tires when sold to vehicle manufacturers, that is, original equipment manufacturers or "OEMs", auto or light van tires, and retreads. The Court of Justice upheld the Commission's definition. To a greater degree than in the cases just discussed, the Court of Justice relied upon a whole range of factors. Original equipment tires, even though in many cases physically the same as replacement tires, were excluded from the market because of differences in dealing with and meeting the needs of vehicle manufacturers as opposed to replacement tire distributors. Auto tires were excluded because of different physical characteristics, consumer perceptions that they were a different product, and the presence of specialized dealers for each of these two tire categories. Prices for heavy tires were much higher. The Court of Justice noted that supply substitutability was limited because the technologies and equipment for manufacturing heavy tires and auto tires differed significantly. Retreads posed a more difficult issue, primarily because the Commission recognized that at least some consumers viewed retreads as interchangeable with new tires. But because a significant number of consumers had concerns about their safety and reliability, some volume of retreads were produced in response to specific orders and did not therefore compete with new tires, and retreads were a secondary market dependent upon the pri-

53. HAWK, *supra* note 28, at 763.

54. NV Nederlandsche Banden-Industrie Michelin v. Commission, Case 322/81, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

mary new tire market, retreads were not included in the market.⁵⁵ Finally, the Court of Justice declined to break the heavy tire market into further categories based on types and dimensions, finding that these differences were not relevant to the demands of distributors who carried a full line, even though they might be relevant to consumers. The decision has been criticized on a number of grounds, which are not repeated here.⁵⁶ It is of import, however, because many of the factors relied upon, including cross-elasticity studies, price differences, consumer perceptions, and differing distribution methods, all play a role in subsequent cases. The Court of Justice's conclusion that the sale of identical products to vehicle manufacturers and for replacement markets is well-ingrained in EC law. This is true even in cases under the Merger Regulation where the *Michelin* distinction has been maintained, particularly in a large number of cases involving various auto parts and equipment, often with little discussion beyond citation of *Michelin*.

These four Article 86 cases have set the general standards applied in cases involving issues of product substitutability. With the exception of *Continental Can*, supply substitutability played little role in the Court of Justice's analysis, nor, as we shall see, has it in more recent cases. Demand substitutability was measured in large part on physical and technical characteristics, with price differences, cross-elasticity of demand, and distribution differences also playing a role, primarily to confirm what the physical characteristics analysis seemed to indicate. *United Brands*, *Hoffman-LaRoche*, and *Michelin* also defined markets in terms of end uses, even when products were physically identical, without inquiry into the ability of the seller to segregate particular end users with respect to price.⁵⁷

The most troublesome of the early decisions of both the Commission and the Court of Justice involved findings of abuse in vertical relationships, primarily cases involving refusals to deal

55. See *Aluminum Co. of America*, 148 F.2d at 416 (providing similar analysis concluding that reprocessed secondary aluminum ingot was not in same market as virgin aluminum ingot).

56. See HAWK, *supra* note 28, at 763; Per Jebsen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L.J. 443, 473-75 (1996).

57. See Commission Decision No. 88/518/EEC, O.J. L 284/41 (1988), [1990] 4 C.M.L.R. 196 (Napier Brown—British Sugar).

with distributors or, in some cases, competing manufacturers. In *Hugin/Liptons*,⁵⁸ a manufacturer of cash registers was held in violation of Article 86 for refusing to supply spare parts for its own machines to a former distributor who was also engaged in repair and reconditioning of cash registers. No one else manufactured parts for Hugin machines. The Commission concluded, as did the Court of Justice, that no other parts were interchangeable with Hugin parts, at least with respect to use on Hugin machines. Hugin thus held a dominant position with respect to parts for its own machines.⁵⁹ U.S. commentators have sharply criticized the Commission's use of such a single brand market.⁶⁰ While *Hugin/Liptons* bears a superficial similarity to the decision of the U.S. Supreme Court in *Kodak*,⁶¹ the analysis in *Kodak* was far more complex and left the outcome in doubt.⁶² *Hugin/Liptons* is best understood as a decision not based on economic concerns, but on concerns over fairness to buyers dependent on a supply that the Commission and the Court of Justice wished to preserve in the market place. The market definition was carefully tailored to this end.⁶³

The definition of product markets in the setting of vertical

58. *Hugin Kassaregister AB v. Commission*, Case 22/78, [1979] E.C.R. 1869, [1979] 3 C.M.L.R. 345.

59. See Commission Decision No. 77/327/EEC, O.J. L 117/1 (1977), [1977] 2 C.M.L.R. D1 (ABG Oil Companies), *rev'd on other grounds sub nom.* BP v. Commission, [1978] E.C.R. 1513.

60. See, e.g., Thomas E. Kauper, *Article 86, Excessive Prices, and Refusals to Deal*, 59 ANTITRUST L.J. 441, 451 (1991).

61. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

62. In *Kodak*, the U.S. Supreme Court held that the question of whether parts and service for Kodak brand copying equipment constituted relevant markets for the purpose of tying and monopolization claims could not be resolved on a motion for summary judgment. The Supreme Court reached this conclusion only after a detailed analysis of the claim that purchasers were "locked-in" to the machines and the parts and service that they required.

63. *Hugin/Liptons* might be viewed as a so-called "lock-in" case. In *Hugin/Liptons* after an initial investment in a cash register, buyers could not easily switch to another make of cash register and thus were required to use Hugin parts. The Commission did not approach the case in this way, and it made no analysis of the difficulty of switching. The Commission did make such an argument in *Societe Alsacienne et Lorraine de Telecommunications et d'Electronique v. SA Novasam*. Case 247/86, [1988] E.C.R. 5987, [1990] 4 C.M.L.R. 434 (contending that consumers who had elected to rent rather than purchase telephone equipment were confined to local installers for maintenance). The Court of Justice summarily rejected the argument.

integration was at issue in both *Commercial Solvents*⁶⁴ and *ECS/AKZO*.⁶⁵ In both cases, the firm in question was dominant in one market, but the effects of its conduct were felt in another. In one sense, the critical issue was to determine the market in which dominance was found, rather than how to define such a market. *Commercial Solvents* produced a raw material, aminobutonal, which was used to produce ethambutol, an anti-tuberculosis drug. Aminobutonal also was used as a paint emulsifier. *Commercial Solvents* had supplied the raw material to Zoja, a competing manufacturer of ethambutol. Zoja found it could obtain aminobutanol from paint manufacturers who purchased it from *Commercial Solvents* at a lower price. *Commercial Solvents* forbade its paint manufacturer buyers from selling to Zoja and refused to do so itself, on the ground that it was going to use the material to produce the drug internally. The Court of Justice defined the market as the raw material rather than ethambutol, where, arguably, there were significant competitors. There was no other raw material substitute for producing the drug.

The facts in *ECS/AKZO* were similar. *AKZO* produced a chemical that was used both in producing flour additives and as a plastics catalyst. *ECS* produced the same chemical, which it sold as a flour additive. After it sought to expand its sales of the base chemical to plastic manufacturers, *AKZO* retaliated by sharply reducing its prices to *ECS*'s flour manufacturer customers, resulting in a charge of violating Article 86. As in *Commercial Solvents*, the market was defined at the raw material level. While these cases are often characterized as market definition cases, they really turn on identifying the level at which the market was defined. Both decisions stand for the proposition that, where a firm has a dominant position in an upstream market, use of that power in a downstream market may be an abuse without establishing dominance in the latter market.⁶⁶

64. *Instituto Chemioterapico Italiano SpA v. Commission (Commercial Solvents)*, Joined Cases 6-7/73, [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309.

65. *Akzo Chemie BV v. Commission*, Case C-62/86, [1991] E.C.R. I-3359, [1993] 5 C.M.L.R. 215 (upholding Commission Decision No. 85/609/EEC, O.J. L 374/1 (1985), [1986] 3 C.M.L.R. 273).

66. See HAWK, *supra* note 28, at 768-72.

2. Product Market Definition - 1989 to Date

In 1989 the Merger Regulation was adopted. By examining decisions on market definition under Articles 85 and 86 beginning at that time, the interplay between these decisions and those under the Merger Regulation can be considered. It is commonly asserted that decisions involving concentrations under the Merger Regulation, which reflect the analysis of a single administrative unit, the Merger Task Force, are a more coherent and cohesive whole than decisions under Articles 85 and 86, and that markets tend to be more narrowly defined in applying the former.⁶⁷ Commentators have expressed the hope that the analysis used in merger cases will influence market definitions under Articles 85 and 86.⁶⁸ While no conclusions are drawn at this point, it should be noted that in non-merger cases market definition has involved not only the Commission, but the Court of Justice and Court of First Instance as well. The courts, however, have had little to say so far with respect to market definition in merger cases. Greater coherence and consistency might be expected where the process is in the hands of a single group within the Commission.

The analysis that follows will consider first the problem of substitute products. End use and brand name markets are then discussed separately.

a. Substitute Products

Perhaps the most striking and influential Court of Justice opinion during this more recent period is *Ahmed Saeed*.⁶⁹ It is also one of the Court of Justice's most cryptic. At issue was the validity of airline tariffs jointly proposed by airlines and approved by the German government. German law prohibited the sale of tickets below these approved fares. After two travel agents sold discounted tickets on a flight from Germany to international destinations, suit was brought in German courts, which in turn referred several questions to the Court of Justice. No discussion of the relevant market appears in its analysis under Article 85. With respect to Article 86, the Court of Justice noted that

67. KORAH, *supra* note 52, at 71-72; Jebesen & Stevens, *supra* note 57, at 462.

68. See KORAH, *supra* note 52, at 72.

69. *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs eV*, Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102.

two approaches to market definition had been suggested. The market could be defined as scheduled air flights, or as a much broader market consisting of charter flights, railways, highways, and scheduled flights on other routes that consumers viewed as substitutes. The Court of Justice then simply concluded that:

The test to be employed is whether the scheduled flight on a particular route can be distinguished from the possible alternatives by virtue of specific characteristics as a result of which it is not interchangeable with those alternatives and is affected only to an insignificant degree by competition from them.⁷⁰

The Court of Justice observed that its test might yield varying results in different cases, noting that for some airline routes no competition might exist, and that on some routes there might be other routes that would serve as substitutes.⁷¹ Nothing more was said, which may not be surprising in a referral case. The Advocate General, however, had concluded that scheduled flights were a separate market, because the bulk of the demand for scheduled flights came from “businessmen, government officials, and politicians,” who need to travel at particular times of day and for whom other modes of transport were not a substitute.⁷² The geographic market, in his view, was defined as flights between an airport in Germany and other Member States because the German Air Transport Law so defined it. If this is the rationale underlying the Court of Justice’s statements, it surely raises more questions than it answers.⁷³

On its face *Ahmed Saeed* seems to say little. Certainly it explains little. From this small seed, however, a mighty oak has

70. *Id.* at 849, ¶ 40, [1990] 4 C.M.L.R. at 135.

71. The Court of Justice did not rule out the possibility that, for some routes, surface transport might be a reasonable substitute, although air route cases generally have tended to define markets in terms of other air routes. But in *Night Services*, an Article 85 case involving joint agreements among European railroads for the operation of the Channel Tunnel, two separate markets were defined. Commission Decision No. 94/663/EC, O.J. L 259/20 (1994), [1995] 5 C.M.L.R. 76 [hereinafter *Night Services*]. For business travelers, the market included high speed rail and air travel. The market for leisure travelers was defined to include economy-class air travel, train, motor coach, and, perhaps, even motor cars.

72. Opinion of Advocate General Lenz, *Ahmed Saeed*, [1989] E.C.R. at 824, ¶ 29, [1990] 4 C.M.L.R. at 114. *Cf.* *Night Services*, O.J. L 259/20 (1994), [1995] 5 C.M.L.R. 76.

73. Why should market definition under Article 86, for example, turn on the definitions used in the German regulatory regime?

grown. In *British Midland*,⁷⁴ for example, the Commission concluded that Aer Lingus, which had refused to interline passengers with British Midland, held a dominant position in a market defined as the sale of air transport between Dublin and London's Heathrow airport. *Ahmed Saeed* was not cited, but was clearly the underpinning of the Commission's decision. A more detailed explanation was offered. Characteristics of surface transport, including speed, convenience, and the need to transfer, meant the market must be confined to air travel. Surface transport was substitutable for some price-conscious travelers, but many do not view surface and air travel as interchangeable. Air fares were significantly higher than surface fares, and there was no evidence the latter constrained the former. In geographic terms, the market was the specific Dublin route.⁷⁵ While some travelers might use a London airport other than Heathrow, given that Dublin-Gatwick service was available, business travelers prefer the convenience and interconnections available at Heathrow. This recitation by the Commission comes perilously close to defining a market for business travel, as suggested by the Advocate General in *Ahmed Saeed* and built into product market definition in subsequent cases.⁷⁶ Finally, supply-side substitutability was constrained by authorization requirements and a lack of landing slot availability. This is at least some explanation, although it is not entirely satisfying, particularly on the use of but one London airport.

Ahmed Saeed has had an influence far beyond air transport markets. In *French-West African Shipowner's Committees*,⁷⁷ the Commission found that cargo sharing and other agreements of a shipowner's committee violated both Articles 85 and 86. Again, market definition is discussed formally only in the Article 86

74. Commission Decision No. 92/213/EEC, O.J. L 96/34 (1992), [1993] 4 C.M.L.R. 596 [hereinafter *British Midland*].

75. While route designations may be viewed as a geographic market issue, it is difficult to separate product and geographic markets in transport cases. These issues, therefore, are discussed here.

76. See *Night Service*, O.J. L 259/20 (1994), [1995] 5 C.M.L.R. 76. Cf. Commission Notice, O.J. C 117/05 (1995) [hereinafter *Havas Voyage/American Express*] (advising under Merger Regulation that markets for travel agency services should be divided between business and leisure travel). Note that airlines, through a variety of pricing tactics, have been reasonably successful in discriminating in price between business and leisure travelers.

77. *French-West African Shipowners' Committees*, O. J. L 134/1 (1992), [1993] 5 C.M.L.R. 322.

analysis. Initially, the Commission defined the market as regular liner cargo service, a market excluding air transport and chartered tramp vessels. They did this for reasons similar to *Ahmed Saeed's* exclusion of surface transport and air charter service. More specifically, the Commission defined the market as liner service between France and eleven African states, with little explanation beyond the assertion that the logic of *Ahmed Saeed* applied to sea routes.

This chain of logic was extended once again in *Sea Containers*.⁷⁸ *Sea Containers*, desiring to operate a vehicle and passenger ferry service on a route between Holyhead in Wales and Dublin and Dun Laoghaire in Ireland, was denied access to the port of Holyhead by Sealink, which owned the port facilities and operated as the port authority. Sealink also operated a ferry service on the route *Sea Containers* sought to enter. The Commission found that, while there were three ferry corridors between Great Britain and Ireland, the corridors were not substitutes. The northern and southern corridors brought passengers a considerable distance from Dublin and, therefore, were not interchangeable in the eyes of consumers. It was then an easy step to conclude that the market was port services for the central corridor. The only British port on the corridor was Holyhead, and Sealink, therefore, held a dominant position. A similar result was reached in *Port of Rødby*,⁷⁹ where the Commission concluded that the Rødby-Pultgarden ferry route was a separate market, there being no "straightforward alternative" in terms of other routes, relying on *Ahmed Saeed*. DSB, an agency of the Danish government and the owner of the port facilities at Rødby, therefore held a dominant position. The Commission's decision was bolstered by a reference to the opinion of the Court of Justice opinion in *Merci Convenzionali Porto di Genova*,⁸⁰ where the Court of Justice, in a referral case from an Italian court, rather casually indicated that the Port of Genoa was a market. The analysis in these air and sea transport cases comes full circle with the Commission's decision in a case dealing with landing fees at the Brus-

78. Commission Decision No. 94/19/EC, O.J. L 15/8 (1994) [hereinafter *Sea Containers*].

79. Commission Regulation No. 421/94, O.J. L 55/22 (1994).

80. *Merci Convenzionale Porto di Genova SpA v. Siderurgica Gabrielli SpA*, Case C-179/90, [1991] E.C.R. I-5889, [1994] 1 C.M.L.R. 422.

sels airport.⁸¹ Relying on both the *Ahmed Saeed* and *Porto di Genova* decisions, the Commission concluded that the relevant market was services linked to the infrastructure at the Brussels airport, finding that, for short- and medium-haul services to and from Brussels, there was only a limited substitutability with other routes.

These cases define markets in very narrow terms. The fact that markets are narrow rather than broad does not in itself indicate that market definitions are right or wrong. But in some of these cases, narrow markets seem to be serving the particular end of imposing public utility-like duties to provide access to facilities thought to be important to the public, and to do so as a matter of EC law. This may reflect sound public policy, but it is not necessarily a policy focused solely on competitive concerns. These decisions are also of interest because of what they say about the use of precedent. They rest on cryptic statements contained in two Court of Justice cases that came to the Court of Justice on referral of questions from national courts. Much has been read into them, just as much has been read into rather casual comments of the U.S. Supreme Court. Finally, lest anyone believe that the analysis under the Merger Regulation might differ, it should be noted that the outcome in airline concentration cases has been no different, although the explanation has been fuller.⁸²

There have been a number of other cases concerned with product substitutability. In those Article 85 cases where market definition has been considered at all, the treatment of this issue has been relatively terse. In *Continental/Michelin*,⁸³ for example, the Commission simply pronounced that the market was "car tires," and similarly pronounced the market to be world-wide. The market in *PMI-DSV*⁸⁴ was described as the relaying of televised pictures and news of horse races for betting shop customers, excluding by simple fiat the relaying of greyhound races and

81. Commission Decision No. 95/364/EC, O.J. L 216/8 (1995) (Discount on Landing Fees at Zaventum).

82. See Commission Notice, O.J. C 232/06 (1992) [hereinafter *Air France/Sabena*]; Commission Decision No. 4064/89/EEC, O.J. C 200/10 [hereinafter *Swissair/Sabena*].

83. Commission Decision No. 88/555/EEC, O.J. L 305/33 (1988), [1989] 4 C.M.L.R. 920 [hereinafter *Continental/Michelin*].

84. Commission Decision No. 95/373/EC, O.J. L 221/34 (1995) (*PMI-DSV*).

other sporting events, a conclusion that, at least to a non-bettor, does not seem obvious. In several Article 85 cases, effects have been measured in market "segments" without further evaluation of markets. For example, in *Fiat/Hitachi*,⁸⁵ a joint venture for the manufacture of hydraulic excavations was evaluated in the hydraulic excavation "subsector" of a broader earthmoving equipment market.⁸⁶ These cases confirm that market definition is seldom a critical factor in Article 85 analysis. Virtually all major market definition cases continue to arise under Article 86 or the Merger Regulation.

Even under Article 86, market definition issues are occasionally handled more by pronouncement than analysis. In *Warner-Lambert/Gillette*,⁸⁷ for example, the market was defined as wet shaving products with the simple statement that users of wet shaving products do not consider dry shaving products "sufficiently close substitutes to form part of the same market." And in the much celebrated *British Plasterboard (BPB)* case,⁸⁸ a case involving a variety of forms of payments intended to bring about what were in effect exclusive supply arrangements, the Commission concluded that the market was plasterboard, explaining simply that because the conduct at issue related to and was directed at plasterboard manufacturers, the market *a priori* should be so defined. The argument that wet plaster was a cost-effective alternative and should be included in the market was rejected because competition from wet plaster could be, and was, considered in evaluating dominance. This approach may seem to contradict normal principles of market definition but seems sensible. For many applications, plasterboard and wet plaster were found to be of limited interchangeability. The Commission thus concluded that competition from wet plaster, while not irrelevant, should not be given the same weight it would be given if it were simply included in the market.

85. Commission Decision No. 93/48/EEC, O.J. L 20/10 (1993) (*Fiat/Hitachi*).

86. See also Commission Decision No. 93/49/EEC, O.J. L 20/14 (1993), [1993] 5 C.M.L.R. 617 (*Ford/Volkswagen*) (analyzing joint venture to produce new vehicle in minivan market segment).

87. Commission Decision No. 93/252/EEC, O.J. L 116/21 (1993) [1993] 5 C.M.L.R. 559 (*Warner-Lambert/Gillette*).

88. Commission Decision No. 89/22/EEC, O.J. L 10/50 (1989), [1990] 4 C.M.L.R. 464 (*British Plasterboard (BPB)*); see *BPB Industries Plc & Anor v. Commission*, Case C-310/93P, [1995] I E.C.R. 865, [1995] 2 C.E.C. 15 (upholding Commission's decision without discussion of product market).

There have been three cases of particular significance with respect to the inclusion of substitute products in product markets since 1989. The decisions in *Langanese-Iglo*⁸⁹ and *Hilti*⁹⁰ are discussed subsequently in dealing with markets in vertical cases and single brand markets. The third is *Tetra Pak II*.⁹¹ Tetra Pak is virtually the sole producer in the Community of machines for the aseptic packaging of liquid foods and the cartons used in such packaging. It was found to have abused its position in these markets through the use of restrictive sales conditions, tying arrangements, and discriminatory pricing. Tetra Pak also had a large market share in the market, as the Commission defined it, for machines and cartons used in packaging liquid foods in a non-aseptic manner. The Commission defined four markets as machines for aseptic packaging of ultra-high temperature treated liquid foods, primarily milk, cartons for the same, machines for packaging liquid foods in cartons in a non-aseptic manner, and cartons for the same. While it concluded that market shares in both aseptic and non-aseptic markets were sufficiently high to find dominance in each, it concluded that such an approach ignored links between them. Milk and fruit juice are packaged both ways, often by the same producers. In these circumstances, it was appropriate to find that conduct affecting the non-aseptic markets constituted an abuse of its aseptic market position.

Tetra Pak argued that the market should include a variety of other forms of packaging, such as glass and plastic bottles. The Commission concluded that such packaging competes at best in the long-term, given their different physical characteristics, user needs, and the differences in the machinery used in the packaging process. "In the short, and probably even the medium term," however, the elasticity of substitution in response to prices "is almost zero," for two reasons.⁹² First, packaging is but a very small part of the price of the packaged product, so even a ten percent price increase would have little impact on the price of the packaged product. Given consumer preferences, the packager/producer will not shift to another form of packaging

89. *Langanese-Iglo*, [1995] E.C.R. II-1533, [1995] 5 C.M.L.R. 602.

90. *Hilti*, T-30/89, [1991] E.C.R. II-1439, [1992] 4 C.M.L.R. 16.

91. *Tetra Pak*, Case T-83/91, [1995] E.C.R. II-755, [1997] 4 C.M.L.R. 726.

92. Commission Decision No. 92/163/EEC, O.J. L 72/1, at 17-18, ¶ 93 (1992), [1992] 4 C.M.L.R. 551, 583 [hereinafter *Tetra Pak II*].

only in response to consumer acceptability. There can, in the Commission's words, be "no elasticity of intermediate demand if there is no elasticity of final demand."⁹³ Second, change-over by producer/packagers to different equipment and packages is both costly and time-consuming, and may require alteration in storage, handling, and distribution systems.

For perhaps the first time, the Commission explained why markets must be defined based on short time periods. Over the long-term, consumer habits evolve, technology changes, and market boundaries shift. A short time period corresponds more to the period in which a company exercises its market power and upon which, therefore, analysis must focus. The prevailing approach to market definition in the United States also uses relatively short time periods.⁹⁴ The time frame question will reappear in the discussion of Merger Regulation decisions, where it figures prominently in the discussion of transition problems.

In the Court of First Instance, the arguments in *Tetra Pak II* grew yet more complex. It was argued that the Commission should have approached market definition by looking separately at packaging for different liquid food group, such as milk, orange juice, etc. The Court of First Instance found that this approach was unwarranted, noting that whatever the product, aseptic and non-aseptic systems each fulfilled the same need, involved the same packager/producers in many cases, and, within each type of system, prices were uniform, regardless of liquid. Moreover, given the dominance of milk in each category, packaging of milk alone could provide a reasonable basis for assessing dominance. The Court of First Instance then agreed with the Commission's findings on lack of sufficient substitutability between aseptic and non-aseptic systems, noting, as the Commission stressed, that small increases in machinery prices would not affect consumers' decision to shift between aseptic and non-aseptic milk. Tetra-Pak's claim that it was the packager/producer's view that was critical and that they would switch even in response to a very small increase was flatly rejected. In the end, the critical factors were those relied upon by the Commission, namely

93. *Id.* at 19, ¶ 97 [1992] 4 C.M.L.R. at 585.

94. The United States Merger Guidelines measure supply substitutability over a period of one year. 1992 MERGER GUIDELINES, *supra* note 18, § 1.32. Another potential entry will be considered only if it is likely to occur within two years from initial planning to significant impact. *Id.* § 3.2.

differences in physical characteristics, consumer preferences based on taste and shelf-life, and the costs inherent in shifting from one system to another. The Court of First Instance also rejected supply substitutability arguments, finding that manufacturers of non-aseptic machinery in cartons would not be able, at least because of a lack of technological knowledge, to modify their machinery to make it usable for aseptic packaging. The same analysis was used in upholding the Commission's findings that aseptic packaging in containers of glass and plastic was not substitutable with aseptic packaging in cartons.

While much of the analysis in *Tetra-Pak II* reflects a conventional assessment of physical and technological characteristics and consumer needs and preferences, several things stand out. First, the Commission's explicit reference to the time frame to be used in assessing markets is noteworthy, even though it has used short time periods implicitly for some time. Second, the reliance on consumer demand as the critical element in concluding that small increases in machinery prices would not cause a shift in this intermediate market to other machinery types, an assessment valid only if strong consumer preferences precluded such a shift, could be significant in looking at a number of intermediate markets. Third, the Commission and the Court of First Instance did consider supply-side substitutability, although factually both concluded rather easily that it was not relevant. And finally, the Commission and the Court of First Instance declined, where machinery for aseptic packaging was basically the same for all types of liquids packages, to segregate the market further based on liquid type. In short, end user market definitions were rejected, at least in part because there was no evidence of price discrimination among the proposed user categories.

b. Identical Products with Different Uses and Buyers

Where product substitutability is at issue, different needs of different buyers may establish that interchangeability between products with different characteristics is low. But what of the case where different buyers put the same product to different uses? Should the market for a single product be further divided based on use categories? In several early decisions, including *Michelin* and *Hoffman-LaRoche*, the Court of Justice and Commission appeared to adopt such definitions. In more recent cases, however, markets have seldom been so defined. In *Tetra-Pak II*,

the Court of Justice rejected end use definitions and distinguished *Hoffman-LaRoche*, stressing that the equipment used for packaging milk and fruit juices was the same, that the packagers of milk and orange juice were to some degree the same, and that there was no evidence of price discrimination between milk and orange juice producers. The implication is that end user markets are appropriate, if at all, only where the users, and the prices charged different users, vary significantly, an approach similar to that generally followed in the United States. On the other hand, the Commission has continued to define separate markets for sales of identical new vehicle parts to original equipment manufacturers and for replacement purposes, a distinction maintained under the Merger Regulation, and U.S. antitrust law as well⁹⁵ without examination of prices.

In two cases dealing with exclusive supply arrangements under Article 85, variations on end use markets are used. In *Delimitis v. Henninger Brau*,⁹⁶ a referral case, the Court of Justice defined two separate markets for the sale of beer, even though the beer itself was physically identical. Beer sold to public houses for on-site consumption was defined as a market separate from sales of the same product to the retail trade. The opinion is typically terse, but the rationale seems to be that the different modes of distribution entail different costs on the part of brewers, with supply to public houses involving the provision of services and on site installations not necessary for sales to the retail trade. The Court of Justice also noted that prices through the two channels were markedly different and, in a passage reflective of the nature of beer drinkers, that "beer consumption in public houses is not essentially dependent on economic considerations."⁹⁷ The latter finding is critical, indicating that brewers could raise prices on sales to public houses without any significant shift by buyers of beer sold through retail outlets. If this is true, public houses are a separate beer market.

Delimitis was in turn followed by the Court of First Instance in *Langanese-Iglo*,⁹⁸ another Article 85 case involving exclusive supply arrangements, this time involving ice cream. The Com-

95. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

96. *Delimitis v. Henninger Brau AG*, [1991] E.C.R. I-935, [1992] 5 C.M.L.R. 210.

97. *Id.* at I-984, ¶ 16, [1992] 5 C.M.L.R. at 246.

98. *Langanese-Iglo*, [1995] E.C.R. II-1533, [1995] 5 C.M.L.R. 602.

mission had found that the relevant product market was “industrial impulse ice cream sold through all distribution channels” except doorstep delivery services,⁹⁹ a definition that seems to include only ice cream sold in prepared single serving packages. Langanese argued that the market included all ice cream, whether produced industrially or by the craft trade,¹⁰⁰ including ice cream sold to bulk buying customers for scooping purposes. From the consumers’ point of view, all of these ice creams are interchangeable to the impulse buyer. The Court of First Instance agreed with the Commission that place of consumption was the critical element. Relying on *Delimitis*, it excluded from the market ice cream sold through restaurants, which constituted a separate market because a different service was involved and sales were less affected by economic considerations than other types of sales, and take home sales of ice creams stored in home freezers, which do not meet impulse buyers’ needs and are only interchangeable to a limited degree with products sold in the street. “Multipacks” were properly excluded for the same reason. The Court of First Instance also agreed with the exclusion from the market of craft trade ice creams, which were neither covered by the exclusive supply arrangements nor sought by or offered to retailers. Ice cream sold in bulk for scooping purposes posed a greater difficulty. The Commission had excluded these sales because there was only a slight overlap in distribution, the need for an additional service, the serving of portions taken from bulk, meant that industrial ice cream and scooping ice cream were seldom offered together because most industrial impulse ice cream was sold through grocery and specialized stores, and there were different product technologies involved. The Court of First Instance disagreed with the Commission, finding industrial impulse and scooping ice cream fully interchangeable from the consumers’ point of view. Differences in distribution, service, and technology did not affect consumer choice. The Court of First Instance did not find the Commission’s error relevant to its competitive analysis and, therefore, did not annul the Commission’s decision.

Langanese-Iglo is a difficult case to evaluate. The Court of

99. *Id.* at II-1555, ¶ 44, [1995] 5 C.M.L.R. at 625.

100. The craft trade comprises all sales of ice cream on the street, at or near the point of manufacture.

First Instance clearly felt constrained by *Delimitis* in excluding from the market all ice cream for other than immediate consumption. Its treatment of craft ice cream is probably best explained by the fact that it was measuring the foreclosure effect of exclusive supply arrangements. Vendors of craft ice cream were, in its judgment, simply not outlets available to industrial ice cream suppliers. And its willingness to challenge the Commission on scooping ice cream suggests that the Court of First Instance is willing to do more on market definition than simply defer to the Commission. Its conclusion also seems clearly correct. Both *Delimitis* and *Langanese-Iglo* seem to reflect the use of narrow use-oriented markets when vertical foreclosure effects are at issue, and are best confined to such cases. They provide little basis for concluding that end use differences standing alone are sufficient to place identical products in separate markets.¹⁰¹

c. Single Brand Markets

In *Hugin/Liptons*, the Court of Justice defined the relevant market as parts for Hugin cash registers. It returned to a single brand market in *Hilti AG v. Commission*. Hilti manufactured powder-actuated fastening ("PAF") guns, power tools that drive nails with the use of an exploding cartridge that is inserted into the gun along with the nails to be driven. Hilti produced not only the guns themselves, but also the cartridge strips and nails that were compatible with its guns. Acting on complaints by competing manufacturers of Hilti-compatible nails, the Commission found that Hilti had violated Article 86 by refusing to provide cartridge strips without nails, and by taking a number of other steps to assure that cartridge purchasers were required to use cartridges only with Hilti nails. In essence, Hilti tied the sales of cartridges and nails together. The Commission defined three separate markets as nail guns, Hilti-compatible cartridge strips, and Hilti-compatible nails. Hilti was found to be dominant in each of these markets.

In the Court of First Instance, Hilti advanced two interrelated arguments. First, its gun, cartridges, and nails were a single, integrated product. Second, as an integrated system, its

101. *But see* Night Services, O.J. L 259/20 (1994), [1995] 5 C.M.L.R. 76 (defining transport markets in terms of classes of end users).

product was interchangeable with a variety of other fastening systems, particularly drilling and screwing, which were therefore part of the same market. The Court of First Instance rejected both arguments. As to the second, the Court of First Instance agreed with the Commission's determination that, in terms of physical and technological characteristics, there was a low degree of interchangeability between fastening systems for many uses and that evidence of the coexistence of different fastening forms with significant shares over a long period of time confirmed this fact. Hilti's arguments that its studies showed a high degree of price elasticity was rejected on the facts. The holding of the Court of First Instance was confirmed by the Court of Justice on the same grounds.¹⁰² These grounds are questionable. Because the Court of First Instance and the Commission found that for a number of applications the PAF system was favored, and for a number it was not, it is difficult to determine the actual degree of substitutability that may have existed. That each of several fastening systems held a significant part of overall fastening sales over a period of time may suggest that each system was technically superior in particular systems, but does not negate price responsiveness among them in the event of a significant price increase.

Hilti also argued that there was a significant degree of supply substitutability between power drill and PAF gun manufacturers, between PAF nails and other nails and screws, and between cartridge strip manufacturers. The Court of First Instance did not resolve any issue of supply substitutability.¹⁰³

The Court of First Instance also agreed that PAF guns and Hilti-compatible cartridges and nails were three separate markets, not one integrated product. Hilti-compatible cartridges and nails are produced by other producers, a fact that alone was deemed to be "sound evidence" of separate markets. To regard these elements as a single system would be "tantamount to permitting producers of nail guns to exclude the use of consumables other than their own branded products in their tools,"¹⁰⁴

102. Hilti AG v. Commission, Case C-53/92P, [1994] E.C.R. I-667, [1994] 4 C.M.L.R. 614.

103. See Opinion of Advocate General Jacobs, *Hilti*, [1991] E.C.R. at II-1439, II-1461, ¶ 31, [1992] 4 C.M.L.R. at 16, 30 (discussing at some length supply substitutability). The issue was not raised in the Court of Justice.

104. *Hilti*, [1991] E.C.R. at II-1473, ¶ 68, [1992] 4 C.M.L.R. at 38-39.

contrary to the right under EC competition law for any producer to produce such consumables. This is frank recognition of the use of market definition to reach a particular result. Having so defined the markets in question, the Court of First Instance rested its finding of dominance on Hilti's share of the market for Hilti-compatible nails. This is curious to those familiar with American law with respect to tying, for it seems to put the market power focus on the tied product. The single brand market definition, therefore, was critical.

Hilti expands upon *Hugin/Liptons*, where the Commission emphasized that the parties seeking spare parts were not the owners of the cash registers, but third parties. The Court of Justice concluded that its judgment in *Hugin/Liptons* did not preclude a finding that equipment and consumables might also be separate markets. A branded market now has been found in the consumables case as well.

Hilti is in a sense a vertical case, not unlike the exclusive supply decisions in *Delimitis* and *Langanese-Iglo*, and, therefore, like these decisions, has no counterpart in decisions involving horizontal concentrations under the Merger Regulation.¹⁰⁵ *Hilti* involves abuse through refusals to deal and thus involves the same policy concerns over such refusals that were apparent in *Hugin/Liptons*. In addition, it involves a market definition carefully tailored to reach a particular result. It is not a case from which to generalize.

d. Supply Substitutability

Despite the Court of Justice's holding in *Continental Can* and the references in several other early cases to the assessment of supply substitutability in defining product markets, there is little in recent cases concerning supply substitutability. In *Tetra Pak II* supply-side arguments were rejected factually. While the supply-side was discussed by the Commission, and more fully by the Advocate General in *Hilti*, neither the Court of First Instance nor the Court of Justice referred to the supply-side. In no recent case has supply-side considerations impacted market definition. Markets have been consistently defined on the basis of demand considerations alone. To the extent considered at all, supply

105. Single brand markets have not been employed in horizontal cases.

substitutability has been treated, along with longer term potential competition, as part of the assessment of competitive effects.

B. *The Definition of Geographic Markets*

Every relevant market includes a geographic market for the obvious reason that firms selling in mutually exclusive geographic areas are not in competition and do not serve to limit the ability of each other to increase price significantly. Geographic market definition involves the identification of those firms, selling the products within the relevant product market, to which customers in the area will turn in the event of a significant price increase, and may also include firms that would enter the geographic area in response to such an increase. Cases under Articles 85 and 86 speak in terms of areas where the "conditions of competition are homogeneous."¹⁰⁶

Article 86 applies to firms holding a dominant position "within the common market or in a substantial part of it." This language presents a subsidiary issue, because it is possible that a properly defined geographic market may not be "a substantial part" of the Common Market. Logically, this is a separate question. But, as Professor Hawk has noted, this requirement may affect market definition by bringing about a reluctance to define markets in term of regions within a single Member State,¹⁰⁷ a reluctance which a detailed review of Court of Justice and Commission decisions clearly reflects. In most cases where geographic market definition has been at issue, the focus has been on whether the market is world-wide, an area covering more than one Member State, or national, recognizing that in a few cases, particularly those involving retailing, the market is obviously local. In its early decisions the Commission and Court of Justice reflected a strong tendency to define markets as national, a result consistent with recognition of the barriers between Member States that were a part of the reason for the Community's creation. Over time, this tendency has become less obvious, particularly in cases under the Merger Regulation, but in Article 86 cases as well.

106. *United Brands*, [1978] E.C.R. at 274, ¶ 39, [1978] 1 C.M.L.R. at 484.

107. Hawk, *supra* note 26, at 778.

1. The Early Cases

In *Suiker Unie*,¹⁰⁸ one of its earliest Article 86 cases, the Court of Justice defined the relevant geographic markets for the sale of sugar as Belgium, Luxembourg, and the southern part of Germany. While some emphasis was placed on high freight rates and the buying habits of processors, driven in part by their need for regular deliveries, emphasis seemed to be placed primarily on the allegedly abusive conduct itself as a measure of the market. Defining geographic markets by reference to the area where the conduct at issue occurred tends of course to make markets self-defining.

The market definition in *United Brands*¹⁰⁹ was all of the Community, less Italy, France, and the United Kingdom. The conditions of competition in these three countries were viewed as different because of discriminatory quotas and import preferences in each. While there were non-discriminatory tariffs and differences in transport costs in the remaining Member States, conditions of competition were effectively the same throughout the whole area. *United Brands* was allegedly unaffected by transport costs, selling in the six country area on a free-on-board ("f.o.b.") basis from two ports. Trade barriers, a conventional element in defining geographic markets, were the critical factor.

The Court of Justice again dealt with geographic market definition in the *Michelin* case,¹¹⁰ a far more controversial decision than *United Brands*. Michelin sold tires in the Netherlands using a system of fidelity rebates. The Commission had found that Michelin abused a dominant position in the market for heavy vehicle tires in the Netherlands even though Michelin and a number of its competitors sold tires throughout the Community, if not the world. The Commission emphasized that Michelin sold in the Netherlands through a Netherlands sales subsidiary, and that it was there that the practices took place. Tire dealers in the Netherlands, moreover, could not obtain Michelin tires from other Michelin subsidiaries and therefore could buy only from other retailers, a source of supply insufficiently relia-

108. *Suiker Unie v. Commission*, Joined Cases 40-48, 50, 54-56, 111, 113-114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

109. *United Brands*, [1978] E.C.R. at 207, [1978] 1 C.M.L.R. at 429.

110. Commission Decision No. 81/969/EEC, O.J. L 353/33 (1981), [1982] 1 C.M.L.R. 643 [hereinafter *Michelin*], *aff'd sub nom.*, *NV Nederlandsche Bandenindustrie Michelin v. Commission*, Case 322/81, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

ble to meet their needs. Dealers were dependent on Michelin tires to maintain prestige. Without them, sales would be lost. The Commission thus came perilously close to defining the product market as Michelin tires.

The Court of Justice accepted this market definition, stressing that the decision was addressed to Michelin's subsidiary, a fact that on its face seems irrelevant to market definition, and adding that Michelin's major competitors also operated through national sales subsidiaries, adapting to the conditions in each national market. Buyers in the Netherlands, moreover, generally obtained tires only from suppliers in the Netherlands.

The decision in *Michelin* contains no analysis of transport costs or cross-elasticity of supply factors. It has been severely criticized for its failure to do so and because of its almost single-minded reliance on the use of national marketing organizations.¹¹¹ While the organization of distribution on a national basis may be indicative of other facts upon which a finding of national markets could be based,¹¹² standing alone and without further explanation it is not compelling. The Commission's apparent concern with the dependence of dealers on Michelin's sales subsidiary may be the most revealing element in the analysis, suggesting that the substantive concern may have been abuse of a dependent relationship rather than an economic concern with the effects of market power.¹¹³

Because geographic markets often were uncontested, there are not many relevant cases in the early period. In those cases where there was a real issue, the analysis of both the Commission and the Court of Justice was relatively brief and conclusory. Many of the fundamental elements later applied, such as high transport costs, legal and regulatory barriers, and sales data showing penetration of different areas, were identified and employed.¹¹⁴ These decisions, and other Commission decisions in these earlier years, are in some respects unconvincing and sug-

111. See, e.g., *HAWK*, *supra* note 26, at 782-83; *Jebsen & Stevens*, *supra* note 56, at 467-68.

112. A firm might use national sales subsidiaries, for example, in recognition of different legal or regulatory environments. A firm might also use national procurement policies, which might themselves indicate that markets are national.

113. See *ABG Oil Companies*, O.J. L 117/1, at 11 (1977), [1977] 2 C.M.L.R. D1, at D14.

114. See Commission Notice, O.J. C 231/2 (1986) (enumerating key factors).

gestive of the use of market definition as an element in implementing substantive policies that are not measured in economic efficiency terms. In more recent years, the principles of geographic market definition have become more refined, particularly in cases under the Merger Regulation. There have been important decisions in the post-1988 period under Articles 85 and 86 as well.

2. The Post-1988 Decisions

The narrowest market definitions in these recent cases are in the transport markets already discussed, definitions that seem to be designed, in some cases at least, for application of the essential facility doctrine.

There are also, of course, cases where opinions are particularly cryptic and some further explanation seems necessary. In *Continental/Michelin*,¹¹⁵ a case involving a notified cooperation agreement for development of a new tire-wheel system, for example, the Commission simply begins with the assertion that the tire market is world-wide. Given its earlier *Michelin* decision, this statement begs for some explanation. Was this definition simply not contested? Is a different standard to be applied under Article 85 than under Article 86, or because this involved a joint venture unrelated to conduct involving distributors? There is no way to know. Similarly, in *Delimitis*¹¹⁶ the Court of Justice, responding to a series of questions on referral from a German court concerning exclusive beer supply agreements, defined the relevant market as national, without elaboration other than to note that "most beer supply agreements are still entered into at a national level." The explanation seems insufficient without some further assessment of the market conditions that underlie the use of such agreements on a national basis. In *Langanese-Iglo*,¹¹⁷ the ice cream exclusive supply case, the Commission relied on *Delimitis* in concluding that the market was Germany, for the same reason. It gave a brief further explanation. National peculiarities were reflected in different consumer brand preferences, prices, and assortments. Finally, the standards for ice

115. *Continental/Michelin*, O.J. L 305/33 (1988), [1989] 4 C.M.L.R. 920.

116. See *supra* note 96 and accompanying text (discussing definition of markets for sale of beer).

117. *Langanese-Iglo*, [1995] E.C.R. II-1533, [1995] 5 C.M.L.R. 602.

cream manufacture were not yet harmonized. Given the differences in governing product standards, it is hard to quarrel with the Commission's conclusion in the absence of evidence that the barrier the standards create could be readily overcome by firms currently outside Germany.

The cases discussed in the preceding paragraph are all Article 85 cases. *Delimitis* and *Langanese-Iglo* are vertical foreclosure cases, which may to some degree explain why the Court of Justice and the Commission defined the markets in terms of the scope of the exclusive supply agreements, although assessment of foreclosure in such cases might normally be based on a determination of the area served by firms to which customers covered by the agreements could otherwise turn for supply. Most Article 85 decisions in which geographic markets are discussed at all tend to do so in conclusory terms, with the primary focus on the competitive effects analysis. The result can be confusing, as it was in *UIP*,¹¹⁸ a case involving a joint distribution and licensing venture between several American motion picture producers and distributors. The Commission defined the geographic market as the Community, because it was concerned only with effects in the Community. It went on to indicate that because of varying cinematographic environments, it would analyze the ventures effects "on the concept of a Community market made up of submarkets corresponding to the various Member States."¹¹⁹ In Article 86 cases, where the analysis of dominant position starts with and depends heavily on market definition, more care seems to be taken, at least in explanation, and more guidance is given. Seldom do these decisions rest on any single factor.

In *British Plasterboard (BPB)*,¹²⁰ the Commission measured dominance in the sales of plasterboard in two geographic mar-

118. Commission Decision No. 89/467/EEC, O.J. L 226/25 (1989), [1990] 4 C.M.L.R. 749 [hereinafter *UIP*].

119. *Id.* at 30, ¶ 38, [1990] 4 C.M.L.R. at 759. A somewhat more detailed analysis is set forth in *UK Agricultural Tractor Registration Exchange*, an Article 85 case involving a detailed information exchange among competitors. Commission Decision No. 92/157/EEC, O.J. L 68/19 (1992), [1993] 4 C.M.L.R. 358 [hereinafter *UK Agricultural Tractor Registration Exchange*]. The Commission defined the market for tractors as the United Kingdom, even though over fifty percent of the tractors sold there were made elsewhere in the Community. Because the suppliers were the same in each country, imports into the United Kingdom could be controlled. The need for local distribution and service was a significant entry barrier.

120. *British Plasterboard (BPB)*, O.J. L 10/50 (1989), [1990] 4 C.M.L.R. 464.

kets, Great Britain and Ireland. Transport costs were high, making it uneconomic to supply from abroad on a large scale. Importers were unable to meet buyers' needs for regular supplies across a wide range of products. For the same reasons, Great Britain and Ireland were not a single market. BPB was the sole producer in both markets. It did not supply one country from the other, and re-export of imports was uneconomic. The decision is straightforward. The reliance on both transport costs and lack of imports is convincing.

Geographic market definition was also at issue in *Hilti*,¹²¹ the nail gun case. In the Court of First Instance, Hilti contended that markets were national, on the grounds that there were substantial price differences from country to country that were not the result of barriers created by private firms, but reflected differences in evaluation of a variety of fastening systems and in other structural elements in each country. The Court of First Instance was brief and to the point. There were substantial price differences. Transport costs were low. Thus, parallel trading between countries was likely, and the market should be defined as Community-wide. Brief as the analysis is, it is important, given the manner in which price disparities have sometimes been taken, as indicative of separate markets. The Merger Regulation itself refers to "substantial price differences" in this manner, as do some early merger decisions. In *Hilti*, on the other hand, they were used to suggest the likelihood of parallel trading and as evidence therefore of Community-wide trading. It is worth noting, however, that more recent merger decisions have given price differences standing alone less weight, and that this may be the result of *Hilti*.

Italian Flat Glass,¹²² a case where markets were defined in the application of Article 86 but not Article 85, is another example where the relevant market, for flat glass, was found to be national, specifically Italy. The Commission concluded that plant location was "a vital factor."¹²³ While transport costs were not "an insurmountable obstacle" to imports, competitiveness decreased as the distance from production plants to buyers in-

121. *Hilti*, [1991] E.C.R. II-1439, [1992] 4 C.M.L.R. 16.

122. Commission Decision No. 89/93/EEC, O.J. L 33/44 (1988) [hereinafter *Italian Flat Glass*]. The Court of First Instance later upheld this decision. *Societa Italiana Vetro SpA*, [1992] E.C.R. at II-1403, [1992] 5 C.M.L.R. at 302.

123. *Italian Flat Glass*, O.J. L 33/44, ¶ 77 (1988).

creased. So while major producers exported, they did so in limited quantities because it was only profitable to do so for quantities produced at marginal cost. Local producers therefore faced only limited competition. Because most suppliers with plants outside Italy were controlled by the same groups to which Italian producers belonged, the risk of outside competition was even less. For customers needing regular supply, purchases must be made within Italy.

There are weaknesses in the Commission's approach that are exposed by its own arguments in the Court of First Instance. It urged that market definition must be based on actual product movements, not those "theoretically possible." Because eighty percent of Italian flat glass consumption was supplied by producers in Italy, there could be "no doubt" that the geographic market was Italy. But market definition must to some degree take into account future probabilities. The existing situation may simply reflect an equilibrium when prices in Italy were at competitive levels and does not necessarily speak to consumer and supplier responses to a significant price increase. Twenty percent of sales were already coming from outside. The Court of First Instance annulled that part of the Commission's decision based on Article 86 but did not resolve questions of market definition. It was troubled, however, by the geographic market definition, noting that documents indicated that Italian producers took account of competition from Benelux countries, Eastern Europe, and Turkey, and that it would have been "useful" for the Commission to have evaluated the effect of distance between these points and Italy.¹²⁴

In *Tetra Pak II*, the Commission had defined the markets for milk packaging machinery as Community-wide because such machines were sold in each Member State and transport costs were low. Price differences among Member States were not taken as evidence of national markets, but were attributable to either monopoly or artificial partitioning of markets. Before the Court of First Instance, Tetra Pak argued that the markets were national

124. In contrast, under the Merger Regulation, the Commission in *Pilkington-Techint/SIV* evaluated a joint venture for the production of float glass, the most common type of flat glass, in a Community-wide market. Commission Decision No. 94/359/EC, O.J. L 158/24 (1994). It found that while float glass could only be transported some five hundred kilometers from each plant, the number and location of plants made it appropriate to define the market as the Community.

because distribution was organized through national subsidiaries and patterns of consumptions and prices varied between states. The Court of First Instance agreed with the Commission and its reasoning. Price differences resulted from artificial partitioning of markets by Tetra Pak and others and, therefore, were not indicative of different conditions of competition. For the same reason, a pattern of purchasing at local levels was not relevant. Finally, no weight was given to the use of national subsidiaries, which was attributable to Tetra Pak's group-wide strategy of partitioning markets. The decision of the Court of Justice in *Michelin*, where considerable weight was given to the use of such subsidiaries, was distinguished because there the national subsidiaries operated autonomously with policies reflecting national market conditions. What is of note in *Tetra Pak II* is the Court of First Instance's unwillingness to give weight to different price levels and the use of national sales subsidiaries without examination of their underlying causes. It also is reflective of the increasing tendency to define markets as Community-wide.¹²⁵

The relationship between overlapping local markets was at issue in *Cement*,¹²⁶ a complex Article 85 case involving price fixing, information exchanges, and related agreements. The Commission defined geographic markets as a set of overlapping markets centered on particular factories, based on an analysis of plant size and capacity, transport costs, and prices. There was a low level of intra-Community trade, but the Commission noted that the low level of exports between areas does not mean there could not be a high level of exports, a position that appears inconsistent with the position it took in *Italian Flat Glass*. The Commission observed that any offer to supply this homogeneous product, even if in only limited amounts, at a price "even slightly lower" than a local producer, could create pressure to lower prices. Exports can occur if the exporter can get higher prices in another area than at home. Given the wide range of price differences over a long period, export could be profitable. In a

125. The Court of Justice in *Tetra Pak II* also ruled in summary fashion that the market did not extend to states that acceded to the EC during the relevant time period. *Tetra Pak II*, O.J. L 72/1, at 18, ¶ 97 (1992), [1992] 4 C.M.L.R at 585. In *Exxon/Shell*, another joint venture case, the Commission declined to extend a Community-wide market to EFTA countries because there was virtually no existing level of imports or exports between EC Member States and those countries. *Exxon/Shell*, O.J. L 144/20 (1994).

126. *Cement*, O.J. L 343/1 (1994).

remarkable passage, the Commission then discusses the relevance of game theory to exporters' decisions to sell into an oligopoly market, where responses and retaliatory actions might be taken, concluding that the existence of geographically separate markets is not a "decisive obstacle" to competition from neighboring markets. Because actions in one market may impact more distant markets, the relevant geographic market was Europe. With its emphasis on likely responses, *Cement* shifts from the static focus of *Italian Flat Glass* and similar decisions, suggesting that the Commission's analysis even in non-merger cases is moving closer to the American approach. *Hilti* seems to reflect a different view of geographic price variations than earlier decisions. The decision in *Tetra Pak II* also marks a departure from the mechanical analysis of *Michelin*. In geographic market cases, as in those involving product markets, the influence of the Court of First Instance is becoming apparent. The Commission may be expected to be more careful in its findings as a result.

II. MARKET DEFINITION UNDER THE MERGER REGULATION

Definition of the relevant market in both product and geographic terms is an essential part of the Commission's substantive analysis in every case under the Merger Regulation.¹²⁷ As a mechanical matter, virtually every merger and joint venture notification or decision under the regulation contains an identified section on the product market and another on the geographic market. Indeed, there appears to be a standard format followed, almost in a "fill-in-the-blanks" sense.

With well over three hundred decisions and published notifications to the parties, there is a lot for the analyst to consider. This is a much higher number of concentration matters with published outcomes than have been published in the United States over a much longer period of time. The reason is simple. Unlike the Justice Department and Federal Trade Commission, the Commission advises the parties who notified it of the proposed transaction of the outcome of its analysis when it concludes, upon consideration of the notification and accompanying submissions, that the transaction "does not raise any serious

127. Council Regulation No. 4064/89, O.J. L 257/14 (1990); see Philip Lowe, *Recent Developments in Merger Control*, in 1994 FORDHAM CORP. L. INST. 139 (Barry Hawk ed., 1995) (examining some recent decisions also discussed in this Article).

doubts as to its compatibility with the common market," that is, that it will not initiate a full proceeding.¹²⁸ As part of this communication, the Commission includes a relatively detailed competitive analysis. This gives to the process a transparency, lacking in the United States, for which the Commission is to be commended. Having said that, however, it is also the case that many of these not incompatible advisories provide less guidance to the Commission's thinking than the far more detailed opinions issued after the formal initiation of proceedings under Article 6, Section 1(c) of the Merger Regulation, many of which also conclude that the transaction is compatible with the Common Market. A very high percentage of the notifications issued without the initiation of proceedings follow a standard approach, which perhaps already can be described as "classic," with respect to market definition. While recognizing, and in some cases discussing, market definition issues raised by the parties or the Commission, the notification concludes that these issues need not be resolved because, even assuming the most narrow market definitions, the market shares are not high enough to suggest that the transaction presents serious competitive issues within the meaning of the Merger Regulation.¹²⁹ This is a highly efficient way of proceeding, particularly given the time constraints within which the Commission must decide whether to initiate proceedings,¹³⁰ but means that many of these notifications contain relatively summary and often unilluminating analysis.

Lawyers handling merger matters also need to be aware that for a number of markets, definitions have already been established. The Commission, unfettered by private cases decided in other fora and, so far, with little direction on market definition matters by the Court of First Instance and the Court of Justice, which in Articles 85 and 86 cases has tended to defer to the

128. The Commission's decisions and notifications to parties without formal proceedings are published in EEC Merger Control Reporter (Kluwer 1996) (4 volumes). Decisions after full proceedings are cited to O.J. L. Notifications to parties are cited with case number and date.

129. There are scores of such decisions. See generally Commission Notice, O.J. C 178/15 (1994) [hereinafter Daimler Benz/RWE]; Commission Notice, O.J. C 228/6 (1992) [hereinafter PepsiCo/General Mills].

130. Under the Merger Regulation, the Commission must make the decision to initiate proceedings within one month of receipt of the notification from the parties. Commission Regulation No. 4064/89, *supra* note 127, art. 10(1), O.J. L 257/14, at 20 (1990).

Commission on these questions anyway, has developed its own set of precedents with respect to particular products and geographic markets. These precedents are likely to govern in subsequent cases. It is therefore critical to know when the Commission is likely simply to rely on the fact that it has already examined and defined the markets at issue. This is particularly true where the Commission has already considered particular markets on a number of occasions. Although the Commission has departed from prior decisions dealing with particular markets,¹³¹ it is not likely to do so. A few illustrations may be useful.

In dealing with products sold to the military, geographic markets are generally defined as national in those cases where the Member State has domestic producers, largely because of defense agency buying preferences. Where the same product is sold for civil uses, or where it is sold to Member States without domestic producers, the market may be either Community-wide, or more commonly, world-wide.¹³² The product market in food retailing is defined in four classes, including small specialty shops, such as bakers, butchers, etc., small neighborhood stores of under four hundred square meters, supermarkets and hypermarkets of over four hundred square meters, and discount stores.¹³³ Geographic markets generally are defined in terms of a radius of twenty minutes driving time, with recognition that because these market circles overlap it is appropriate to define the geographic markets as departments.¹³⁴ Pharmaceutical markets are defined using the third level of the Anatomical Therapeutic Classifications ("ATC") of the World Health Organization ("WHO"). Geographically, pharmaceutical markets are national, primarily because of the legal and regulatory framework still present in Member States, a definition that the Commission

131. In *Renault/Heuliez* and *Renault/Volvo*, the Commission divided the sales of buses into two markets: buses for public transport and touring coaches. Commission Notice, O.J. C 149/15 (1991) [hereinafter *Renault/Heuliez*]; Commission Notice, O.J. C 281/3 (1990) [hereinafter *Renault/Volvo*]. In *Mercedes-Benz/Kassbohrer*, it reexamined the issue in the German market and concluded that there were three markets: city buses, intercity buses, and touring coaches. Commission Decision No. 95/354/EEC, O.J. L 211/1 (1995) [hereinafter *Mercedes-Benz/Kassbohrer*].

132. See generally Commission Notice, O.J. C 264/9 (1995) [hereinafter *Thomson-CSF/Teneo/Indra*]; Commission Notice, O.J. C 136/4 (1993) [hereinafter *Thomson/Shorts*]; Commission Notice, O.J. C 59/13 (1991) [hereinafter *Aerospaiale/MBB*].

133. See, e.g., Commission Notice, O.J. C 239/4 (1994) [hereinafter *Delhaize/PG*]; Commission Notice, O.J. C 232/14 (1992) [hereinafter *Promodes/BRMC*].

134. See *Promodes/BRMC*, O.J. C 232/14 (1992).

has noted may change after the January 1995 directive on new authorization procedures for drugs comes into full effect.¹³⁵ The Commission has repeatedly concluded that while reinsurance is a separate product market, there are as many markets for life and other forms of insurance "as there are kinds of insurance for different risks." Because of national legislation, established market structures, distribution channels, and consumer preferences, insurance markets remain national even though Community legislation "increasingly leads to an opening up to Community-wide competition."¹³⁶ The market for reinsurance, on the other hand, is world-wide. In dealing with a variety of auto parts sold both to car manufacturers and to consumers for replacement purposes, original equipment and replacement markets have consistently been held to be separate, with continuing reliance placed on *Michelin*, an Article 86 case.¹³⁷ Similarly, geographic markets for passenger air transport routes have been defined as city pairs, or bundles of routes where there is evidence of demand-side substitutability, following the decision made under Article 86 in *Ahmed Saeed*,¹³⁸ an approach upheld by the Court of First Instance in *Air France v. Commission*.¹³⁹ The market for standard waste handling services is regional or national, while the market for handling hazardous waste is Community-wide.¹⁴⁰ Pay television and free access television are separate markets.¹⁴¹ The list of decided markets, those markets de-

135. See Commission Notice, O.J. C 156/10 (1991) [hereinafter *Sanofi/Sterling Drug*] (introducing this approach). It has been followed in a large number of other cases. *E.g.*, Commission Notice, O.J. C 113/03 (1994) [hereinafter *Rhone-Poulenc/Cooper*]; see also Commission Notice, O.J. C 278/04 (1994) [hereinafter *American Home Products (AHP)/American Cyanamid*] (noting new drug authorization directive).

136. Commission Notice, O.J. C 180/03 (1995) [hereinafter *Allianz/Elvia/Lloyd Adriatico*]; see generally Commission Notice, O.J. C 296/09 (1991) [hereinafter *UAP/Transatlantic/Sun Life*]; Commission Notice, O.J. C 299/05 (1994) [hereinafter *Commercial Union/Group Victoire*].

137. See Commission Decision No. 91/595/EEC, O.J. L 320/26 (1991) (*Varta/Bosch*); Commission Notice, O.J. C 265/08 (1991) (*Mannesmann/Boge*); *Pilkington-Techint/SIV*, O.J. L 158/24 (1994).

138. See *supra* notes 69-82 and accompanying text (discussing *Ahmed Saeed*).

139. *Air France v. Commission*, Case T-2/93, [1994] E.C.R. II-323.

140. See, *e.g.*, Commission Notice, O.J. C 10/07 (1993) [hereinafter *Waste Management International plc/SAE*]; Commission Notice, O.J. C 88/06 (1993) [hereinafter *SITA-RPC/Scori*]; Commission Notice, O.J. C 165/08 (1994) [hereinafter *GKN/Brambles/Leto Recycling*].

141. See Commission Decision No. 94/922/EC, O.J. L 364/1 (1994), [1995] 1 C.E.C. 2509 [hereinafter *MSG Media Service*]; Commission Notice, O.J. C 244/06

fined in the same manner in a series of decisions that rely on earlier ones, could go on.

The decided markets are important not just because they are decided but also because the list exposes several common issues that run through a number of cases in a more general way. To what extent are markets to be defined for purposes of the Merger Regulation using the standards applied under Articles 85 and 86? This is not an easy question to answer. The expectation of a number of commentators that in merger cases the analysis will be more rigorous, consistent, and economically sound than under Articles 85 and 86, and that this in turn will influence the Commission's analysis in the latter, seems to be correct. More will be said of this subsequently. In one important sense, however, there is a very clear difference between merger cases and others. The Merger Regulation is typically applied, as Section 7 of the Clayton Act is in the United States, before the merger or other concentration has occurred. Article 86 cases rest on proof of actual market effects of allegedly abusive behavior. The Commission has no such evidence to rely upon in merger cases. It must predict likely effects at some point in the future, the relevant time itself being a significant issue. At a minimum, this means the Commission cannot rely on actual price effects as part of the market definition process or to obviate the need for defining markets altogether. Moreover, market definition plays a more significant role in predictive cases than when actual effects can be seen. It would hardly be surprising to see greater care used in merger cases.

Because merger cases are predictive, they must deal in some manner with changes in the market that are in the process of occurring or that will be occurring in the future, a problem that typically does not exist in Article 85 and 86 cases where the inquiry is more directed to the past and present. If weight is to be given to future change, how soon must it be likely to occur in order to be relevant? To be more concrete, what is the impact on market definition of technological change that has not yet had a significant market impact but may well do so in the future? Does, for example, the introduction of digital television transmission impact on the assessment of television markets, even

(1991) [hereinafter *ABC/Generale des eaux/Canal+/WH Smith TV*]; Commission Notice, O.J. C 129/6 (1995) [hereinafter *Kirch/Richemont/Multichoice/Telepiu*].

though it has not yet done so?¹⁴² How soon must it be likely to occur? And should such future change be factored into market definition, or should it be considered as a separate matter in assessing the transaction's likely competitive impact? The more common situation presenting this sort of question arises out of the EU drive toward a truly common market. Through a long series of directives and policies the EU has modified, eliminated, or harmonized previously conflicting national technical and/or safety standards, licensing and authorization requirements, procurement policies, and a variety of other legal or regulatory requirements. In many instances these harmonizing directives have just come into effect, or have not been in effect long enough to accomplish their purpose. Existing national legal and regulatory regimes have played a significant role in defining both product and geographic markets. The use of specific technical standards in public procurement, for example, may impact upon product substitutability and, therefore, on product market definition in markets where government procurement plays a major role. National regulatory policies have played a greater role, however, in defining geographic markets, so it is here that the Community's efforts at harmonization have presented the most serious issues.

It is commonplace that a variety of legal and regulatory barriers can and do have the effect of segregating markets geographically. Tariffs and quotas have long been seen as precluding effective competition across national boundaries and, therefore, as providing powerful evidence that markets affected by such barriers are national. Recognition that particular markets are world-wide has been a phenomenon based on the dropping of such barriers. National health and safety standards, price regulation, entry authorization requirements, procurement policies, and legal protection of government owned or favored enterprises can have the same effect. Not surprisingly, national regulatory regimes imposing such requirements have played a major role in the Commission's analysis of geographic markets, often leading to the conclusion that geographic markets are national in scope. This is still true today, but the period of time that the Merger Regulation has been in effect, 1990 to the present, has coincided with the EU effort to harmonize a broad range of

142. See *MSG Media Service*, O.J. L 364/1 (1994).

product standards, authorization and licensing requirements, public procurement policies, and other regulatory regimes throughout the entire Common Market. The very purpose of these efforts is to create truly Community-wide markets where only national markets existed before. The transition in a broad range of markets is ongoing but incomplete. For a given product or set of products, harmonization directives have not gone into effect. With others, while the relevant directives have gone into effect, implementation has not occurred fully. The rate of implementation may vary from Member State to Member State, and even where full implementation has occurred, market structure may not have changed for a wide variety of reasons. The relevance and evaluation of these changes in defining geographic markets has posed a difficult problem for the Commission. Philosophically committed to Community-wide markets, the Commission cannot and has not simply assumed that such markets necessarily exist, even though it is reasonable to assume that for at least some markets, they will exist at some impossible to predict time in the future. Some markets may, of course, be national or regional for other reasons, such as transport costs. The Commission has therefore been required, consciously or unconsciously, to establish time frames of reference. How far along must the transition be before it becomes relevant in market and/or competitive analysis? If merger cases require a prediction of future effects, at what future time should these effects be assessed? Put another way, if a given transaction is deemed anti-competitive over the very short run, should the transaction be accepted because given the erosion of regulatory barriers the market will become competitive in the future without competition policy intervention, with the corollary that the anti-competitive effects will continue to the detriment of consumers until this occurs? U.S. courts and enforcement authorities have not confronted this set of problems to the same degree. One could argue that most of these regulatory transition questions were resolved in the United States when the Constitution replaced the Articles of Confederation in 1789, although similar questions may arise in dealing with mergers in once regulated markets that are now in the process of deregulation.

The Commission's response to these issues has been cautious. It has not simply assumed that markets that, because of national regulatory requirements or, some might say, regulatory

protection, are currently national should be treated as Community-wide. To the contrary, it has generally defined markets in terms of existing structure and practices. Where the presence of national regulatory regimes has contributed to a determination that markets are national, it has continued to treat them as national for market definition purposes even though such regimes are in the process of harmonization. The pace and effectiveness of harmonization may be considered in the broader assessment of likely future effects.

This can be seen in a number of cases. In *Alcatel/Telettra*,¹⁴³ after a lengthy discussion of Commission directives to liberalize and deregulate telecommunications markets, as well as its directive on public procurement, which was to be implemented in Spain in 1996, the Commission defined the relevant market for telecommunications equipment as Spain. This definition was based on the current structural characteristics of the Spanish market, namely, the procurement policies in Spanish telephone markets, the lack of need for implementation of the procurement directive until 1996, and the vertical links between the Spanish telephone monopoly and its major equipment suppliers. Having so defined the market, the Commission accepted assurances that new procurement policies would be implemented quickly and the link with its major supplier would be terminated and accepted the transaction at issue. The Commission's decision in *Mannesmann/Hoesch*¹⁴⁴ is similar. The market for steel gas line pipes was defined as national, Germany, in large part because of the existence of very detailed German product standards and public procurement policies. After a lengthy discussion of efforts to harmonize standards for these products, efforts expected to lead to new standards in 1994 and, for some elements, in 1996, the Commission concluded that until harmonization was completed the German standards posed a significant entry barrier and "that an immediate change cannot be expected."¹⁴⁵ Even though the market was defined nationally, however, the transaction was declared compatible with the Common Market as a result of a competitive assessment resting in

143. Commission Decision No. 91/251/EEC, O.J. L 122/48 (1991), [1991] 4 C.M.L.R. 778 [hereinafter *Alcatel/Telettra*].

144. Commission Decision No. 93/247/EEC, O.J. L 114/34 (1993) [hereinafter *Mannesmann/Hoesch*].

145. *Id.* at 44.

part on the fact that harmonization of technical standards was to be completed within two to four years, as was implementation of the forthcoming Public Procurement Directive. These developments, characterized by the Commission as "certain," coupled with the existence of strong entry incentives, indicated that, while the proposed concentration might immediately create a dominant position, it would "quickly erode." In *Mercedes-Benz/Kassbohrer*¹⁴⁶ the Commission's analysis follows the same lines, finding the market for city buses national because of German public procurement policies, but then allowing the transaction to proceed because of the expected changes in those policies.

The cases just discussed might lead to the conclusion that, while the Commission defines markets in the short-term, it invariably finds ways to allow transactions to proceed where regulatory barriers are likely to be removed effectively through Community-wide harmonization in the foreseeable future, which we might say means two to four years. At least in cases where the changes are not clearly predictable and implementation time seems uncertain, little weight has been given to the fact that harmonization efforts have begun.

In *Alcatel/AEG Kabel*,¹⁴⁷ the Commission noted that markets for a variety of cables might be thought to be national because of a variety of national technical standards, certification procedures, and procurement policies, but that the markets were in a state of transition because of the harmonization of technical standards and implementation, or the expected implementation, of the EC public procurement directive. Because of the already attained implementation of the procurement directive, the market for telecommunications cable was characterized as Community-wide. As to power cables, however, harmonization was "much less advanced." Because significant differences in national specifications would likely remain "for the foreseeable future," the power cable market was defined as national. In *Hoechst/Schering*,¹⁴⁸ while no final decision on geographic markets was made, the Commission's notification strongly suggests that, in part because of widely divergent authorization procedures, herbicide and fungicide markets should be characterized

146. *Mercedes-Benz/Kassbohrer*, O.J. L 211/1, at 19-20, ¶ 100 (1995).

147. Commission Notice, O.J. C 6/23 (1992) [hereinafter *Alcatel/AEG Kabel*].

148. Commission Notice, O.J. C 9/03 (1994) [hereinafter *Hoechst/Schering*].

as national despite a 1991 directive meant to harmonize authorization procedures. Because of the long time needed to evaluate these materials, no time frame for the full effect of the directive could be established. It should be noted, however, that *Alcatel/AEG Kabel*, *Hoechst/Schering*, and a number of like cases,¹⁴⁹ were notifications issued without full proceedings. In each of these cases, the Commission concluded, after a conventional market analysis, that the concentration did not raise serious doubts about compatibility with the Common Market. It was not required to go further and consider the weight to be given to harmonization directives in its competitive assessment.

These transition issues will become less severe as the harmonization of regulatory standards becomes increasingly effective. National markets will become Community markets, and we may expect that geographic market issues will focus more on whether markets are local or regional within Europe on the one hand, or world-wide on the other. Past decisions defining markets nationally because of different regulatory standards may be cast aside. The pharmaceutical cases provide some foreshadowing of things to come. In its 1991 notification in *Sanofi/Sterling Drug*,¹⁵⁰ the Commission concluded that pharmaceutical markets were national. By 1995 the Commission was taking note of the entry into force on January 1 of that year of the new marketing authorization procedures for drugs throughout the Community. Because various national regulatory requirements are not affected by the adoption of these procedures, drug markets were still characterized as national,¹⁵¹ but these are markets where a broader geographic market will in the not-too-distant future be found.

The Commission's approach to the transitional problems arising from the harmonization over time of a variety of national regulatory requirements and procurement policies has been highly pragmatic. When truly pushed, in cases where concentrations might otherwise be found incompatible with the Common Market because of such existing requirements, it has tended to

149. See, e.g., Commission Notice, O.J. C 322/19 (1991) [hereinafter *TNT/Canada Post*].

150. Commission Notice, O.J. C 156/10 (1991) [hereinafter *Sanofi/Sterling Drug*].

151. See *American Home Products (AHP)/American Cyanamid*, O.J. C 278/3 (1994).

allow the parties to proceed where harmonization is very likely, over a relatively short time period, to ameliorate their impacts, although it has done so not in the way it defines markets but in its overall analysis of competitive effects. By so doing, it is implicitly recognized that at least some of the concentrations notified to it reflect the desire of the parties to position themselves to be competitive as protecting barriers fall. It would be ironic if parties were driven to merge in anticipation of impending harmonization, and the Commission's analysis in the meantime ignored that fact.

One further transitional issue is now developing. On January 1, 1993, the European Economic Area ("EEA") Treaty came into effect. As a result, and with little discussion, Commission notifications in some cases began to characterize markets not as Community-wide but as EEA-, or Community and EEA, wide.¹⁵² The Europe Agreements may ultimately have similar effects, either because the countries of Eastern Europe become full-fledged EC members, or because of the dropping of trade barriers even if they do not. These changes will likely force the Commission to a greater consideration of intra-European regional markets for some products and services.

Finally, before turning to a more detailed analysis of the EC approach to both product and geographic market definitions under the Merger Regulation, one other element common to the analysis of both should be noted. Any reader of the Commission's modifications and decisions must be struck by the frequency with which the Commission relies on surveys and other inquiries of both competitors and customers and, in some cases, consumers, in the affected markets. The Justice Department and Federal Trade Commission have done the same. The Merger Guidelines, which define markets by asking what would happen in response to a "small but significant and non-transitory

152. *See, e.g.*, Commission Notice, O.J. C 212/23 (1992) [hereinafter Rhone Poulenc/SNIA]. In deciding whether EFTA countries are included in the market, the focus has been on the presence or absence of legal or regulatory barriers, transport costs and the degree of existing import and exports between EU member states and EFTA countries. *See, e.g.*, Commission Decision No. 94/208/EC, O.J. L 102/15 (1994), [1994] 1 C.E.C. 2136 [hereinafter Mannesmann/Vallourec/Ilva]; Commission Notice, O.J. C 259/03 (1994) [hereinafter Vesuvius/Wulfrath]. *See also* Commission Notice, O.J. C 187/07, ¶ 16 (1994) [hereinafter Electrolux/AEG] ("The integration of EU and EFTA States and the resulting removal of barriers to trade means that markets are no longer national in scope.").

price increase," virtually invite the use of data derived from competitors and customers. The same question is posed in a number of Commission decisions. Such inquiries produce a good deal of information. The Commission, however, also relies on the ultimate judgments of consumers and competitors with respect to product substitutes, consumer preferences, and geographic availability of competing products, particularly when they agree on these questions. It is thus not unusual for Commission decisions and notifications to recite the judgments of customers and competitors as one ground for defining markets in a particular manner.¹⁵³ There is little evidence that this has been done routinely in Article 85 and 86 cases.

A. The Definition of Product Markets Under the Merger Regulation

The Merger Regulation itself contains no specific provisions dealing with how product markets are to be defined, nor does it indicate how market share data is to be used or weighted in the Commission's competitive analysis. Its ultimate standard, that a merger that "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it . . ." is prohibited, suggests an analysis comparable to that for finding dominance under Article 86. This calls for the use of market shares at least as a starting point in merger cases. The Court of First Instance has so indicated.¹⁵⁴ A critical element of market share determination is product market definition, the point at which the competitive analysis in the Commission's notifications and decisions routinely begins. Definition of product markets is also critical in considerations relating to relief and to the evaluation of undertakings offered by the parties in order to be permitted to proceed with concentrations otherwise thought by the Commission to be incompatible with the Common Market.

Very broadly, the Commission has defined product markets in terms of substitutability in the eyes of the consumer, demand substitutability, and, in a much more limited number of cases, in

153. See generally Commission Notice, O.J. C 300/22 (1991) [hereinafter *Metallgesellschaft/Safic Alcan*]; Commission Decision No. 91/535/EEC, O.J. L 290/35 (1991), [1992] 4 C.M.L.R. M81 [hereinafter *Tetra Pak/Alfa-Laval*]; Commission Decision No. 92/553/EEC, O.J. L 356/1 (1992) [hereinafter *Nestle/Perrier*]; Commission Notice, O.J. C 169/10 (1994) [hereinafter *Medeol SA/Elosua SA*].

154. *Air France*, [1994] E.C.R. at II-352, ¶ 80.

terms of supply substitutability. Market definition is an empirical economic issue, an issue addressed in the Merger Guidelines by asking what would happen if a hypothetical monopolist of a given product, narrowly defined, imposed a "small but significant and non-transitory price increase, the price of other products remaining the same."¹⁵⁵ This same formulation appears in various forms in several Commission decisions, most notably *Nestle/Perrier*,¹⁵⁶ where the Commission concluded that "an appreciable non-transitory increase in the price of source waters" would not lead to a significant shift to soft drinks. More often, the Commission has begun its analysis with the "price, characteristics, and intended use" formula found in several notices and block exemptions issued in the implementation of Article 85(3).¹⁵⁷

In many cases, product markets are uncontested and obvious. The issue of product market definition arises when there are arguably other products to which consumers could turn in the event the concentration attempted to increase price or engage in other conduct that adversely affects their interest, or where a generic class of products, for example "beverages," which in a very general sense serve the same purpose for consumers, such as quenching thirst, but the market needs more narrow definition to accurately reflect a reasonable degree of substitutability. There may be a number of products that meet a given consumer need, but consumers do not treat all of them indifferently. Some end users of a given product may, because of their specific needs or end uses, have virtually no real substitutes available, while others, purchasing exactly the same product, may be readily able to turn to substitutes.

There are a variety of methods by which demand substitutability could be measured. Consumers simply could be asked to identify substitutes, or to respond directly in an effort to elicit their response to a hypothetical price increase. Direct inquiry of competitors may reveal the substitute products that they perceive to be a competitive threat, and/or to identify industry practice that is of evidentiary value. Cross-elasticity studies re-

155. 1992 MERGER GUIDELINES, *supra* note 18, § 1.11.

156. *Nestle/Perrier*, O.J. L 356/1, at 3-4 (1992).

157. *E.g.*, Commission Notice, O.J. C 56/16 (1991) [hereinafter *Digital/Kienzle*]; *Mannesmann/Hoesch*, O.J. L 114/34, at 38, ¶ 40 (1993).

flecting price relationships between products can be utilized. The characteristics of the products at issue, including their physical attributes, design, and normal uses, may be evaluated, to the end of identifying what a reasonable consumer could do. The Commission has utilized all of these techniques, often in combination, in the product market definition process. Because all of these elements are so commonly used in combination, it is difficult to know what weight the Commission gives to each. The decided cases can, however, be broken into specific categories and each of the critical factors examined independently. First, there are a large number of cases in which the critical issue is whether products that are not the same in terms of physical characteristics, but are used for the same purpose by consumers, are in the same market. For example, are paper towels and paper napkins in the same market? Second, where products are physically similar, but are used for different purposes by buyers, markets might be identified by end use. Third, within a given product market, producers may use some percentage of their product output internally, as when aluminum ingot is both sold to manufacturers of fabricated aluminum products and used internally by the ingot producers to produce products from it. Is such captive use part of the product market? These same questions also have been considered, of course, under Article 86.

1. Physically or Technically Differentiated Products

Like Article 86 cases, the Commission's merger analysis in the first category of cases typically begins with an examination of qualitative factors, the physical characteristics, and the end uses of the products in question. Where these characteristics or uses are sufficiently different, they may belong in separate markets for that reason alone. In *Fiat Geotech/Ford New Holland*,¹⁵⁸ for example, the Commission divided the agriculture machinery market into tractors, combines, and hay and forage machines based on little more than its assessment that each type of machine was physically different and served different consumer needs. This is an objective evaluation, arrived at without consideration of cross-elasticity or reliance on surveys of consumers or competitors. There are a number of cases of this sort, some of them directly

158. Commission Notice, O.J. C 118/14 (1991) [hereinafter *Fiat Geotech/Ford New Holland*].

applying the standard in the Notice on Agreements of Minor Importance, namely that product interchangeability should be "judged from the vantage point of the user, normally taking the characteristics, price, and intended use of the good together" ¹⁵⁹

The qualitative inquiry focuses initially on physical characteristics, technological considerations, and the uses to which the product has been and can be put. In *ABC/Generale des Eaux/Canal+/W.H.Smith TV*,¹⁶⁰ for example, the Commission concluded that pay-television was a market apart from free-access television. Pay-television, financed by subscription fees, broadcast specialized programming catering to narrowly targeted audiences. While free-access television, on the other hand, paid for by advertising revenues, offered programming of wider interest. This distinction is adhered to and elaborated upon in a subsequent series of cases.¹⁶¹ In *DuPont/ICI*,¹⁶² the market for nylon carpet fibers was distinguished from polypropylene, acrylic, polyester, and natural fibers after a very detailed analysis of such characteristics as dyeability, resilience, abrasion resistance, and flammability, all characteristics of importance to carpet manufacturers. In pharmaceutical cases, different technical and therapeutic qualities have led the Commission to define markets in accordance with the third level of the ATC system recognized by the WHO, a delineation recognized by the Commission as involving "a certain level of arbitrariness," indicating that, within a limited range, considerations of certainty and administrative ease may be appropriate.¹⁶³ Steel gas line pipes were distinguished from pipes of plastic and other materials in *Mannesmann/Hoesch*¹⁶⁴ not

159. Notice on Agreements, O.J. C 231/2, § 11 (1986); see *supra* note 156 (citing cases that use this standard). While the Merger Regulation itself says nothing about product market definition, as already noted, Form CO, which sets forth what is required in a notification, incorporates this same "characteristics, price, and intended use" standard. Form correlating to the notification of a concentration pursuant to regulation (EEC) No. 4064/89 §6.I, reprinted in EEC Merger Control Reporter (Kluwer 1996, Part A, p. 31).

160. *ABC/Generale des eaux/Canal+/WH Smith TV*, O.J. C 244/06 (1991).

161. See *supra* note 140 and accompanying text (discussing cases distinguishing between pay-television and free-access television).

162. Commission Decision No. 93/9/EEC, O.J. L 7/13 (1992) [hereinafter *Du Pont/ICI*].

163. *Sanofi/Sterling Drug*, O.J. C 156/10 (1991); see *supra* note 134 and accompanying text (discussing other pharmaceutical cases).

164. *Mannesmann/Hoesch*, O.J. L 114/34, at 39, ¶ 42 (1993).

only because of significantly different physical characteristics, but also because of barriers to interchangeability based upon differences in national safety standards and procurement policies. In these and a number of other cases, market definition rested on the Commission's qualitative assessment without detailed consideration of cross-elasticity studies or of more subjective factors, such as consumer or competitor opinion.

The evaluation of a product's characteristics and end uses is, as noted above, to be examined "from the vantage point of the user." The Commission, therefore, may focus on the nature and needs of consumers themselves. While products may seem fungible in terms of purpose, switching costs may preclude more than limited substitutability, as was the case in *Tractebel/Distrigaz II*,¹⁶⁵ where gas and electricity were viewed as separate markets. Based largely on what it perceived as different needs of business and leisure travelers, the Commission in *Havas Voyage/American Express*¹⁶⁶ regarded travel agencies serving business travelers as a market different from those serving those leisure travelers. In *Medeol/Elosua*¹⁶⁷ bottled olive oil was distinguished from bottled sunflower oil partly because the two products appealed to different groups of consumers. Olive oil generally was purchased by those who like its taste and its health benefits, while sunflower oil appealed to those with different tastes and attracted to its sharply lower prices. In perhaps its most extreme use of consumer profiling, the Commission in *Newspaper Publishing*¹⁶⁸ recognized that there were separate markets for British tabloid, mid-market, and quality newspapers, based upon differences in price, content, and the different socio-economic levels of their readers.

Reliance on qualitative characteristics of this sort in product market definition is commonplace in American cases as well, where a similar analysis is typically the starting point, and, in some cases, the end of the inquiry. This is not true of all of the qualitative factors upon which some of the Commission's decisions rely, particularly where the use of different absolute price levels, as opposed to a lack of correlation in price movements, is

165. Commission Notice, O.J. C 249/3 (1994) [hereinafter *Tractebel/Distrigaz II*].

166. *Havas Voyages/American Express*, O.J. C 117/8 (1995).

167. *Medeol SA/Elosua SA*, O.J. C 169/10 (1994).

168. Commission Notice, O.J. C 85/6 (1994) [hereinafter *Newspaper Publishing*].

used to differentiate product markets. In *Torras/Sarrio*,¹⁶⁹ for example, one factor relied upon in putting coated and uncoated paper in different markets was that coated paper prices were roughly fifteen percent higher. Differences in prices were one of several factors used in *VIAG/Continental Can*¹⁷⁰ to separate glass, plastic, and metal beverage containers. Substantial price differences contributed to the conclusions in *Nestle/Perrier*¹⁷¹ that bottled source waters and soft drinks were not in the same market and in *Newspaper Publishing*¹⁷² that the British market for national newspapers consisted of separate markets for tabloid, mid-market, and quality papers.¹⁷³ In each of these cases, the Commission's decision did not rest solely on price level differences, and is, perhaps, justifiable on other grounds.

Reliance on price differences in product market definition is a characteristic of EC competition policy generally, as we have seen. Why are such differences, unconnected from relative price movements, relevant at all? As the leading American commentator notes, and as the U.S. Supreme Court held in the *DuPont* case,¹⁷⁴ "[p]roducts can be near-perfect substitutes even when their prices or qualities differ."¹⁷⁵ Consumers could switch from a product priced at US\$1.00 to a substitute priced at US\$1.50 if the lower-priced product increased to US\$1.10 and the consumer used the cheaper product only when the price differential was US\$0.50. While the relativity of price movements is of great

169. Commission Notice, O.J. C 58/20 (1992) [hereinafter *Torras/Sarrio*].

170. Commission Notice, O.J. C 156/10 (1991) [hereinafter *VIAG/Continental Can*]; see also Commission Decision No. 96/222/EC, O.J. L 75/38 (1996) [hereinafter *Crown Cork & Seal/Carnaud Metalbox*] (concluding that there is no single packaging market that includes metal, glass, plastic, and paper). The Commission found that tinsplate and aluminum aerosol spray cans are in separate markets because of a lack of elasticity between aluminum and tinsplate cans. The Commission based its finding on a combination of price and quality differences, an analysis of customer switching costs, and customer surveys.

171. *Nestle/Perrier*, O.J. L 356/1 (1992).

172. *Newspaper Publishing*, O.J. C 85/6 (1994).

173. See *Medeol/Elosua*, O.J. C 169/10 (1994) (relying in part on large price differences in putting olive oil and sunflower oil in different markets); see also Commission Notice, O.J. C 225/3 (1994) [hereinafter *Voith/Sulzer (II)*] (suggesting that large price differences between new and reconstructed paper machines indicated that they were in separate markets).

174. *United States v. E.I. du Pont de Nemours & Co. (Cellophane)* 351 U.S. 377 (1956).

175. AREEDA ET AL., *supra* note 2, at ¶ 562c.

importance, absolute price levels seem in most cases of little relevance.

In some cases involving manufacturers of goods incorporated into final products by downstream manufacturers, the Commission has relied on another price factor, the relationship of the price of the upstream product to the price of the finished product, in segregating markets. This is illustrated in *VIAG/Continental Can*,¹⁷⁶ where the Commission observed that beverage containers were but a small part of the retail cost of beverages, and in *Tetra-Pak/Alfa Laval*,¹⁷⁷ where machines for packaging aseptic milk in cartons were defined to exclude machines for packaging such milk in plastic and glass, with the Commission noting that the machines were but a small part of the retail price of aseptic milk. Because this was so, the Commission reasoned, the retailer's decision to purchase milk likely would not be influenced by a significant price increase in the price of packaging machines. Why, one might ask, is the focus not on the decisions made by beverage and milk bottlers who purchase these machines? The same rationale might apply, but if retailers, and consumers, are indifferent to the packaging, why would bottlers not switch in response to a significant machine price increase? The answer in these cases may well be that they are not indifferent.¹⁷⁸

While a number of Commission decisions end with its qualitative analysis, many, particularly those where a full proceeding was initiated, do not. A simple characteristics, price, and end use analysis is often inconclusive. Physically different products may serve the same function for at least some buyers, or at least so it is argued. While the Commission has repeatedly asserted that "a limited substitutability in terms of functionality is not sufficient to establish substitutability in competition terms,"¹⁷⁹ the evaluation of the degree of substitutability in these cases is typically more complex than an examination of qualitative factors permits. Care must be taken here not to place too much weight

176. *VIAG/Continental Can*, O.J. C 156/10 (1991).

177. *Tetra Pak/Alfa-Laval*, O.J. L 290/35, at 38, ¶ 19 (1991), [1992] 4 C.M.L.R. M81, M88 (following decision under Article 86 in *Tetra Pak II*).

178. The decision in *Tetra Pak II* found that consumers had strong packaging preferences and that those preferences exerted a greater influence over packager/producers than price.

179. *Nestle/Perrier*, O.J. L 356/1, at 2 (1992).

on notifications where the Commission simply assumes the most narrow market without decision after suggesting a range of very narrow markets, almost casually at times. In the typical case where there is a significant issue concerning differentiated products and where the matter cannot be disposed of by simply assuming the most narrow possible market, the Commission has relied heavily on quantitative methods of analysis, such as relative price movements, more formal econometric cross-elasticity studies, and, in some cases, on more subjective evaluations by competitors and consumers.

Cross-elasticity of demand is a conventional method of market analysis.¹⁸⁰ Measures of cross-elasticity, the rate at which buyers switch to a substitute product in response to a price increase in another, are an alternative means of analyzing interchangeability, a methodology utilized by the U.S. Supreme Court in *United States v. E.E. du Pont de Nemours & Co.*¹⁸¹ and in the Merger Guidelines. The Commission's use of cross-elasticity studies and relative price movements generally looks to existing prices, and thus is subject to the so-called *Cellophane* fallacy, namely that buyers may switch from product A to product B when the price of A rises only when the manufacturer of A is already charging monopoly prices.¹⁸² The 1992 Merger Guidelines attempt to correct this problem to some extent,¹⁸³ but the Commission has not done so. The use of current prices for cross-elasticity analysis may, however, be perfectly justifiable where, as under the Merger Regulation, the focus is on future competitive conditions.¹⁸⁴ Consumer and competitor surveys may also be of value, if for no other reason than that people who deal in a given product may know better than anyone else the markets in which they function. Competitor responses, of course, must take into account that competitors may color their views based on their views of the competitive or efficiency effects of the merger in question.

180. HOVENKAMP, *supra* note 1, at § 3.4.

181. 351 U.S. at 377.

182. See AREEDA ET AL., *supra* note 2, at ¶ 539.

183. "[T]he Agency will use prevailing prices . . . unless premerger circumstances are strongly suggestive of coordinated interaction, in which case the Agency will use a price more reflective of the competitive price." 1992 MERGER GUIDELINES, *supra* note 18, § 1.11.

184. William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 623 n.35 (1983).

Cross-elasticity, or the lack thereof, has played a major role in a number of cases.¹⁸⁵ In *Tetra Pak/Alfa-Laval*¹⁸⁶ the Commission faced the argument that machines for packaging aseptic milk in cartons were in the same markets as machines packaging the same product in plastic or glass. After finding different physical characteristics between the two types of packaging that impacted on retailer and transport costs, the Commission also relied on the views of both manufacturers and dairies that price elasticity was low. The Commission's decision in *Nestle/Perrier*,¹⁸⁷ finding that bottled source water and soft drinks were not a single market and defining the market as bottled source water alone, is a particularly good example of the Commission's method of analysis where some degree of substitutability is likely. First, the Commission examined the physical characteristics of bottled source water, finding that consumers identified it with purity, cleanliness, and "in general, health and a healthy style of life," a view confirmed by a number of consumer surveys and by the manner in which the product is promoted. Second, to further emphasize these differences, the Commission found substantial absolute price differences, with soft drinks selling at two to three times the price of bottled source water, a factor of dubious relevance, as discussed earlier, although given the magnitude of the price difference it may be more relevant here than in other cases. Finally, the Commission found that the prices for the two sets of products had had a very different price evolution and that there was an absence of any real price correlation. Similarly, in *DuPont/ICI*¹⁸⁸ the Commission's differentiation between nylon and polypropylene fibers began with an assessment of the physical and use characteristics of each fiber type. Its conclusion that nylon fibers were in a separate market were confirmed by a lack of cross-price elasticity. Even though the Commission found that it was unable to measure precisely, the data was sufficient to show a general tendency.

By far the most elaborate analysis of product markets is the

185. See, e.g., *Newspaper Publishing*, O.J. C 85/6 (1994); *Medeol SA/Elosua SA*, O.J. C 169/10 (1994).

186. *Tetra Pak/Alfa-Laval*, O.J. L 290/35 (1991).

187. *Nestle/Perrier*, O.J. L 356/1 (1992).

188. *Du Pont/ICI*, O.J. L 7/13 (1992).

Commission's decision in *Procter & Gamble/VP Schickedanz*,¹⁸⁹ where the critical issue was whether there was a single product market for feminine hygiene products or whether tampons and sanitary pads were in two separate markets. While both are used for the same general purpose, there are significant physical differences between them. As in *Nestle/Perrier*, the Commission examined consumer preferences, finding, on the basis of a series of consumer studies, that once a decision was made to use one product or the other, the usage patterns remained stable, although Procter & Gamble introduced conflicting studies. Studies of supermarket scanner data indicated that cross-price elasticity was low. Tampons and sanitary pads, therefore, were separate product markets. It is hard to imagine what the Commission omitted.

Other forms of consumer and customer inquiries also have been used. These inquiries may simply gather relevant facts, seek to identify likely responses to hypothetical price increases, or ask for judgments about market definition directly. In *Aerospatiale-Alenia/De Havilland*,¹⁹⁰ for example, the Commission distinguished between commuter aircraft with twenty to thirty-nine seats, forty to fifty-nine seats, and sixty seats and over, based in large part on the views of competitors and customers that these divisions did reflect accurately relevant markets. Other cases¹⁹¹ place similar reliance on such judgments, both as to product and geographic markets. There are clearly dangers in the reliance not on the facts, but on the opinions such inquiries elicit. It would be extremely unwise to rely simply on such opinions, which may reflect a number of biases, and the Commission has not done so. In each instance where such opinions have been referred to, they have been confirmed by qualitative evidence.

2. Physically Similar Products with Different End Uses or Methods of Distribution

Products that appear identical or nearly identical may be sold for quite different end uses. A chemical agent, Agent X, might be sold for use as a component in drug manufacture or in

189. Commission Decision No. 94/893/EC, O.J. L 354/32 (1994), [1995] 1 C.E.C. 2466 [hereinafter *Procter & Gamble/VP Schickedanz*].

190. Commission Decision No. 91/619/EEC, O.J. L 334/42 (1991) [hereinafter *Aerospatiale-Alenia/de Havilland*].

191. See, e.g., *Medeol/Elosua*, O.J. C 169/10 (1994).

the manufacture of paint. When, if ever, should the market be defined in terms of end use, for example, as the sale of Agent X to drug manufacturers? Or when should the market definition of an otherwise fungible product take into account the type of distributor to whom it is sold? Under the Merger Guidelines, end use markets are appropriate only if the seller could successfully impose a "small but significant and non-transitory price increase" on a particular group of buyers, that is, when it can successfully discriminate in price.¹⁹² The answer under the Merger Regulation is less clear.

The Commission has suggested end use or class of customer markets in notifications in which it has not decided on market definition but has simply assumed the narrowest possible market.¹⁹³ These cases are not a reliable guide to the Commission's thinking. There are cases, such as *DuPont/ICI*, where markets are defined in end use terms. In *DuPont/ICI*, for example, nylon fibers for use in carpet manufacture, but in *DuPont/ICI* the fibers for different uses differed physically. A carpet manufacturer, therefore, could not buy from or resell to a different type of manufacturer who used nylon fiber with different physical characteristics. But what of the case where the same product is sold to different types of buyers?

Since the Court of Justice's decision in *Michelin*,¹⁹⁴ an Article 86 case treating the sales of new tires to OEMs and to distributors for sale as new replacement tires as separate markets, the Commission has maintained the distinction in a number of cases involving automobile parts. The Commission has maintained the distinction even though the parts sold to OEMs and as replacements are exactly the same. The distinction appears in a number of decisions under the Merger Regulation.¹⁹⁵ As a practical matter, given the decision in *Michelin*, upon which a number of merger decisions expressly rely, the Commission may have no choice. It has not questioned whether the standards adopted in an Article 86 case should apply to merger cases, and

192. 1992 MERGER GUIDELINES, *supra* note 18, § 1.12.

193. See, e.g., *Rhone-Poulenc/Cooper*, O.J. C 113/03 (1994) (leaving open questions whether distribution of drugs by wholesalers and direct sales by laboratories are separate markets).

194. See *supra* notes 54-56 and accompanying text (discussing *Michelin*).

195. See *Varta/Bosch*, O.J. L 320/26 (1991); *Mannesmann/Boge*, O.J. C 265/08 (1991); *Pilkington-Techint/SIV*, O.J. L 158/24 (1993).

it has explained the outcome in the same terms as *Michelin*. It has stressed that the distinction reflects common industry practice, as well as different competitive conditions. Sales to car manufacturers require that they strictly comply with specifications of the buyer, maintain a close research relationship between buyer and seller, and satisfy year-round just-in-time delivery requirements. These relationships are not needed in the replacement market, where there are sales to a large number of varied types of buyers, demand is seasonal, and an extended distribution system is required.¹⁹⁶ The Commission, however, has not discussed the price relationship between these two markets, nor has it asked whether these equipment manufacturers can, or have, successfully discriminated in price between these two classes of buyers. If one assumes that car manufacturers pay a lower price for equipment on new cars than is paid for replacement parts, how is this discrimination maintained? The answer may simply be that of a lawyer rather than an economist. The Commission is simply following what the Court of Justice has said.

On the other hand, when the Commission in *McCormick/CPC/Rabobank/Ostmann*¹⁹⁷ concluded that the sale of dried herbs and spices to food retailers was a market separate from sales to industrial users and restaurants, it rested its decision squarely on the fact that retailers may be charged different prices, and that arbitrage between these groups of customers did not seem possible. Retailers buy in small glass bottles, whereas industrial users buy in large drums. Repackaging did not seem likely.

Thus, while the Commission has occasionally suggested end use markets, particularly where different distribution systems are involved, there is nothing in its Merger Regulation cases to suggest that, in the absence of price discrimination, it is prepared to define markets in end use terms where products are otherwise found to be interchangeable.¹⁹⁸

196. See *Varta/Bosch*, O.J. L 320/26 (1991) (explaining why relationships are not needed in replacement market); see also *Mannesmann/Boge*, O.J. C 265/08 (1991).

197. Commission Notice, O.J. C 256/03 (1993) [hereinafter *McCormick/CPC/Rabobank/Ostmann*].

198. See Commission Notice, O.J. C 204/09 (1991) (suggesting separate markets for granulated sugar to industrial users and to retail trade) [hereinafter *Eridiana/ISI*]. The Commission did not ultimately reach a decision, referring instead to each class of sales as market "segments." It noted that there was a close price connection between

3. Supply Substitutability

The ability of a firm or group of firms to increase price above competitive levels is dependent not only on demand factors but also on the willingness of firms not currently producing the product to do so in response. Potential competition may check market power as effectively as the availability of substitute products. Issues relating to market barriers and long run potential entry are generally outside the scope of this Article. Supply substitutability may bear, however, on market definition and to that extent is relevant here.

Supply substitutability can be considered in two ways in terms of market definition. Markets can be defined simply in terms of demand considerations, and all questions relating to potential entry can be assessed as part of the general analysis of competitive effects, the method generally employed by U.S. enforcement agencies and courts through the 1970s.¹⁹⁹

Alternatively, at least in those cases where firms not producing the product currently have the ability to do so without incurring substantial costs within a relatively short period of time, the market can be defined as including some part of the capacity of these firms, with longer run potential entry still separately evaluated in the competitive analysis. The latter is now the approach taken in the Merger Guidelines.²⁰⁰ Specifically, these Merger Guidelines include in the market those firms likely to produce the product in question within one year in response to a significant price increase, where there are no significant sunk entry and exit costs, and no serious product acceptance, production, or distribution barriers that would make entry unprofitable. The obvious case is where a firm outside the market currently has the technology and equipment to produce the product in question and the ability, through its existing system, to distribute it. Once firms meet the Merger Guidelines' criteria, the amount of their capacity likely to be devoted to production in response to a significant price increase is included in the calculation of market share.

the two segments, but that this was unlikely to be a factor in the absence of price variations.

199. See *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) (explaining difference between old regime, where supply substitutability was treated apart from market definition, and new regime of Merger Guidelines).

200. 1992 MERGER GUIDELINES, *supra* note 18, § 1.32.

Despite the fact that the Commission's decision in *Continental Can*,²⁰¹ an Article 86 case, was rejected by the Court of Justice in part because of its failure to assess adequately supply-side substitutability in defining the relevant market, markets have generally been defined only in terms of demand substitutability. All matters relating to future entry, whether in the short- or long-term, have been considered in evaluating dominance and anti-competitive effects. This has been true in Articles 85 and 86 cases, in those block exemptions where a calculation of market share may be required, and in the Notice, where substitutability is determined in terms of characteristics, price, and intended use. The same has been true in decisions under the Merger Regulation. Potential competition is generally evaluated in determining dominance, although it must be said that seldom has a concentration been allowed where in the short run it results in dominance because of the likelihood of entry in the more distant future.²⁰²

It would not be accurate to say, however, that supply substitutability has never been relevant in product market definition. In *Aerospatiale-Alenia/De Havilland*,²⁰³ the Commission did consider the ability of aircraft manufacturers producing commuter aircraft in the twenty to thirty-nine seat aircraft category to produce commuter aircraft in the forty to fifty-nine seat category, and vice versa, as part of its process of defining relevant product markets. It concluded that, while there might be some possibility that manufacturers could modify existing models to larger capacities, the ability was insufficient to show that aircraft in one group were substitutable for aircraft in another, which appears to be a strict demand substitutability test. It also noted, however, that even if facilities for doing so already existed, conversion of production would take "longer than three or four years,"²⁰⁴ which the Commission obviously believed was too long. In *Mannesmann/Hoesch*²⁰⁵ possible supply substitutability was considered in greater detail. After concluding in demand terms that the market appeared to be steel gas-line pipes, it turned to the argument that the market should not be so defined because

201. *Continental Can*, [1973] E.C.R. 215, [1973] C.M.L.R. 199.

202. *But see* Mercedes-Benz/Kassbohrer, O.J. L 211/1 (1995).

203. *Aerospatiale-Alenia/De Havilland*, O.J. L 334/42 (1991).

204. *Id.* at 45, ¶ 14.

205. *Mannesmann/Hoesch*, O.J. L 114/34 (1993).

producers of other types of steel tubes could quickly and easily switch production to gas-line pipe. The Commission established a general standard that in determining product markets "supply-side substitutability can only be taken into account if manufacturers of products other than the product in question can readily and quickly switch to the production of the latter."²⁰⁶ The Commission then rejected this argument, partly because it concluded that switching would be more costly and time-consuming than the parties contended. To the extent the argument rested on the ability of manufacturers of other types of steel tubes to switch, as opposed to the ability of firms that did not already produce steel tubes to do so, given that all major steel cable manufacturers already produced gas line pipe, the question was not one of market definition but of potential capacity utilization by firms already in the market. The issue, in short, was one of expansion, not entry. Nevertheless, the decision clearly suggests that supply substitutability may be relevant to market definition in a limited number of cases.

This is confirmed in *McCormick/CPC/Rabobank/Ostmann*,²⁰⁷ where the Commission had concluded, based on demand considerations, that sales of herbs and spices to retailers were a market separate from the sale of these products to industrial and catering firms. The Commission factually rejected a contention that firms specializing in sales to the latter could switch to supplying retailers and should therefore be included in the retail market. Supply-side substitution was relevant in market definitions only "when it can take place in the very short-term and without significant costs."²⁰⁸ The Commission found there would be significant costs and time lags.

Because these decisions factually reject supply substitution claims, they are not clear demonstrations of the Commission's willingness to modify markets defined in demand terms as a result of supply considerations. The language of these decisions does suggest the possibility. The standard in *McCormick/CPC/Rabobank/Ostmann* begins to sound like the standard in the Merger Guidelines.

206. *Id.* at 41, ¶ 66.

207. *McCormick/CPC/Rabobank/Ostmann*, O.J. C 256/03 (1993).

208. *Id.*

4. Other Product Market Issues

a. Technology Markets

The licensing of technology is a significant business activity with major consequences throughout the world. It is not surprising that antitrust authorities in the United States and the European Community have begun to focus directly on the impact of private firm conduct on technological development, and to do so by focusing directly on competitive effects as measured in technology terms, rather than on the impact of such conduct in the product or service markets in which technology is utilized, as has been done in the past. This shift of focus will in some cases require definition of technology markets. In recent years, the Justice Department has in several cases defined markets in terms of technology development and licensing.²⁰⁹ The Commission did so for the first time in *Shell/Montecatini*,²¹⁰ where one of the markets in which the competitive effects of a proposed joint venture was defined as the licensing of advanced polypropylene technology and associated services, a market that the Commission concluded was world-wide in scope. This decision was followed in *Union Carbide/Enichem*,²¹¹ which dealt with the licensing of polyethylene technology.

The use of technology markets in competitive analysis raises a number of issues not discussed here. It may be noted, however, that the Commission's approach to market definition in these cases is relatively conventional. In both, the analysis began with recognition of product markets for polypropylene and polyethylene. The available and desired technologies in the production of these products were identified, as were the firms engaged in licensing these relevant technologies. Market shares were then determined.

The identification of competing technologies is a daunting task, more complex in many cases than in the cases that the

209. *See, e.g.*, *United States v. General Motors Corp. and ZF Friedrichshafen A.G.*, Civ. No. 93-530 (D.Dela. 1993) (complaint-transaction withdrawn); *United States v. Pilkington plc*, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D.Ariz.) (consent). The FTC has also used such market definitions. *See, e.g.*, *Montedison S.p.A.*, 5 Trade Reg. Rep. (CCH) ¶ 73,749 (1995) (consent).

210. Commission Decision No. 94/811/EC, O.J. L 332/48 (1994) [hereinafter *Shell/Montecatini*]. *See* Lowe, *supra* note 127, at 142-43 (discussing *Shell/Montecatini*).

211. *Union Carbide/Enichem*, O.J. C 123/05 (1995).

Commission has considered so far. Much further development is needed before the Commission's approach can be fully evaluated.

b. Captive Output

It is standard practice in the United States that captive output, output of a factor of production used internally in the production of downstream goods or services, is included in the market for the base product. A higher price may bring an expansion of production or shift away from internal use by the integrated firm.²¹² While the 1992 Merger Guidelines are somewhat ambiguous, the 1984 Merger Guidelines are categorically clear on the point.²¹³

The rule applied by the Commission is otherwise. In *Mannesmann/Boge*²¹⁴ the Commission excluded from the market for shock absorber sales to motor vehicle manufacturers all shock absorbers that they produced and used internally. The only explanation offered was that these products did not represent an alternative source of supply to other vehicle manufacturers. It recognized that there was a "theoretical possibility" that the motor vehicle manufacturers might switch to their own production in the event of a price increase by outside producers, but found that such a switch would not occur because of the vehicle manufacturers' desire "to reduce production depth" and because alternative sources were available. The Commission's "theoretical possibility" is the reverse of the normal rationale for inclusion of captive output in the market, namely that producers with captive output would move to sales to outside producers in the event of such an increase.

Mannesmann/Boge was followed in *Accor/Wagon Lits*²¹⁵ where, in defining a market for group catering to hospitals and educational and other institutions, the Commission excluded

212. See AREEDA ET AL., *supra* note 2, at ¶ 535e.

213. The 1984 Justice Department Merger Guidelines state that captive production and consumption "are part of the overall market supply and demand." §2.23. The current (1992) Merger Guidelines include such output of vertically integrated firms when inclusion "accurately reflects their competitive significance in the relevant market prior to the merger." §1.31.

214. *Mannesmann/Boge*, O.J. C 265/08 (1991).

215. Commission Decision No. 92/385/EEC, O.J. L 204/1 (1992) (*Accor/Wagon Lits*).

from the market catering carried out by the institutions themselves. This, the Commission explained, was "in line with the Commission's consistent practice."²¹⁶ The Commission relied upon *Accor/Wagon Lits in Unilever France/OrtizMiko II*²¹⁷ to exclude so-called artisanal ice cream from the market for impulse ice cream. Impulse ice cream, consumed at or near the point of sale, is a market that the Commission concluded was to be divided into separate markets for wrapped ice cream, scooped ice cream, and soft ice cream, a set of markets already defined in the Commission's decision under Article 85 in *Langanese-Iglo*.²¹⁸ Artisanal ice cream, manufactured by traveling dealers who produce their own ice cream and by very small manufacturers who sell at the place of production and/or scattered local sites, was excluded from the market even though it represented a very substantial share of ice cream sales in some Member States, in part because some of the demand was captive.

B. *The Definition of Geographic Markets Under the Merger Regulation*

Firms that sell the same products in mutually exclusive areas do not compete in the same area and are not, therefore, in the same geographic market. In merger cases, geographic market definition is simply the process of identifying those firms that produce the same product as the parties and provide reasonable alternatives to consumers, thus limiting the ability of the merged firms to raise prices to noncompetitive levels.

Under the Merger Guidelines geographic markets are defined by starting with the geographic region in which the merging parties sell and asking whether a hypothetical monopolist that was the only producer with locations in that area could profitably impose a "small but significant and non-transitory" price increase.²¹⁹ If firms with locations elsewhere are such a sufficiently attractive alternative to buyers that an attempt to increase price at the initial location would make sales unprofitable because of lost volume, these firms must be added to the market. The market definition is expanded until a hypothetical monopo-

216. *Id.* at 15, ¶ 15.

217. *Unilever France/OrtizMiko II*, O.J. C 55/05 (1994).

218. *See supra* notes 98-101 and accompanying text (discussing *Langanese-Iglo*).

219. 1992 MERGER GUIDELINES, *supra* note 18, § 1.21.

list of the redefined area could impose such an increase. The Merger Guidelines further provide that in judging likely buyer response, the enforcement agencies will take into account evidence that consumers have shifted, or have considered shifting, purchases between areas in response to relative changes and that sellers have based decisions on the likelihood of such switches. The timing and costs of switching will also be considered. When the hypothetical monopolist could successfully discriminate in price among buyers in different locations and arbitrage is unlikely, separate markets are indicated. The 1984 Merger Guidelines were more specific in identifying shipment patterns, transportation costs, and costs of local distribution as relevant factors.²²⁰ In most cases these factors, along with a variety of regulatory barriers, are the primary focus of the inquiry.

Unlike product market definition, the Merger Regulation itself sets forth a general standard for the definition of geographic markets. Article 9, Section 7 of the Merger Regulation states:

The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in these areas. The assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between the area concerned and neighboring areas or of substantial price differences.²²¹

The first sentence of this provision is strikingly similar to the general standard set forth by the Court of Justice in *Suiker Unie*,²²² an Article 85 case.

This provision of the Merger Regulation appears in the article pursuant to which the Commission is authorized to refer a notified concentration to the competent authorities of Member States when it is likely to impede competition through the crea-

220. U.S. DEPARTMENT OF JUSTICE MERGER GUIDELINES § 2.32 (1984).

221. Commission Regulation No. 4064/89, *supra* note 127, art. 9(7), O.J. L257/14, at 20 (1990).

222. *Suiker Unie*, [1975] E.C.R. at 1977, ¶ 371, [1976] 1 C.M.L.R. at 451.

tion or strengthening of a dominant position in a market within a Member State. The appropriateness of referrals is not a question discussed in this Article. The very fact that geographic market definition plays a critical role in the process suggests that, where referral is at issue, market definition may be under stress as pressure is brought to bear on the Commission to refer a matter. The Commission's treatment of geographic market definitions may generally be based on purely economic criteria, as appears to be the case, but where referral is at issue, undisclosed non-economic factors may shape the way in which the market is defined. This may have been the case, for example in *McCormick/CPC/Rabobank/Ostmann*,²²³ where the Commission found a separate national market for dried herbs and spices in Germany, thereby permitting the Commission, which was unable to proceed itself because a critical deadline was missed, to refer the matter.

Before turning to specific Commission decisions in detail, several other general observations are in order. First, any assessment of the Commission's approach to geographic markets must recognize that the Community was born out of a desire to overcome the fact that national boundary lines had long served as major barriers to competition throughout Europe. Tariffs, quotas, procurement policies, and variant technical and regulatory requirements all served to segregate and protect national and local markets. These barriers were reinforced in some cases by language differences and local or national customs and preferences. For these and other reasons, even firms that operated in a number of European countries often organized their distribution systems along national lines, using national sales subsidiaries or other, less formal, means. As the Merger Regulation came into effect, these national barriers were falling, and they continue to do so, but in some markets entrenched positions may still hold. To a U.S. observer, the Commission still seems overly willing to define markets as national through reliance on such factors as national concentration data, price differences determined along national lines, and disparate national market shares. Logically, these do necessarily reflect national border barriers. When the Commission, for example, uses a sharp dis-

223. *McCormick/CPC/Rabobank/Ostmann*, O.J. C 256/03 (1993). See Lowe, *supra* note 127, at 145.

parity in national market shares as a factor in reaching the conclusion that markets are national, as it frequently does, it assumes that national, as opposed, for example, to regional, market shares are something meaningful. But why should such shares be determined on a national basis in the first place? The Commission has defined markets as narrowly as the area within a twenty minute drive to a supermarket²²⁴ and as broadly as the world.²²⁵ It has in a limited number of cases defined markets in terms of regions within Europe that overlap national boundaries.²²⁶ In most cases, however, the critical issue is whether the market in question is national or Community-wide, or, in some later, cases EEA-wide. Some of the key factors the Commission examines, and the way in which the data upon which it relies is organized, seems to lead it to perceive the issue in this way. Given the Community's background, the continuing concern with breaking down national barriers, and the fact that even with these barriers falling markets that benefitted from national protection are slow to change, it is neither surprising nor unwise that the Commission so often sees the issue in national-EC terms.

Second, because the Merger Regulation coincides with, and indeed may be seen as part of, the intensification of the Community's efforts to harmonize a variety of legal, technical and other regulatory standards throughout the Community, geographic market definition has been particularly impacted by the transition issues discussed earlier. The Commission as a result has been required to focus on not only the existence of barriers of this sort, but also on the imminence of their demise and their lingering effects.

Third, it is important again not to give too much weight to notifications where a variety of possible geographic markets are discussed, but for the purposes of decision the narrowest markets are assumed. There are clues in these decisions, but often not much more.

224. *Promodes/BRMC*, O.J. C 232/14 (1992).

225. The geographic markets in most defense industries have been defined as world-wide. See *Aerospatiale/MBB*, O.J. C 59/13 (1991); *Thomson/Shorts*, O.J. C 136/4 (1993); *Thomson-CSF*, O.J. C 264/9 (1995). See also *Aerospatiale-Alenia/De Havilland*, O.J. L 334/42 (1991); *Metallgesellschaft/Safic Alcan*, O.J. C 300/12 (1991).

226. There are relatively few cases of this sort. See *Eridiana/ISI*, O.J. C 204/09 (1991); *VLAG/Continental Can*, O.J. C 156/10 (1991).

Turning to the decisions themselves, it is clear that where the issue is close no single factor is decisive. There are, of course, cases where a single factor may be decisive, particularly when there are significant trade or regulatory barriers, or transport costs are extremely high and, as a result, markets must be viewed as national or local.²²⁷ On the same basis, high tariffs and/or transport costs on goods coming into the Common Market indicate that the market does not extend beyond the European Community.²²⁸ There are also cases in markets that have been the subject of previous decisions where the outcome turned on what the Commission already had decided. Pharmaceutical and insurance markets are national. Markets for major items of military equipment are world-wide. These decisions may be reexamined as the presence of regulatory barriers fall. Similarly, the Commission may be prepared to reevaluate markets defined in older decisions under Articles 85 and 86.²²⁹ For lawyers handling cases confronted with precedent of this type, the central issue will be whether market conditions have changed since the earlier decision.

Most cases, however, involve an evaluation of a multiplicity of factors, some of which may point in opposite directions. While transport costs, shipment and purchasing patterns, and price correlations, or the lack thereof, seem to be the most significant of these factors, others have played an important role. Different market shares among major producers in different Member States are taken as evidence that the market is no greater than national, even though it also indicates that these firms are making sales in each. High concentration levels in a given Member States are thought to be evidence of the same. Here, as with the analysis of differing market shares, the data used as a starting point is almost invariably national. Significantly, different price levels between geographic areas have been a major element in determining that each of these areas is a separate geographic market. Weight has been put on consumer

227. See *supra* notes 143-53 and accompanying text (discussing Commission's definitions of markets).

228. See, e.g., Commission Notice, O.J. C 259/06 (1994) [hereinafter *Rhone-Poulenc/Caffaro*]; Du Pont/ICI, O.J. L 7/13 (1992).

229. See *Eridiana/ISI*, O.J. C 204/09 (1991) (reexamining geographic market definition for sugar employed in *Suiker Unie*). See also Commission Notice, O.J. C 165/39 (1992) [hereinafter *Solvay-Laporte/Interox*].

buying preferences, and, therefore, the presence or absence of Euro-brands advertised and promoted throughout the Community, as opposed to brands that are promoted in a single Member State. In addition, particularized needs, such as buyers' need for proximity to production plants to insure just-in-time delivery has been a factor in determining the geographic market. Organization of distribution systems on a national basis has been another factor in cases holding that a market is national, as opposed to Community-wide. Language differences also play a role in a limited number of cases. The cases discussed below illustrate how each of these factors has been applied.

In *Magnetti-Marelli/CEAc*,²³⁰ the second case in which the Commission initiated full proceedings, the Commission set the stage for utilization of several factors analyzed in subsequent cases in an increasingly refined way. The Commission concluded that the market for replacement starter batteries was national, for France and Italy, rather than Community-wide, because market shares of the producers varied significantly between Member States, and prices in Germany and Spain were higher than elsewhere in the Community. These are two of the key factors described in the Merger Regulation itself. These differences, the Commission believed, could be attributed to a variety of causes. The Commission mentioned causes such as different product ranges being sold in different Member States, varying stock of existing vehicles, differences in brand preferences, significant differences in distribution channels. The Commission also noted that the concentration of supply in these markets constituted a significant entry barrier which made it difficult for other firms to increase market shares or enter. The Commission did not use high concentration to suggest that interdependent pricing had raised prices to above competitive levels. Its suggestion that high concentration is an entry barrier is elaborated upon in *Nestle/Perrier* and *Procter & Gamble/VP Schickedanz*,²³¹ discussed below. Missing from the decision is any detailed analysis of interpenetration data reflecting the level of imports and ex-

230. *Magnetti-Marelli/CEAc*, O.J. L 222/38 (1991). The Commission elaborated upon and followed the analysis of geographic market for starter batteries at issue in *Magnetti-Marelli* in subsequent decisions. See e.g., *Varta/Bosch*, O.J. L 320/26, at 31, ¶ 38 (1991) (discussing arguments for finding that geographic market was Europe).

231. *Procter & Gamble/VP Schickedanz*, O.J. L 354/32 (1994), [1995] 1 C.E.C. 2466.

ports to and from France and Italy from other Member States. As the Commission has gained experience in merger cases, such data has become a key element in its analysis.

A significant disparity in market shares on a national basis has continued to be a significant element in the Commission's analysis, as set forth in the Merger Regulation, just as relative uniformity of national market shares has taken to be indicative of an Community-wide market. In *Mannesmann/Boge*²³² the replacement shock absorber market was defined in Community-wide terms, with emphasis being placed on the fact that all major manufacturers were present in all Member States, market shares were very even, and there was evidence of strong and mutual penetration of Member State markets, with imports representing fifty percent or more of total sales. The OEM was more complex. Market shares were less uniform, with national producers having the highest shares in several Member States, a fact deemed unimportant because physical proximity of vehicle manufacturers to supplies was not "a decisive geographic barrier." This appears to be an explanation as to why significant variations in market share are important. In this case, the critical element seemed to be that European vehicle manufacturers asserted that they purchased on a Community-wide basis. In *Mannesmann/VDO*,²³³ another case involving the sale of auto parts to manufacturers, the Commission followed its earlier decision, but observed that where different market shares are extreme the assumption that markets for auto parts are Community-wide might not hold, at least in the absence of evidence of significant intra-Community trading. While market share disparity continues to be an element in analysis, particularly where national companies have very high shares in their home state,²³⁴ it appears to be only a starting point and of consequence only when the variations in shares are quite large. The Commission, in recent cases where there were such disparities, has not rested on that fact alone but has gone on to examine the underlying reasons for them. In *Knorr-Bremse/Allied Signal*,²³⁵ although no decision was ultimately reached, the Commission noted that, while the national market

232. *Mannesmann/Boge*, O.J. C 265/08 (1991).

233. Commission Notice, O.J. C 297/12 (1991) (*Mannesmann/VDO*).

234. See Commission Notice, O.J. C 57/07 (1995) [hereinafter *Svenska Cellulosa/PWA*].

235. Commission Notice, O.J. C 298/04 (1993) [hereinafter *Knorr-Bremse*].

shares for replacement brake system components varied considerably, the disparity was not a good indication of national markets because it was attributable to different vehicle mixes and the consumers' preference for a replacement part of the make employed by the original vehicle manufacturer.

The current approach is shown in *Mercedes-Benz/Kassbohrer*.²³⁶ While the Commission's analysis of the geographic market for city buses begins with the observation that market shares of major manufacturers varied significantly between Member States, with national companies having the highest share in their home countries, the decision that Germany was a separate market actually rests on the fact that there was a relatively low level of imports into the German market and public authorities in Germany routinely purchased German products.

High concentration in national markets has also been a factor in defining markets in national terms in a handful of cases in addition to the battery decisions. While a large number of factors led to the conclusion in *Nestle/Perrier*²³⁷ that France, as opposed to a larger regional area including Belgium and parts of Germany, was the relevant market for bottled source water, the Commission bolstered its decision with a finding that a very high degree of concentration in France was a barrier to entry because it increased the likelihood of reaction against newcomers, a view it expressed again in *Procter & Gamble/VP Schickedanz*.²³⁸ In these two cases, the reference to high concentration in a national market seems incidental to the outcomes, which were based on a number of other, more important, elements. To an American antitrust lawyer, the fact that high concentration is perceived as a barrier to entry seems curious.²³⁹ High concentration is normally associated with the likelihood of interdependent, supra-competitive pricing. Such pricing is not a barrier but an invitation to enter.²⁴⁰

236. *Mercedes-Benz/Kassbohrer*, O.J. L 211/1 (1995). See Commission Notice, O.J. C 24/06 (1995) [hereinafter *Elsag Bailey/Hartmann & Braun Age*].

237. *Nestle/Perrier*, O.J. L 356/1 (1992).

238. *Procter & Gamble/VP Schickedanz*, O.J. L 354/32 (1994), [1995] 1 C.E.C. 2466.

239. *But see* *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) (expressing view that fear of retaliation by firms in increasingly concentrated market might serve as barrier to entry and deterrent to aggressive competition by small firms in market already).

240. High concentration might of course be reflective of scale economies, the presence of which would make entry by outside firms with higher costs less likely. If on

Of the three critical elements in *Magnetti-Marelli/CEAc*, including disparate market shares, high national concentration, and significant variations in national prices, the last has been the most commonly employed in finding markets national. In defining the market for dried herbs and spices as Germany, for example, the Commission in *McCormick/CPC/Rabobank/Ostmann*²⁴¹ concluded that, while price differences were eroding, differences remained and price negotiations were generally carried out at the national level. Again defining the market as Germany, this time for potash, the Commission in *Kali + Salz*²⁴² pointed to significantly higher prices in Germany than in the rest of the Community, even though German producers had substantial excess capacity. Interestingly, the Commission also defined the market for the rest of the Community as Community-wide, resting in part on the generally comparable prices throughout the rest of the area. Substantial price differences also played a role in *Procter & Gamble/VP Schickedanz*, although emphasis was also placed on the relationship of price movements between Member States.

Significant differences in prices between geographic areas do not necessarily indicate that each of these areas is a separate market. Different price levels may suggest cost advantages resulting from greater efficiencies, lower wages or other locally varying costs, differences in transport costs, and so on. Sellers in the low cost areas may be insulated from the competition of those in high cost areas, suggesting that the low price area is a separate market. But buyers in the high price areas clearly could be expected to switch to sellers in the low cost areas in case of a price increase if the price advantage of doing so is more than its added costs, such as higher transport costs, assuming that no other barriers are present.²⁴³ The high price area should not be char-

examination in a given area supra-competitive prices are being charged, that fact alone may indicate market power. That would be true without regard to concentration levels elsewhere.

241. *McCormick/CPC/Rabobank/Ostmann*, O.J. C 256/03 (1993).

242. Commission Decision No. 94/449/EC, O.J. L 186/38 (1994) [hereinafter *Kali + Salz*].

243. This very point seems to have been recognized by the Court of First Instance in *Hilti*, an Article 86 case, and by the Commission in *Cement*, a case under Article 85. See *supra* notes 121-26 (discussing geographic market definition in terms of price differences).

acterized as a market on the basis of price differences alone.²⁴⁴ Real price levels in different areas may be very difficult to determine, moreover, in the face of varying patterns of rebates, discounts, and other conditions of purchase. Such data, therefore, is often unreliable. For this reason, the Commission in *Mercedes-Benz/Kassbohrer*²⁴⁵ found it inappropriate to rely on price comparisons. Instead, it focused on interpenetration of sales among Member States.

While price and market share disparities continue to play a role in the Commission's analysis, significantly greater emphasis has been put on the relationship between prices, that is, price correlations, shipment patterns, transport costs, and particularized consumer needs and preferences. Positive price correlations, evidence that prices have moved similarly in different areas, suggest that there is a single geographic market. Where prices differ and price movements are uncorrelated, however, separate markets are likely to be found. Similarly, significant imports from one area into another and significant exports from the second area to the first suggest that there is a single market. A lack of exports from and imports in a given area is more ambiguous, at least in the absence of evidence of low price correlations.²⁴⁶ The Commission has relied on price correlation data, often in combination with shipment data, both in finding markets to be Community-wide, and, in some cases, world-wide, and in finding markets to be national. In *Mannesmann/Boge*,²⁴⁷ for example, the Commission found that there was a strong and reciprocal penetration of sales of shock absorbers for the replacement market throughout the Common Market, with imports representing as much as fifty percent of total sales.²⁴⁸ Conversely, in *McCormick/CPC/Rabobank/Ostmann*, Germany was held to be the relevant geographic market for dried herbs and spices, in part because imports into Germany were at very low levels.²⁴⁹

244. See HOVENKAMP, *supra* note 2, at 112-13.

245. *Mercedes-Benz/Kassbohrer*, O.J. L 211/1 (1995).

246. The lack of exports and imports may simply reflect the fact that both markets are competitive. The analysis of likely responses to a significant price increase in one area should focus on transport costs.

247. *Mannesmann/Boge*, O.J. C 265/08 (1991).

248. See Commission Notice, O.J. C 58/05 (1992) (using similar analyses) [hereinafter *Torras/Serio*]; see also Commission Notice, O.J. C 82/04 (1995) (making heavy use of customer interviews) [hereinafter *Dalgety PLC/The Quaker Oats Company*].

249. *McCormick/CPC/Rabobank/Ostmann*, O.J. C 256/03 (1993).

The most detailed examination of these factors has been in *Mannesmann/Vallourec/Ilva (DMV)*,²⁵⁰ where the issue was whether the market for stainless steel tubes was Community-wide, world-wide, or a geographic area broader than Europe but narrower than world-wide. The Commission found that the United States, Japan, and Western Europe were separate markets. The Commission has dealt with a number of cases where the argument has been made that the market is world-wide, or at least larger than Western Europe. It has found markets world-wide when dealing with sales of aircraft, satellite equipment, and other similar material where the sales are not to government agencies for defense or other governmental purposes.²⁵¹ Technology licensing cases have to date defined the geographic market as world-wide.²⁵² More often in these cases, because of high transport costs and/or significant tariffs on goods coming into the European Community, the market is ultimately defined as the Community, including, in later cases, the EEA countries. In *Mannesmann*,²⁵³ the Commission referred to both tariffs and transport costs, but based its conclusion primarily on a very careful analysis of price correlations and shipment data. Price correlations between the United States and Europe were strong, but in the absence of other supporting evidence, such as mutual penetration of geographic areas, a high degree of price correlation was not itself sufficient to establish a market broader than Western Europe. The Commission seems to have concluded that an absence of price correlation is a stronger indication of separate markets than the reverse. While exports from Western Europe exceeded ten percent of total production, import penetration into Western Europe was significantly less. The Commission specifically considered the so-called Elzinga-Hogarty test,²⁵⁴ which concludes that either an import or export level in excess

250. *Mannesmann/Vallourec/Ilva (DMV)*, O.J. L 102/15, at 21, ¶ 37 (1994), [1994] 1 C.E.C. 2136.

251. See generally *Thomson-CSF*, O.J. C 264/9 (1995); *Thomson/Shorts*, O.J. C 136/4 (1993); *Aerospaiale/MBB*, O.J. C 59/13 (1991).

252. See *Shell/Montecatini*, O.J. L 332/48 (1994); *Union Carbide/Enichem*, O.J. C 123/05 (1995).

253. *Mannesmann Vallourec/Ilva (DMV)* O.J. L 102/15, at 20, ¶ 29 (1994), [1994], 1 C.E.C. 2136.

254. K. Elzinga & T. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973); K. Elzinga & T. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 ANTITRUST BULL. 1 (1978).

of ten percent is indicative of a wider market, faulting the test on the ground that mutual penetration was necessary to permit arbitrage based on price differences in between areas. The latter argument seems at least debatable. The issue, after all, is what the response to a significant future price increase is likely to be. Static existing shipment data is not necessarily indicative of an absence of future response in one direction or the other.²⁵⁵

Not surprisingly, transport costs have played a significant role in the Commission's decisions. Where transport costs are sufficiently high that it would be unprofitable for firms outside a given area to sell into that area even in the face of a significant price increase, that area is most likely a separate market, as the Commission has recognized.²⁵⁶ In *Pilkington-Techint/SIV*,²⁵⁷ for example, the Commission found that transport costs of glass were sufficiently high that each of some thirty-six flat glass plants in the European Community served an area approximating a circle with a radius of some five hundred kilometers. Because the circles substantially overlapped, however, it was appropriate to define the market as at least Community-wide. The Commission has used the same overlapping concentric circle analysis in defining food retailing markets. While from the consumers' point of view the market is narrowly local, these being markets determined by consumers' willingness to travel, markets were defined more broadly because of the overlaps of these areas.²⁵⁸

Variations in distribution systems in different Member States have also been thought indicative of national markets. Why this is so is not altogether clear. In several decisions, the Commission has simply indicated without explanation that, even when major firms are present and selling in a number of Member States, the organization of marketing and distribution on a national level was a factor in finding a given product market national.²⁵⁹ This may reflect nothing more than a judgment that companies that organize their distribution along national

255. See *Cement*, O.J. L 343/1 (1994) (noting meaning of shipment data).

256. See *Kali + Salz*, O.J. L 186/38 (1994) (explaining use of transport costs); see also *Nestle/Perrier*, O.J. L 356/1 (1992) (discussing importance of transport costs).

257. *Pilkington-Techint/SIV*, O.J. L 158/24, at 24, ¶ 4 (1994). See *supra* note 124 (contrasting Article 86 decision in *Italian Flat Glass*).

258. *Promodes/BRMC*, O.J. C 232/14 (1992).

259. See, e.g., Commission Notice, O.J. C 226/04 (1993) (*Nestle/Italgel*); Commission Notice, O.J. C 273/06 (1993) [hereinafter *American Cyanamid/Shell*]; *Knorr-Bremse*, O.J. C 298/05 (1993); *Mannesmann/Valourec/Ilva (DMV)*, O.J. L 102/15

boundary lines, for example, making sales in Germany through a German sales subsidiary, must do so because of variations in local customs, buying preferences, which may also be reflected in the use of national rather than Euro-brands, legal or technical barriers, or language difficulties. These factors can be addressed directly, however, without using differences in the structure of distribution as a surrogate. The Commission has long been concerned, of course, with breaking down distribution restraints, particularly prohibitions on parallel imports by distributors, but assuming that no such prohibitions exist, there is no reason to believe that parallel imports will not occur in response to price increases in a given area. In those cases where an explanation has been given, the focus has been either on the added costs of having to adjust marketing strategies in different areas because of the prevalence of one type of distribution in one area and another elsewhere, thus making it difficult to employ a common strategy throughout the Common Market,²⁶⁰ or because difficulty of access to distribution in a given Member State operates as a barrier to entry.²⁶¹ An inability to obtain access to local distributors may be such a barrier, but this would presumably be of greatest concern when the focus is on the ability of firms not currently making sales in the area to do so, not when those firms already have a significant presence.

Of importance in some cases is the nature of brands under which goods are sold, advertised, and promoted. The Commission, in merger cases, has not suggested that product markets should be defined in terms of brands. It has, however, used the distinction between national brands and Euro-brands in differentiating national and Community-wide markets. In *Procter & Gamble/VP Schickedanz*,²⁶² one of the key elements in a determination that the market for sanitary napkins was national, for Germany and Spain, was the fact that no major supplier sold under the same brand names throughout Europe, even though several sold in most Member States. While several heavily promoted brands were sold in a number of countries, a large proportion of

(1994), [1994] 1 C.E.C. 2136. *But see supra* notes 124-25 and accompanying text (discussing *Michelin* and *Tetra Pak II*).

260. *Magnetti-Marelli/CEAc*, O.J. L 222/38 (1991).

261. *McCormick/CPC/Rabobank/Ostmann*, O.J. C 256/03 (1993).

262. *Procter & Gamble/VP Schickedanz*, O.J. L 354/32 (1994), [1995] 1 C.E.C. 2466.

sales was under "important, essentially national brands." To be sure, the Commission's decision was based on several other factors. Price levels and market shares differed significantly from country to country, purchasing was generally done on a national basis, concentration in each country was high, and there was a high degree of brand loyalty. The emphasis on national brands, both as an indication of consumer preference and as a barrier to entry, is striking. Just as the prevalence of national brands has been taken to suggest that markets are national, brands common throughout Europe have been indicative of a Community-wide market.²⁶³

Finally, the Commission has looked to particular customers' needs, which suggests that markets must be limited to firms capable of meeting these needs. With respect to both newspaper and television markets, for example, markets have been defined in national terms in large part because of language and cultural differences that play a key role in news, editorial, and program content.²⁶⁴ For products like complex machinery, the need for technical assistance or rapid servicing has been recognized as a basis for confining markets geographically to firms that can provide such services rapidly and dependably.²⁶⁵ Where customers are manufacturers whose production is dependent on just-in-time delivery, the need for physical proximity to the suppliers' plants has been stressed in rejecting arguments that markets were Community-wide.²⁶⁶ A particularly interesting example is *Metallgesellschaft/SaficAlcan*,²⁶⁷ where the market for natural rubber was defined as world-wide. For latex, however, the market was characterized as Community-wide because customers' need for rapid delivery required the presence of supply tanks within the Common Market.

263. See *Dalgety PLC/The Quaker Oats Company*, O.J. C 82/04 (1995). See also *Svenska Cellulosa/PWA*, O.J. C 57/07 (1995).

264. See *Newspaper Publishing*, O.J. C 85/6 (1994) (discussing definition for newspaper markets); *MSG/Media Service*, O.J. L 364/1 (1994), [1995] 1 C.E.C. 2509 (explaining television markets). See also Commission Notice, O.J. C 93/08 (1991) (noting markets for mail order catalogues) [hereinafter *Otto/Grattan*].

265. See *Mannesmann/Hoesch*, O.J. L 114/34 (1993) (discussing criteria for defining markets); *Vesuvius/Wulfrath*, O.J. C 259/03 (1994).

266. See *VIAG/Continental Case*, O.J. C 156/10 (1991). See also *Crown Cork & Seal/Carnaud Metalbox*, O.J. L 75/38 (1995). Cf. *Mannesmann/Boge*, O.J. C 265/08 (1991) (noting that in particular case physical proximity not critical to just-in-time delivery and therefore not "decisive" barrier).

267. *Metallgesellschaft/SaficAlcan*, O.J. C 300/12 (1991).

While the discussion above identifies and, in some cases, questions a number of the elements commonly employed in the Commission's analysis, seldom is any one determinative. No case better exemplifies this than *Procter & Gamble/Schickedanz*, where both product and geographic markets were hotly contested. The Commission examined differences in market shares and price levels, price movements, concentration levels, plant sitings for the purpose of shortening delivery distances, distribution systems, the presence or absence of Euro-brands, consumer product preferences, and entry barriers.

In a large number of cases, transitional questions arising from the lingering presence of a variety of technical standards, regulatory approval requirements, and procurement policies have come into play, as discussed in more detail above. These transitional concerns have been worked into the Commission's analysis in conjunction with the factors already discussed,²⁶⁸ and have added to the Commission's consideration of geographic market definition an added degree of complexity that does not confront U.S. courts and enforcement authorities.

Overall, much of the Commission's analysis will seem familiar to U.S. antitrust lawyers. The Commission does not generally pose the question asked by the Merger Guidelines, namely, what is the likely response by buyers and sellers in response to a significant price increase. Will buyers look to purchasers outside a given area, and will outside firms be able to respond profitably through sale into the area? This question has been directly posed to both buyers and sellers in a few cases, and some weight may be given to their answers.²⁶⁹ Whether the question is posed in this fashion or not, the Commission's analysis is generally consistent with the U.S. approach, where factors such as price discrimination, price correlations, shipment data, transport costs, strong consumer preferences and particularized needs, and, in some cases, legal and regulatory barriers have been at the heart of the analysis. While it is true that the use of differences in market shares and absolute price levels, as set forth in the Merger Regulation itself, concentration levels and distribution

268. See Commission Notice, O.J. C 187/07 (1990) (blending analysis of transitional concerns with variety of other factors) [hereinafter *Electrolux/AEG*].

269. See, e.g., Commission Notice, O.J. C 204/06 (1993) [hereinafter *Costa Crociere/Chargeurs/Accor*].

systems among different geographic areas as elements seem questionable and are not a common part of the analysis in the United States, these factors have generally played a subordinate role in recent cases or have caused inquiry into a variety of other factors that seem more directly relevant.

CONCLUSION

Market definition is a very fact-specific process. Because the emphasis on particular elements of the analysis will vary from case to case, decisions are difficult to compare and general themes are not easily identified. The characterization of outcomes as broad or narrow is not particularly useful, having little to do with whether they are right or wrong. Reliance on a particular factor in one case, but not in another, does not mean that either is incorrect, because it is usually a combination of factors that is critical. Despite these difficulties, however, some general themes can be identified.

It has been said from time to time that the Commission and Court of Justice have tailored market definitions to reach particular outcomes that reflect substantive policies other than those based on conventional antitrust concerns over market power. There is some truth in this observation, at least with respect to Article 86 cases dealing with essential facilities, refusals to deal, and some other vertical restraints. Markets in these decisions do seem to have been drawn more narrowly than a purely economic concern about adverse price and output effects would warrant, but this is a very limited number of relatively discrete cases. It cannot be said of most Articles 85 and 86 cases, where market definition has been at issue, and it is certainly not true of decisions under the Merger Regulation.

Can it be said that the market definition process in the European Community has become more sophisticated? Decisions under the Merger Regulation, particularly those following the initiation of proceedings, do show a maturation of the process as greater weight has been given to such things as cross-elasticity studies, price correlations, and market interpenetration data. In their totality the merger decisions seem to present a more cohesive, coherent whole. There are a variety of reasons for this. The Court of First Instance and Court of Justice have played little role to date in merger cases. Market definition in such cases

has been left to the Commission, and particularly to the Merger Task Force, a relatively small group in which consistency and cohesiveness are more readily obtained. Merger cases have not generally involved vertical issues or refusals to deal, and thus have not had to confront the somewhat peculiar market definitions that appear in Article 86 cases dealing with those issues. Merger decisions also tend to contain fuller expositions of the Commission's thinking than appear in a number of other cases. The use by the Commission in merger cases of a standard format and methodology, including the use of competitor and customer surveys, also leads in the direction of consistency in analysis.

It does not follow, however, that outcomes vary significantly from those under Article 86, even in older cases. The holding in the Court of Justice in *Continental Can*, for example, rests on a relatively sophisticated analysis. There are, of course, older decisions like *Michelin* that can and should be criticized. A good deal of criticism has been directed at cases like *Hugin/Liptons*, but much of that criticism assumes that the policies at issue are conventional U.S. antitrust policies. A strong argument can be made for the proposition that cases of this sort reflect different concerns, such as fairness or abuse of dependent relationships. If this is truly the case, criticism of market definitions in those cases on purely economic grounds may be misplaced. Whatever one's judgment about older Article 86 cases, however, it is surely true that the analysis in Articles 85 and 86 cases has also matured, as evidenced by decisions like *Tetra Pak II* and *Cement*. Whether this is the result of interplay between merger decisions and others cannot be determined, but this may well be the case.

The relationship between Article 86 and merger cases that is visible runs in the other direction. Article 86 cases have been expressly relied upon and followed in a number of merger decisions. The most obvious examples are the Commission's continued recognition in auto supply cases of the distinction between OEM and replacement markets drawn in *Michelin* and the reliance in transport cases on *Ahmed Saeed*. The treatment of geographic markets in *Hilti* also appears to have had an influence in merger decisions. Other examples might be given. That such a relationship exists is hardly surprising. The Merger Task Force did not spring out of nowhere. Article 86 precedents already existed. Nor does the Task Force work in a vacuum. Interplay

between merger decisions must be expected to run in both directions.

Do EC decisions on market definition, particularly under the Merger Regulation, depart significantly from the approach taken in the Merger Guidelines? In one significant respect, the treatment of supply substitutability, they do. While there are signs of changes, the Commission and European courts generally have not used supply substitutability in market definition, but have considered it in the broader assessment of competitive effects. But so long as it is considered, does it really matter where? Other specific differences, such as the treatment of captive output, can be identified. Certainly the Commission has not purported to be as precise in its approach as the Merger Guidelines, with their five percent price increase standard and detailed analysis of sunk costs, time frames, and so on. This is not a criticism. Some believe, after all, that the apparent precision of the Merger Guidelines is illusory. While the EC analysis tends to use short time frames in its market definition, for which it has been criticized, the time periods set forth in the Merger Guidelines are not significantly different. In short, the EC approach and the approach of the Merger Guidelines are far more similar than divergent.

Finally, a study of market definition in the European Community done ten years from now will undoubtedly not look the same as this one. The influence of the Court of First Instance, already apparent, will increase. More important, markets themselves will change. As the European market becomes more "common," there will be less concern about transitional problems. Geographic markets will continue to expand to more regularly include other countries in Europe that accede to the European Union or in other ways become affiliated with it. Once this occurs, the focus may shift to consideration of regional markets which overlap national boundaries. As other barriers fall, the concept of world markets will become more commonplace. Markets evolve. So too will market definitions.