

# CHAPTER 8

## Definition of the Relevant Market

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### SYNOPSIS

- § 8.01 Introduction
- § 8.02 General Principles of Product Market Definition
  - [1] Form CO
  - [2] The Market Definition Notice
    - [a] Demand-Side Substitutability
    - [b] Supply-Side Substitutability
    - [c] Potential Competition
  - [3] The Commission's Reliance on Precedent
- § 8.03 Case Studies Illustrating the Commission's Analytical Approach
- § 8.04 The Commission's Appraisal of Relevant Product Markets
  - [1] Product Characteristics and Uses
    - [a] Consumer Products
    - [b] Chemical Products
    - [c] Industrial Products
    - [d] Service Markets
    - [e] Pharmaceutical Products
    - [f] Air Transportation
    - [g] Telecommunications
  - [2] Functionally Interchangeable Products
    - [a] Branded and Private Label Products
    - [b] New Products and Services
  - [3] Evidence of Consumer Substitution
  - [4] Pricing Information
    - [a] Differences in Absolute Pricing Levels
    - [b] Price Correlation Data

- [c] Own-Price and Cross-Price Elasticity Data
  - [5] Bidding Data
  - [6] Consumer Survey Evidence
  - [7] Common Conditions of Competition
    - [a] Complementary Products
    - [b] Competing but Differentiated Products
  - [8] Chain of Substitution
  - [9] Supply-Side Substitutability
  - [10] Different Categories of Customers or Channels of Distribution
- § 8.05 The Commission's Evidentiary Approach to Product Market Definition
- [1] The Views of the Notifying Parties
  - [2] Internal Business Documents
  - [3] The Views of Market Participants
  - [4] The Position Taken by Other Commission Directorates
  - [5] The Views of National Competition Authorities
- § 8.06 General Principles of Geographic Market Definition
- [1] Form CO
  - [2] The Market Definition Notice
    - [a] The Commission's "Working Hypothesis"
    - [b] Supply-Side Considerations
    - [c] Market Integration
  - [3] The Commission's Reliance on Precedent
  - [4] Broad Conclusions on Geographic Market Definition in Different Contexts
    - [a] Global Markets
    - [b] Regional Markets
    - [c] EU-Wide Markets
    - [d] Intra-EU Regional Markets
    - [e] National Markets
    - [f] Sub-National or Local Markets
- § 8.07 Case Studies Illustrating the Commission's Analytical Approach
- § 8.08 The Commission's Appraisal of Relevant Geographic Markets
- [1] Actual Customer Purchasing Patterns
  - [2] Geographic Variation in Price

- [3] **Geographic Variation in Market Shares**
- [4] **Trade Flow Data**
- [5] **Transportation Costs**
- [6] **National or Local Preferences**
- [7] **Requirement of a Local Presence**
- [8] **Regulatory, Technical, or Other Factors**
- [9] **Chain of Substitution**

### § 8.01 Introduction

Definition of the relevant market has, from the outset, been a central element in the Commission's appraisal under the Merger Regulation. The emphasis placed on market definition reflects the jurisprudence of the Community courts under Article 82, which recognizes that "definition of the relevant market is of essential significance."<sup>1</sup> Specifically in regard to the Merger Regulation, the Court of Justice has observed that "a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition."<sup>2</sup> This conclusion echoes the position taken by successive Competition Commissioners, beginning with Sir Leon Brittan Q.C., now Lord Brittan.<sup>3</sup>

The objective of defining a market in both its product and geographic dimensions is "to identify in a systematic way the immediate competitive

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<sup>1</sup> Opinion of Advocate General Roemer in *Europemballage and Continental Can v. Commission*, Case 6/72, 1973 E.C.R. 215. The Commission has also recognized the relevance of economic analysis in the application of Art. 81. See Opinion of Advocate General Van Gerven in *Stergios Delimitis v. Henninger Bräu AG ("Delimitis")*, Case C-234/89, 1991 E.C.R. I-935 ("As a preliminary matter, it is necessary to define the *relevant market* on which competition must be assessed" (emphasis in original)).

<sup>2</sup> *French Republic and Société Commerciale des Potasses et de l'Azote (SCPA) and Entreprise Minière et Chimique (EMC) v. Commission ("Kali und Salz")*, Joined Cases C-68/94 and C-30/95, 1998 E.C.R. I-1375, para. 143. See also *Schneider Electric v. Commission ("Schneider")*, Case T-310/01, judgment of October 22, 2002 (2002 E.C.R. II-4071), para. 171 (the markets defined by the Commission provide the framework within which the competitive analysis should be undertaken).

<sup>3</sup> Sir Leon Brittan, Q.C., now Lord Brittan, *Principles and Practice of the Merger Regulation*, Centre for European Policy Studies, Brussels, September 24, 1990, Commission Press Release IP/90/751 ("The substantive analysis of mergers under the Merger Regulation will be very much a matter of market analysis and definition. I will want to know from my advisers what the product or service market is in a given case and what is the geographical market in which the companies concerned compete. . . . [D]etailed analysis of competitive forces will be necessary in every case before a reliable market definition can be made").

constraints facing the merged entity.”<sup>4</sup> Since market share data are a first step in the process of determining market power, an analytically sound approach to market definition is essential. This is because overly narrow market definitions risk prohibiting essentially pro-competitive or neutral mergers, while unduly broad market definitions risk frustrating the identification of anti-competitive transactions.

The Commission typically tests the compatibility of concentrations by reference to narrowly defined product and geographic markets, reflecting a view that, if competition concerns do not arise on narrowly scoped markets, then none should be raised if the markets are defined more broadly.<sup>5</sup>

In recent years, the Commission has placed somewhat less emphasis on market definition, recognizing that it is “a cornerstone of competition policy, but not the entire building . . . a tool for the competitive assessment, not a substitute for it.”<sup>6</sup> The Commission has instead attached greater importance to assessing the competitive relationship between the merging parties, measuring the competition that will be eliminated by the merger, and examining the structure and dynamics of the market. In part because of methodological difficulties associated with market definition and in part because of the trend towards focusing on the central economic issue, namely the likelihood that a merger will lead to higher prices or reduced output to the detriment of consumers, the Commission has increasingly viewed market definition as an initial step in its analysis, but not a substitute for a detailed examination of the competitive effects of a transaction.

This chapter describes the Commission’s approach to defining product and geographic markets under the Merger Regulation, summarizes the principles contained in the Market Definition Notice, and provides practical guidance.

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<sup>4</sup> Horizontal Mergers Guidelines, para. 10. *See too Office Depot/Guilbert*, Case COMP/M.3108, Commission decision of May 23, 2003, para. 22 (following a lengthy examination of the scope of the relevant product and geographic market for office supplies, Commission stated that “the precise boundaries of the relevant market are difficult to determine, but this should not distract from the main purpose of defining a market, namely to identify those competitors of the undertakings involved that are capable of constraining their behaviour”).

<sup>5</sup> *See, e.g., EDF/AEM/Edison*, Case COMP/M.3729, Commission decision of August 12, 2005, para. 48.

<sup>6</sup> Mario Monti, Market Definition as a Cornerstone of EU Competition Policy, Workshop on Market Definition, Helsinki, October 5, 2001 (Commission Press Release SPEECH/01/439).

## § 8.02 General Principles of Product Market Definition

### [1] Form CO

The Merger Regulation does not define a relevant product market. Form CO, however, provides the following definition:

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable.<sup>1</sup>

This definition contains the Commission's basic approach to market definition, which is that demand-side substitutability, *i.e.*, purchasers' preparedness to switch from one product to another in response to a small but significant change in relative price, is central to determining the scope of a relevant product market. This approach is consistent with the determination of the Court of Justice in *United Brands* that reasonably interchangeable products should be considered part of the same relevant product market if they are apt to meet the same consumer need.<sup>2</sup> It is also largely consistent with the demand-side approach to market definition employed by U.S. antitrust enforcement agencies.

### [2] The Market Definition Notice

In 1997, the Commission adopted the Market Definition Notice to "provide guidance as to how the Commission applies the concept of relevant product and geographic market in its ongoing enforcement of Community competition law" and to "increase the transparency of its policy and decision-making in the area of competition policy."<sup>3</sup> The Market Definition Notice, which also applies to Articles

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<sup>1</sup> Section 6, Form CO.

<sup>2</sup> *United Brands Company and United Brands Continental B.V. v. Commission* ("*United Brands*"), Case 27/76, 1978 E.C.R. 207, paras. 12–35. *See also* *L'Oreal v. De Nieuwe AMCK*, Case C-31/80, 1980 E.C.R. 3775, para. 25 ("the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products"). By contrast, separate product markets may be identified where it can be shown that there exists a demand for a particular product that is distinct from the demand for other products (para. 19). *See also* *Langnese-Iglo v. Commission* ("*Langnese-Iglo*"), Case T-7/93, 1995 E.C.R. II-1533, para. 61.

<sup>3</sup> Market Definition Notice, paras. 1 and 4.

81 and 82, recognizes that “definition of the relevant market in both its product and its geographic dimensions often has a decisive influence on the assessment of a competition case.”<sup>4</sup> It explains the role of market definition in antitrust analysis in the following terms:

Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance . . .<sup>5</sup>

The Market Definition Notice identifies three elements relevant to defining markets: (1) demand-side substitutability; (2) supply-side substitutability; and (3) potential competition. The approach taken with respect to each of these three elements is described below.

#### [a] Demand-Side Substitutability

Demand-side substitutability is concerned with consumers’ preparedness to switch between products in response to relative changes in price. The Commission considers demand-side substitution to be “the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions,”<sup>6</sup> and accordingly gives this element greatest weight in its market definition analysis. The Commission has indicated that any such substitution should “have the necessary effectiveness and immediacy required for the purposes of market definition.”<sup>7</sup> Consumer substitution can be judged directly by examining evidence of consumer switching or indirectly by examining the influence of product price, characteristics, and use.<sup>8</sup> The search for an analytical

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<sup>4</sup> Market Definition Notice, para. 4.

<sup>5</sup> Market Definition Notice, para. 2.

<sup>6</sup> Market Definition Notice, para. 13.

<sup>7</sup> *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of October 30, 2001 (2004 O.J. L43/13), para. 163 (food and beverage packaging).

<sup>8</sup> The Commission has employed various economic techniques to measure demand-side substitutability indirectly. *See* XXIVth Report on Competition Policy (1994), para. 280: “In its

means of assessing economic substitutability has led the Commission to adopt the “hypothetical monopolist” test that had previously been adopted by U.S. antitrust authorities as the primary analytical tool for assessing demand substitution. This test is a conceptual aid used to probe the boundaries of product and geographic markets by assessing the parameters of economic substitutability among different products. Under this test, a market is defined as:

A product or a group of products and a geographic area in which they are sold, so that a hypothetical firm, seeking to maximize its profits, not subject to price regulations and constituting the unique present and future seller of these goods can impose a significant and lasting price increase exceeding the current price or one which is foreseeable in a normal situation.<sup>9</sup>

The hypothetical monopolist test seeks to determine the extent of economic substitutability between two or more products by assessing whether and to what extent consumers may be expected to modify their purchasing behavior in response to a “small but significant and non-transitory increase in price” of 5–10% over the prevailing or competitive market price.<sup>10</sup> The test recognizes that such a price increase will be unprofitable if it leads a significant number of consumers to substitute other products. Conversely, it will be profitable where demand substitution is insignificant. The key issue, as framed by the Market Definition Notice, parallels that developed and applied by U.S. agencies:

The question to be answered is whether the parties’ customers would switch to readily available substitutes or to suppliers located elsewhere in response to a

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analysis of demand-substitutability, the Commission may make use of both qualitative and quantitative methods. Qualitative methods could, for example, include an examination of product characteristics and the intended use of a product by consumers, whereas quantitative methods could involve the examination of price trends and the estimation of cross-elasticities using econometric methods.” *See also* Market Definition Notice, para. 39.

<sup>9</sup> 1992 U.S. Department of Justice Merger Guidelines, Antitrust & Trade Reg. Rep. (BNA) No. 1559, 4 Trade Reg. Rep. (CCH), para. 13,104 (the “U.S. Horizontal Merger Guidelines”). The formulation used in the U.S. Horizontal Merger Guidelines of asking what would happen if a hypothetical monopolist of a given product imposed a “small but significant and non-transitory price increase, the price of other products remaining the same” has been used by the Court of First Instance. *See Hilti v. Commission (“Hilti”)*, Case T-30/89, 1991 E.C.R II-1439, para. 56, which predates the Market Definition Notice: “Other illustrations also show that small but significant increases in the prices of consumables for PAF systems are unlikely to cause large shifts in the choice between the various fastening systems.” While the Market Definition Notice (paras. 15–19) does not expressly adopt the “hypothetical monopolist” terminology used in the U.S. Horizontal Merger Guidelines, the test that it sets forth clearly mirrors its U.S. counterpart.

<sup>10</sup> Because of this formulation, the hypothetical monopolist test is also commonly referred to as the “SSNIP test” or “5% test,” although the Market Definition Notice does not use these terms.

hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable.<sup>11</sup>

### [b] Supply-Side Substitutability

Supply-side substitutability is concerned with producers' preparedness to switch production capacity from manufacturing one product to another in response to a relative change in price. The relevance of supply-side substitutability for purposes of market definition was established by the Court of Justice in *Continental Can*.<sup>12</sup> The Market Definition Notice indicates that the Commission will take account of supply-side substitution only in situations where "the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved" that is equivalent to demand-side substitution "in terms of effectiveness and immediacy."<sup>13</sup>

The Market Definition Notice suggests that supply-side substitutability will only rarely have the same disciplining effect as demand-side substitutability. In situations where supply-side substitution is possible but may require significant time or investment, the Commission typically takes account of such supply-side substitution as a potential constraint on the merging firms' competitive behavior

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<sup>11</sup> Market Definition Notice, para. 17. See too *AstraZeneca/Novartis*, Case COMP/M.1806, Commission decision of July 26, 2001 (2004 O.J. L110/1), para. 59 ("One way to think of a relevant product market is that it is the smallest set of products for which a company, should it be the only firm to offer these products, would find it profitable to impose a small but significant (5–10%) and permanent price increase. If this hypothetical company were *not* to find it profitable to do this, then the conclusion should be that there is somehow enough competitive pressure from other products and that the relevant product market is therefore wider than presumed").

<sup>12</sup> *Europemballage and Continental Can v. Commission* ("*Continental Can*"), Case 6/72, 1973 E.C.R. 215, para. 33 ("In order to be regarded as constituting a distinct market, the products in question must be individualized, not only by the mere fact that they are used for packing certain products, but by particular characteristics of production which make them specific[al]ly suitable for this purpose. Consequently, a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by a simple adaptation, with sufficient strength to create a serious counterweight"). See also *Michelin v. Commission* ("*Michelin*"), Case 322/81, 1983 E.C.R. 3461, para. 41.

<sup>13</sup> Market Definition Notice, para. 20. The phrase "short term" in the paragraph denotes a period that does not entail a significant adjustment of existing tangible and intangible assets in order for supply-side substitution to occur.

in the course of its assessment of dominance, rather than its definition of the relevant market.<sup>14</sup> Under the U.S. Horizontal Merger Guidelines, supply-side factors are not taken into account in defining the scope of relevant product markets, but are instead considered in identifying firms “participating in the relevant market” that can potentially constrain the exercise of market power.<sup>15</sup>

### [c] Potential Competition

The third source of competitive constraint identified in the Market Definition Notice, potential competition, is not usually taken into account when defining markets since, in the Commission’s view, “the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry.”<sup>16</sup> The Market Definition Notice envisages that potential competition may be taken into account “at a subsequent stage” (*i.e.*, as part of the Commission’s assessment of dominance), once a relevant market has been defined.<sup>17</sup> This is consistent with the U.S. approach, which examines potential entry as a constraint on market power rather than as an element of market definition.<sup>18</sup>

### [3] The Commission’s Reliance on Precedent

Decisions rendered at the conclusion of phase II investigations contain extensive examinations of the scope of the relevant product market.<sup>19</sup> Such decisions describe the Commission’s approach to market definition and its view of the probative value of certain types of evidence. The large majority of transactions notified under the Merger Regulation are, however, approved at the end of phase I, and the Commission’s practice in such decisions is generally to avoid taking a

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<sup>14</sup> Market Definition Notice, paras. 14 and 23.

<sup>15</sup> U.S. Horizontal Merger Guidelines, § 1.32 (“[T]he Agency will identify other firms not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses . . . . These supply responses must be likely to occur within one year and without the expenditure of significant sunk costs of entry and exit, in response to a ‘small but significant and nontransitory’ price increase”).

<sup>16</sup> Market Definition Notice, para. 24.

<sup>17</sup> Market Definition Notice, para. 24. For an appreciation of the Commission’s assessment of potential competition, *see* chapter 11.

<sup>18</sup> U.S. Horizontal Merger Guidelines, §3.

<sup>19</sup> As of December 31, 2005, around 125 decisions had been rendered after phase II investigations.

definitive position on the scope of the relevant market.<sup>20</sup> The Court of First Instance has determined that the Commission is permitted to perform an extensive examination of the scope of the relevant market even in situations where it approves a transaction unconditionally:

Where the Commission intends to declare a notified operation compatible with the common market it is bound, in the light of the particular characteristics of each operation, to provide sufficient reasons for its decision in order to permit third parties, where necessary, to challenge the merits of its analysis in the Community courts. Whilst it is true that under the Commission's decision-making practice it generally only makes a detailed analysis of the definition of the relevant market and those operating on it if it intends to decide that an operation is incompatible . . . there is nothing to prevent it, in view of the obligation to state reasons referred to above, from carrying out such an analysis when it adopts a decision that an operation is compatible, particularly if it is a decision taken under Article 8(2) of [the Merger Regulation].<sup>21</sup>

Since the adoption of the Merger Regulation, the Commission has developed considerable knowledge of a wide array of markets.<sup>22</sup> Prior decisions, although not binding on the Commission in new investigations, often carry significant weight.<sup>23</sup> Where the Commission has previously examined a particular market,

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<sup>20</sup> See, e.g., Mario Monti, Market Definition as a Cornerstone of EU Competition Policy, speech of October 5, 2001, [www.europa.eu.int/comm/competition/speeches/index\\_2001.html](http://www.europa.eu.int/comm/competition/speeches/index_2001.html), (“In view of our limited resources, we define markets only when strictly necessary. In merger cases . . . if none of the conceivable alternative market definitions for the operation in question give rise to competition concerns, the question of market definition will normally be left open”).

<sup>21</sup> *The Coca-Cola Company and Coca-Cola Enterprises v. Commission*, Joined Cases T-125/97 and T-127/97, 2000 E.C.R. II-1733, para. 3.

<sup>22</sup> By way of example, the Commission has to date examined nine transactions affecting the markets for crop protection, two of which were subject to phase II investigations (*i.e.*, *AstraZeneca/Novartis*, Case IV/M.1806, Commission decision of July 26, 2000 (2004 O.J. L110/1); and *Bayer/Aventis Crop Science*, Case COMP/M.2547, Commission decision of April 17, 2002 (2004 O.J. L107/1)). The Commission has considered 12 transactions affecting non-alcoholic commercial beverages, two of which were subject to phase II investigations (*i.e.*, *Coca-Cola Enterprises/Amalgamated Beverages GB*, Case IV/M.794, Commission decision of January 22, 1997 (1997 O.J. L218/15); and *The Coca-Cola Company/Carlsberg A/S*, Case IV/M.833, Commission decision of September 11, 1997 (1998 O.J. L145/41)).

<sup>23</sup> See, e.g., *Bombardier/ADtranz*, Case COMP/M.2139, Commission decision of April 3, 2001 (2002 O.J. L69/50) (Commission relied on its prior decision in *ABB/Daimler-Benz*, Case IV/M.580, Commission decision of October 18, 1995 (1997 O.J. L11/1), in identifying various markets for railway transport technology); *CVC/Lenzing*, Case COMP/M.2187, Commission decision of October 17, 2001 (2004 O.J. L82/20) (Commission relied on a series of prior decisions in the fiber market, including *Akzo Nobel/Courtaulds*, Case IV/M.1182, Commission decision of June 30, 1998;

the burden may in effect be placed on the notifying parties of the new transaction to show why the previous definition was incorrect or, in light of changed circumstances, should be changed. The approach adopted in *Volvo/Renault* with respect to the identification of separate markets for city buses, inter-city buses, and touring coaches is illustrative. In that case, the Commission referred to its prior jurisprudence in this area,<sup>24</sup> summarized the various considerations relied upon in those decisions, and stated that “[t]he notifying party [had] not presented elements that convincingly suggest that the product market definitions used by the Commission in its most recent decisions should be changed.”<sup>25</sup>

### § 8.03 Case Studies Illustrating the Commission’s Analytical Approach

It is difficult to generalize about the Commission’s approach to market definition, not least because the Commission has not always been consistent in its methodological framework and analytical approach. Review of the Commission’s decisional practice nevertheless discloses a strong tendency to define product markets narrowly. The following case studies are illustrative.

In *Procter & Gamble/VP Schickedanz (II)*, the Commission identified distinct markets for two kinds of feminine protection products, tampons and sanitary towels (pads), rejecting the contention of Procter & Gamble (“P&G”) that these products together constituted a single market.<sup>1</sup> In reaching its conclusion, the Commission relied on the following factors:

- (1) Notwithstanding their essential functional interchangeability, women tended to purchase tampons and pads for “distinct purposes, and to develop usage patterns according to strong personal preferences.”<sup>2</sup> In

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*DuPont/ICI (II)*, Case IV/M.984, Commission decision of October 2, 1997, to support the market definition adopted); *UPM-Kymmene/Haindl*, Case COMP/M.2498, Commission decision of November 21, 2001 (2002 O.J. L233/38) (in identifying markets for newsprint, the Commission relied on its prior decisions in *Repola/Kymmene*, Case IV/M.646, Commission decision of October 30, 1995, and *Enso/Stora*, Case IV/M.1225, Commission decision of November 25, 1998 (1999 O.J. L254/9)); and *Arcelor/Umicore/Duology JV*, Case COMP/M.3134, Commission decision of July 4, 2003 (Commission relied on its prior decision in *Pechiney World Trade/Minemet*, Case IV/M.473, Commission decision of July 20, 1994, in identifying different non-ferrous metals markets).

<sup>24</sup> *Mercedes-Benz/Kassbohrer*, Case IV/M.477, Commission decision of February 14, 1995 (1995 O.J. L211/1), *Renault/Iveco*, Case IV/M.1202, Commission decision of October 22, 1998; and *Volvo/Scania*, Case COMP/M.1672, Commission decision of March 14, 2000 (2001 O.J. L143/74).

<sup>25</sup> Case COMP/M.1980, Commission decision of September 1, 2000, para. 19.

<sup>1</sup> Case IV/M.430, Commission decision of June 21, 1994 (1994 O.J. L354/32).

<sup>2</sup> *Procter & Gamble/VP Schickedanz (II)*, *supra*, para. 37.

addition to “certain objective constraints on the choice of method,” tampons and pads were not “regarded as substitutable by the consumer once she ha[d] established a preference or pattern of usage,” in part because of their different characteristics and performance attributes.<sup>3</sup>

- (2) P&G’s pad product, *Always*, was 50% more expensive than *ob*, the leading tampon product sold in Germany (the geographic focus of the Commission’s investigation). In addition, evidence was advanced suggesting that when the price of *ob* had increased by 25%, pad prices remained constant and pad sales “did not show any marked response.”<sup>4</sup>
- (3) All of P&G’s competitors argued that there were separate markets for pads and tampons. In addition, all but one of the retailers contacted by the Commission identified distinct markets and, “[o]f the 21 retailers that expressed a view on the effect of [pad] promotions,” 15 said that “such promotions would have no effect on tampon sales, three said that the effect would be minimal, while one felt that such a promotion would increase sales for all [feminine hygiene products].”<sup>5</sup>
- (4) A consumer survey commissioned by P&G, which disclosed a widespread willingness to switch between pads and tampons in response to a price rise, was found to have overstated women’s attitudes due to a “natural desire of the interviewee to please,” and was in any event inconsistent with other survey evidence, including a study conducted by a Member State competition authority, which showed a high level of consumer loyalty to pads and tampons in the event of a posited price rise.<sup>6</sup>
- (5) Purchase panel data said to show that consumers did switch between pads and tampons was discounted, *inter alia*, on the ground that it did not evidence usage patterns and contradicted the views of competitors and retailers that “women are particularly conservative and stable in their buying of feminine protection products.” In addition, a study of the effect of the launch in Germany of P&G’s *Always* pad product suggested that there was no “reduction in tampons’ share of the combined tampon

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<sup>3</sup> *Procter & Gamble/VP Schickedanz (II)*, *supra*, para. 42.

<sup>4</sup> *Procter & Gamble/VP Schickedanz (II)*, *supra*, para. 70.

<sup>5</sup> *Procter & Gamble/VP Schickedanz (II)*, *supra*, para. 47.

<sup>6</sup> *Procter & Gamble/VP Schickedanz (II)*, *supra*, para. 49.

**8-12.1**

DEFINITION OF THE RELEVANT MARKET

**§ 8.03**

and towel markets;” on the contrary, *Always* was found to have “taken  
(Text continued on page 8-13)

