



## **MARKET DEFINITION GUIDELINES**

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# MARKET DEFINITION GUIDELINES

## 1.0 INTRODUCTION

- 1.1 These Guidelines are intended to be used by staff of the Competition & Consumer Authority (the Authority) when defining the market for purposes of assessing the effects on competition.
- 1.2 The objective of Competition Act (Cap 46:09) ‘the Act’ in Botswana is to maintain and encourage competition amongst business enterprises as a vehicle to promote economic efficiency, and maximise consumer welfare. The Act promotes or maintains market competition by regulating anti-competitive business conduct.
- 1.3 The Market Definition Guidelines provide a conceptual framework within which the definition of market is couched.
- 1.4 These Guidelines are not a substitute for the Act and Competition Regulations. They must, therefore, be read in conjunction with the Act, Regulations and other guidelines. Their purpose is to complement what is in the law.

## 2.0 MARKET DEFINITION

- 2.1 Market Definition is central to most anti-competition cases because determining the existence of market power requires the definition of a relevant market. It provides a framework for competition analysis and it is usually the first step in the assessment of market power.<sup>1</sup>
- 2.2 The purpose of Market Definition is to provide a context within which competition analysis or assessment can be undertaken. It is not an end in itself, but a key step in identifying the competitive constraints acting on a supplier of a given product or service.
- 2.3 Section 2 of the Act defines the relevant market as “the geographical or product market to be used for the purpose of assessing the effects of a practice, conduct or agreement on competition”. Thus under the Act, a market comprises a product or geographic area. To gain greater insights, the Authority will analyse both the geographical and product features in question.
- 2.4 The geographic market may be national, or confined to a district, city, town or village, etc. The boundaries of the geographic area or dimension are usually clear and straight forward; hence, factors to consider include transport costs, the degree of cross border trade, trade barriers and regulatory constraints. On the other hand,

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<sup>1</sup>ABA Section of Antitrust Law, *Market Definition in Antitrust Theory and Case Studies* (2012), page 67. American Bar Association publishing.

the product market is a component of a relevant market which identifies all the products that are considered by consumers to be close substitutes.

- 2.5 Section 72 of the Act specifies how the relevant market is determined in Botswana; it reads as follows:

*“(1) This section applies in relation to any case arising under Parts V to X of this Act.*

*(2) The criteria for determining —*

*(a) when goods or services are to be treated as goods or services of a separate description; and*

*(b) whether the share of supply or acquisition specified in sections 28, 31 or 54, where applicable, is fulfilled, shall be such as in any particular case appear to the Authority to be the most appropriate in the circumstances.*

*(3) For the purpose of establishing whether the share of supply criteria are satisfied, the share of the group as a whole is to be used where an enterprise —*

*(a) is a subsidiary of a group; or*

*(b) is otherwise party to arrangements by which enterprises are inter-connected within a group.*

*(4) When the Authority has opened an investigation because it is satisfied that the applicable criteria for share of supply or acquisition have been fulfilled, the Authority shall decide whether the goods or services used in calculating such share of supply or acquisition also constitute the relevant market for the purpose of assessing the effects on competition or whether some alternative definition of the market should be substituted for this purpose.”*

- 2.6 Therefore, pursuant to section 72 of the Act, the purpose of defining the relevant market enables the Competition & Consumer Authority to provide a context in which competition matters are to be analysed. An appropriately defined relevant market should provide information that allows an investigation to be properly contextualised and analysed at an early stage.

- 2.7 Market Definition is important when assessing whether an undertaking’s market share is below the specified thresholds. This is because under the ‘De minimis’ rule,<sup>2</sup> the conduct of a player which has very low or negligible market share (less than 10%) does not have an appreciable effect on competition unless the contrary is proven. Regulation 4 of the Competition Regulations, 2011 states that:

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<sup>2</sup> *The de minimis* rule is a legal doctrine by which a court refuses to consider trifling matters. This is an expression about minimal things; i.e., a level of risk that is too small to be concerned with. That is, “*the law cares not for small things.*” In a lawsuit, a court applies the *de minimis* doctrine to avoid the resolution of trivial matters that are not worthy of judicial scrutiny. Its application sometimes results in the dismissal of an action, particularly when the only redress sought is for a nominal sum. Appellate courts also use the *de minimis* doctrine when appropriate.

*“The Authority may consider an enterprise or enterprises to be in a dominant position if it is satisfied that - (a)*

*the enterprise supplies or acquires at least 25 per cent of the goods or services in the market; or three or fewer enterprises supply or acquire at least 50 per cent of the goods or services in the market.”*

### **3.0 THE PROCESS OF DEFINING A MARKET<sup>3</sup>**

#### **3.1 Step 1: Identify the Product, that is:**

- (a) What are its features, attributes, and characteristics?
- (b) Who uses it, how, where and when?
- (c) How is the product produced, positioned and distributed?

#### **3.2 Step 2: Identify Substitutes to the Product**

- (a) Establish the closest substitutes to the product under consideration. The substitute products<sup>4</sup> are the most immediate competitive constraints on the behaviour of the enterprise supplying the product in question. In order to establish which products are close enough substitutes to be in the relevant market, a conceptual framework known as the hypothetical monopolist test is usually employed.<sup>5</sup>
- (b) Both demand side and supply side substitution must be taken into account in determining the relevant market. Substitution possibilities must be considered in the three following dimensions:
  - (i) product (substitute or near substitute products);
  - (ii) geographic (limits on degree to which customers will travel or products can be supplied over); and
  - (iii) functional (such as retail, wholesale and manufacturing).
- (c) **Carry Out the Substitutability by Using the Monopolist Test**
  - (i) After identifying substitutes, the substitutability by monopolist test (that is, the test that seeks to establish the smallest product group such that a

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<sup>3</sup>Competition Law Guidelines 2004. Market Definition. Understanding Competition Law, Office of Fair Trading.

<sup>4</sup>The definition of a market depends on the supply side as well as the demand side. Even if two products are completely different from the consumer’s standpoint, if they are made by the same producers, an increase in the price of one that is not cost-justified will induce producers to shift production from the other product to this one in order to increase their profits by selling at a supra-competitive price.

<sup>5</sup>As established in the case of *Blue Cross & Blue Shield United of Wisconsin v Marshfield Clinic*, 65 F. 3d 1406, 1410-11 (7<sup>th</sup> Cir.1995) it was argued that the delineation of a relevant product market is cross-elasticity of supply, which depends on the extent to which producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product. Refer to ABA Section of Antitrust Law, *Market Definition in Antitrust Theory and Case Studies (2012)*, page 11. American Bar Association publishing.

hypothetical monopolist<sup>6</sup> controlling that product group could profitably sustain supra-competitive prices) is carried out. A supra-competitive price is one that is at least a small but significant amount above competitive levels. That product group and area is usually the relevant market.<sup>7</sup>

- (ii) In applying the test, before it is determined whether the enterprise in question has monopoly power in that market and is violating anti-competition law, the question posed is whether a hypothetical monopolist can profitably impose a small but significant and non-transitory increase in price (SSNIP) in the product market as defined.<sup>8</sup>
- (iii) It should be emphasised that defining a market strictly in accordance with the test's assumptions is rarely possible. Therefore, even if the test could be conducted precisely, the relevant market is in practice no more than an appropriate frame of reference for analysis of the competitive effects. Nevertheless, the conceptual framework of the test is important as it provides a structure within which evidence on the market definition can be gathered and analysed.

### 3.3 Step 3: Interpret the Result of the Monopolist Test

- (a) If the hypothetical monopolist can profitably impose a SSNIP in the product market as defined, and the price increase would be profitable, then the market is correctly defined, and from here the analysis could go forward to the stage of determining whether anti-competition laws are being violated if the company at issue has significant market power.

### 3.4 Step 4: Determine Whether a Supra-Competitive Price<sup>9</sup> Can Be Sustained

- (a) In applying this approach, the steps to follow are:<sup>10</sup>
  - (i) start by considering a hypothetical monopolist of a product in question, which operates in a geographic area under consideration; and
  - (ii) then find out if it would be profitable for the hypothetical monopolist to sustain the price of the product in question above competitive levels.

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<sup>6</sup> The Hypothetical Monopolist Test is an economic model used as a framework to determine if a relevant product market is properly defined. It has been adopted by many Competition Agencies, e.g., US Federal Trade Commission, Australian Competition and Consumer Commission, Office of Fair Trading.

<sup>7</sup> Competition Law Guideline 2004. *Market Definition*. Understanding Competition Law, Office of Fair Trading (Now called Competition and Markets Authority).

<sup>8</sup> Refer to [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=940667](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940667), article by M. B. Coate and J. H. Fischer (Oct 2007). *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*. US Federal Trade Commission. Potomac Papers in Law and Economics.

<sup>9</sup> This is pricing above what can be sustained in a competitive market, and it may be indicative of a business that has a unique legal or competitive advantage or of anti-competitive behaviour that has driven competition from the market.

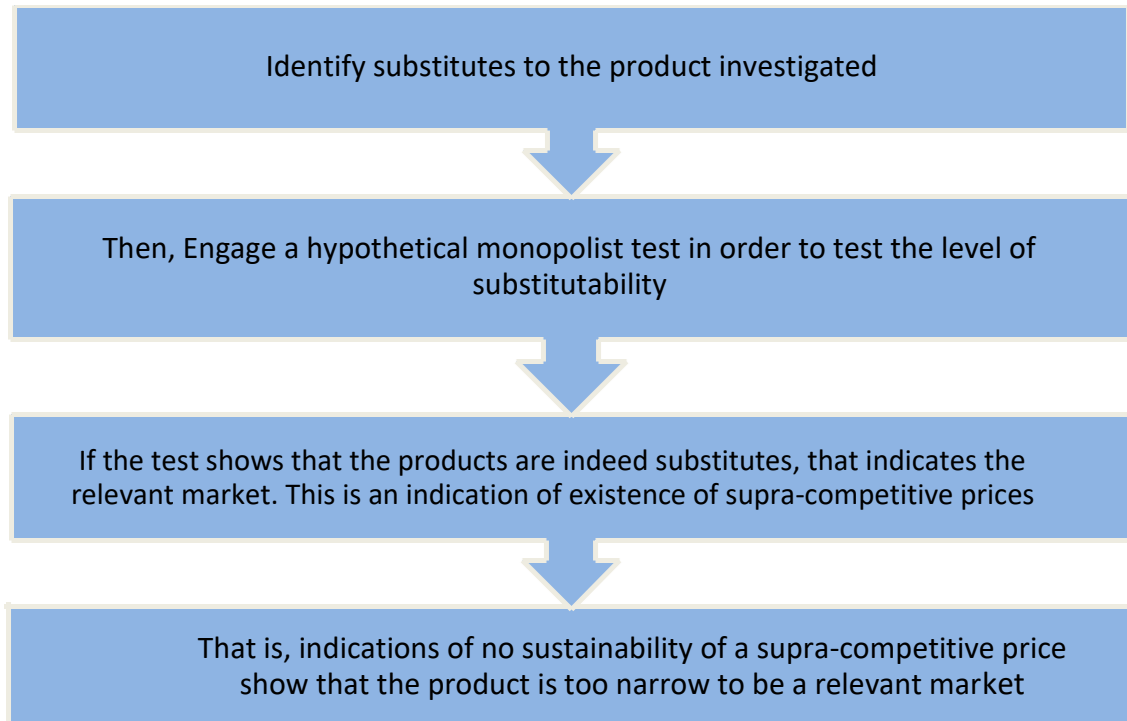
<sup>10</sup> ABA Section of Antitrust Law, *Market Definition in Antitrust Theory and Case Studies (2012)*, page 40. American Bar Association publishing. Page 6 of 17

- (b) If the answer to the question is yes, the test is complete; therefore, the product and area under the hypothetical monopolist's control is usually the relevant market.
  - (c) If it is not profitable for a hypothetical monopolist to sustain such price increase, it would be a result of a sufficiently large number of customers switching some of their purchases to other substitute products. In that case, it is assumed further that the hypothetical monopolist controls both the focal product and its closest substitute. The process is then repeated, but this time in relation to the larger set of products under the hypothetical monopolist's control.
  - (d) It would be ideal for the investigator to find out if it would be profitable to sustain prices a little bit more than competitive levels. If so, the test is complete. The relevant market is usually the focal product and its closest substitute.
  - (e) If not, it is assumed that the hypothetical monopolist also controls the second closest substitute to the focal product and the process is repeated once more.
  - (f) When the test is complete for the first time, the relevant market is usually defined. However, occasionally it will be appropriate to define the relevant market to be wider than the narrowest product group that passes the test.
- 3.5 An alternative method of defining a market is to look at the nature and extent of competitive constraints on a particular enterprise from that enterprise's point of view.<sup>11</sup>

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<sup>11</sup>ABA Section of Antitrust Law, *Market Definition in Antitrust Theory and Case Studies (2012)*, page 26. American Bar Association publishing. Page 7 of 17

3.5.1 The following is a diagrammatical summary of steps to follow when defining a market:



3.6 In practice, defining a market requires balancing various types of evidence and the exercise of reasonable judgement. However, it is not an end in itself. Where there is strong evidence that the relevant market is one of a few plausible market definitions, and the competitive assessment is shown to be largely unaltered, it may not be necessary to define the market uniquely.<sup>12</sup>

3.7 In practice, market definition normally contains two dimensions: a product and geographic area. It is often practical to define the relevant product market first and only then to define the relevant geographic market.

## 4.0 THE PRODUCT MARKET

4.1 This is a component of a relevant market which identifies all the products that are considered by consumers to be close substitutes.

4.2 Substitutability includes whether the substitutes or substituted product can technically serve the same purpose, and whether it will do so in a way that is cost effective enough for sufficient customers to consider it a realistic alternative.

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<sup>12</sup> For a more detailed overview of prohibited conduct, refer to the Botswana Competition and Consumer Authority Guide on Monopolisation and Abuse of Dominance (2013).



### 4.3 Practical Steps For Defining the Relevant Product Market

- 4.3.1 The Market Definition process usually starts by looking at a relatively narrow potential definition.
- 4.3.2 This would normally be one or more of the products which two parties to an agreement both produce, or one or more of the products which are the subject of a complaint about conduct, that is, the focal product or group of products. Previous experience and common sense will normally indicate the narrowest potential market definition, which will be taken as the starting point for the analysis. For example, in the South African Airways case<sup>13</sup>, the relevant market was the subject of great dispute and the Tribunal found that the market definition was flawed; hence, it was not relevant to the theory of harm being advanced.
- 4.3.3 Find out whether a hypothetical monopolist of the focal product could profitably sustain prices at a small but significant amount above competitive levels. The price increase must be large enough that a response from customers is reasonably likely, but not so large that the price rise would inevitably lead to substantial shift in demand. This leads to markets being defined so widely that market shares convey no meaningful information on market power. The rate of 5% to 10% above competitive levels will normally be considered small but significant and this is done through the SSNIP test.<sup>14</sup>
- 4.3.4 Following the price rise, customers may switch some of their purchases from the focal product to other substitute products (demand side substitution). However, it is not necessary for all customers, or even majority, to switch.<sup>15</sup> The important factor is whether the volume of purchases likely to be switched is large enough to prevent a hypothetical monopolist from profitably sustaining prices with small but significant price increases above competitive levels.
- 4.3.5 Substitute products do not have to be identical to be included in the same market. For example, if two products perform the same purpose, but one is of a higher price and quality, they might be included in the same market. The question is whether the price of one sufficiently constrains the price of the other. Although one is of a lower quality, customers might still switch to this product if the price of the more expensive product rose such that they no longer felt that the higher quality justified the price differential.<sup>16</sup>

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<sup>13</sup>In the case of Competition Commission/South African Airways (Pty) Ltd (SAA) Case 18/CR/Mar01, the boundaries of the relevant market were the subject of great dispute in this matter. The Competition Tribunal noted that: *SAA disputes the way the Commission has defined the market not, as is usual, in a debate over possible substitutes, but at the conceptual level as to what market is relevant given the nature of the complaint.* The Competition Tribunal found that SAA's market definition was flawed and noted: "In short, the market definition is wrong because it is not relevant to the theory of harm being advanced.

<sup>14</sup>ICN Merger Working Group: Investigation and Analysis Subgroup (2006).

<sup>15</sup>ABA Section of Antitrust Law, *Market Definition in Antitrust Theory and Case Studies (2012)*, page 60. American Bar Association publishing.

<sup>16</sup>M. B. Coate and J. H. Fischer (Oct 2007). *A Practical Guide to the Hypothetical Monopolist Test for Market Definition*. US Federal Trade Commission. Potomac Papers in Law and Economics.

4.3.6 The important issue is whether the enterprise could sustain prices sufficiently above competitive levels. Customers may take time to respond to a sustained rise in the price of the focal product.

4.3.7 As a rough rule of thumb, if substitution would take longer than one year, the products to which customers eventually switched to would not be included in the same market as the focal product. Products to which customers would switch within a year without incurring significant switching costs are more likely to be included in the relevant market.<sup>17</sup>

4.3.8 However, the relevant time period in which to assess switching behaviour may be significantly shorter than one year: for example, that can happen in industries where transactions are made very frequently. A case by case analysis of switching is therefore appropriate.<sup>18</sup>

#### 4.4 Evidence on Substitution

4.4.1 Evidence on substitution from a number of different sources may be considered. Information used will vary from case to case and will be considered and the following evidence and issues are often likely to be important:<sup>19</sup>

- (a) evidence from the enterprises active in the market and their commercial strategies may be useful. For example, company documents may indicate which products the enterprises under investigation believe to be the closest substitute to their own products;
- (b) customers and competitors will often be interviewed. In particular, customers can sometimes be asked directly how they would react to a hypothetical price rise, although because of the hypothetical nature of the question, answers may need to be treated with a degree of caution;
- (c) a significant factor in determining whether substitution takes place is whether customers would incur costs in substituting products. High switching costs relative to the value of the product will make substitution less likely;
- (d) evidence on product characteristics may provide useful information on whether customer substitution patterns are likely to be influenced significantly by those characteristics;

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<sup>17</sup> Competition Law Guideline 2004. *Market Definition. Understanding Competition Law*, Office of Fair Trading (Now called Competition and Markets Authority).

<sup>18</sup> *Ibid.*

<sup>19</sup> Article on *Critical Loss Analysis in Market Definition and Merger Control* by K. Huschelrath: Centre for European Economic Research (ZEW), Discussion Paper no. 09-083 accessed on [http://papers.ssrn.com/so/3papers.cfm?abstract\\_id=1547085](http://papers.ssrn.com/so/3papers.cfm?abstract_id=1547085).

- (e) where the objective characteristics of products are very similar and their intended uses are the same, this would be good evidence that the products are close substitutes. However, the following caveats should be noted:
  - (i) firstly, even where products apparently have very similar characteristics and intended use, the switching costs and brand loyalty may affect how substitutable they are in practice;
  - (ii) secondly, just because products display similar physical characteristics, this does not necessarily mean that customers would view them to be close substitutes; and
  - (iii) thirdly, products with very different physical characteristics may be close substitutes if, from a customer's point of view, they have a very similar use.
- (f) evidence on own or cross price elasticity of demand<sup>20</sup> may also be examined. The own price elasticity of demand measures the rate at which demand for a product changes when its price changes up or down. The cross price elasticity of demand measures the rate at which demand for a product changes when the price of another product goes up or down;

#### 4.5 Evidence: Supply Side Substitution

4.5.1 When assessing the scope for supply side substitution,<sup>21</sup> the evidence from some or all of the following sources may be relevant:<sup>22</sup>

- (a) potential suppliers might be asked whether substitution was technically possible, about the costs of switching production between products, and the time it would take to switch production. The key question is whether it would be profitable to switch production, given a small price increase above competitive price<sup>23</sup> levels;

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<sup>20</sup>To identify the determinants of market power, a simple model of a profit maximising monopolist selling a single homogeneous product without any foreseeable threat to entry is considered. The monopolist maximises profits by choosing a price and output at which marginal revenues equals marginal cost. The price elasticity of demand measures the sensitivity of the quantity demanded in response to changes in price. Therefore, the elasticity of demand for a particular product depends on the extent to which buyers could and would switch to substitutes in response to changes in the product's price. Because the elasticity of demand increases with buyer's ability to switch to substitutes, it will have an inverse relationship with market power.

<sup>21</sup>Sometimes consumers may be unable to react to a price increase. Nevertheless, producers may be able to do so by, for example, increasing their supply to satisfy the demand of these consumers. If other producers respond to an increase in the relative price of the products supplied by the single supplier by switching production facilities to producing the monopolised collection of products, the increased level of supply may render any attempted price increase unprofitable. In this case, those producers with the ability for supply-side substitution should be included in the relevant market. Refer to an article on Critical Loss Analysis in Market Definition and Merger Control by K. Huschelrath: Centre for European Economic Research (ZEW), Discussion paper no. 09-083 accessed on [http://papers.ssrn.com/so/3papers.cfm?abstract\\_id=1547085](http://papers.ssrn.com/so/3papers.cfm?abstract_id=1547085).

<sup>22</sup>Office of Fair Trading (July 2001), *"The role of market definition in monopoly and dominance enquiries"*, Economic Discussion Paper 2, accessed at <http://www.offt.gov.uk>.

<sup>23</sup>This is setting the price of a product or service based on what the competition is charging. Competitive pricing is used more often by businesses selling similar products, since services can vary from business to business, while the attributes of a product remain similar. This type

- (b) potential suppliers might be asked whether they had a spare capacity or were free or willing to switch production. An enterprise may be prevented from switching production because all their existing capacity is tied up, e.g., they may be committed to long-term contracts. There might also be difficulties obtaining necessary inputs or finding distribution outlets;
  - (c) although potential suppliers may be able to supply the market, there may be reasons why customers would not use their products, so the views of customers might be sought; and
  - (d) more generally, customers may also be able to supply wider information about potential suppliers. Customers that are businesses might take actions to encourage potential suppliers to enter.
- 4.6 In some cases, where there are high levels of supply side substitutability, it may be appropriate to define a market with reference to the similarity of production methods. If there is any serious doubt about whether or not to account for possible supply side substitution when defining the market and calculating market shares, the Authority will, in this instance, apply the principle of the Competition and Markets Authority (formerly Office of Fair Trading)<sup>24</sup> that defines the market only on the basis of demand side substitutability, and the supply side constraint in question.
- 4.7 In regard to the Federal Trade Commission (FTC), the FTC recognises that firms are subject to three sources of competitive constraints: demand substitutability, supply substitutability and potential competition. However, the FTC has further indicated that demand substitutability is seen as the most important disciplinary force and therefore stresses its importance in the delineation of the relevant market. Supply-side substitutability may only be taken into account in defining markets in those situations where its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. In other words, the FTC's approach in deciding whether different products or regions should be included in the same relevant market depends almost exclusively on their substitutability from the perspective of the consumer.<sup>25</sup>

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of pricing strategy is generally used once a price for a product or service has reached a level of equilibrium, which often occurs when a product has been on the market for a long time and there are many substitutes for the product.

<sup>24</sup> Competition Law Guideline 2004. *Market Definition. Understanding Competition Law*, Competition and Markets Authority (formerly Office of Fair Trading).

<sup>25</sup> Globalisation and the definition of the relevant geographic market in anti-trust practice; by L. Sleuwaegen and I. De Voldere; Available in: <https://public.vlerick.com/Publications/d6b8d457-69a9-e011-8a89-005056a635ed.pdf>.

## 5.0 THE GEOGRAPHIC MARKET

- 5.1 Geographic markets are defined using the same process as that used to define product markets. The geographic market may be national, or confined to a district, city, town or village, etc. This will outline some practical issues which are particularly relevant to geographic market definition, such as demand and supply side issues and imports.
- 5.2 The geographic market or dimension identifies the geographic area within which substitutable products compete, as in the United Brands<sup>26</sup> case where the aspect of the relevant market examines its geographic extent.
- 5.3 As with the product market, the objective is to identify substitutes which are sufficiently close that they would prevent a hypothetical monopolist of the focal product in one area from profitably sustaining prices a bit higher than competitive levels.
- 5.4 The process starts by looking at a relatively narrow area, being the focal area. This might be an area supplied by the parties to an agreement or the subject of a complaint about the conduct or, if that area was relatively wide, past experience might suggest a narrower area that is more appropriate, as illustrated in the Distillers Corporation (SA) Ltd/Stellenbosch Farmers Winery Group Ltd. In this case, the Competition Tribunal of South Africa found that both the parties (Merging parties and the Competition Commission) defined the markets broadly (including all alcoholic beverages) and narrowly (whisky, brandy and vodka), respectively. Rather, the Tribunal's focus was on the vast price differentials between various spirits brands, with the relevant product markets being: premium spirits markets, proprietary spirits markets, and value spirits market. Even though the Tribunal found that the merger would lead to a substantial lessening or prevention of competition in the proprietary spirits market, the merger was conditionally approved.<sup>27</sup>

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<sup>26</sup>In this case the Commission stated that for Article 82 of the EU Treaty to apply, it must: "...presuppose the clear delimitation of the substantial part of the EC in which it may be able to engage in abuses which hinder effective competition and this is an area where the objective conditions of competition applying to the product in question must be the same for all traders." In this case it was found that characteristics and conditions of markets will separate them into mere localised markets as opposed to being Europe-wide. Price differences between the geographic locations are, therefore, not a key factor.

<sup>27</sup>The merging parties proposed a widely-defined product market which should include all alcoholic beverages, ranging from beer to spirits, including wine and flavoured alcoholic beverages. This led to a relatively low post merger market share of 19.7%. However, the Competition Commission delineated the product market narrowly, based on the various spirit types (such as whisky, brandy and vodka), different types of wine. Therefore, based on this product market definition, Distillers market share in the brandy market and the sparkling wine market were above acceptable levels in the view of the Competition Commission. The Tribunal did not accept either of the parties' market definition, but defined three distinct product markets based on the vast price differentials between various spirits brands with the relevant product market being: premium spirits markets; proprietary spirits market; and value spirits market.

- 5.5 For consumer products, geographic markets may often be quite narrow, while for wholesaling or manufacturing markets, geographic market may often be broad. This is due to the fact that, in the latter markets, customers may be in a better position to switch between suppliers in different regions provided transport costs are not too high.
- 5.6 The supply side entails looking at the potential for undertakings in other territories to supply the focal area. When defining the geographic market, supply side substitution is analysed using the same conceptual approach set out for the product market. Therefore, the main evidence will usually mirror the information gathered on product market definition. Where the price of a product is low relative to its transport costs, this might indicate a relatively narrow geographic market.
- 5.7 On imports, when considering whether the geographic market should be defined more widely than a national market, data on imports may be informative. Significant imports of the product may indicate that the market is wider than a national market. However, the presence of imports in a territory will not always mean that the market is international, for a number of reasons.<sup>28</sup>
- 5.7.1 firstly, imports may come only from international operations of domestic suppliers, in which case they may not act as an independent constraint on domestic enterprises;
- 5.7.2 secondly, in order to import on a larger scale, international suppliers may require substantial investments in establishing distribution networks in the destination country; and
- 5.7.3 thirdly, there may be quotas and other barriers to trade which limit the volume of imports into the destination country. These factors may mean that suppliers of the relevant product located outside the national market would not provide a sufficient constraint on domestic suppliers to be included in the same relevant geographic market.
- 5.8 Conversely a lack of imports does not necessarily mean that the market cannot be international. The potential for imports may still be an important source of substitution should prices rise.<sup>29</sup>

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<sup>28</sup>Competition Law Guideline 2004. *Market Definition. Understanding Competition Law*, Office of Fair Trading.

<sup>29</sup>ABA Section of Antitrust Law, *Market Definition in Antitrust Theory and Case Studies (2012)*, page 51. American Bar Association publishing. Page 14 of

## 6.0 OTHER ISSUES

6.1 A possible dimension to market definition is time (temporal dimension). There could be a temporal market<sup>30</sup>, which may be evidenced in the following ways:

- 6.1.1 peak and off peak services;
  - 6.1.2 seasonal variations; and
  - 6.1.3 innovation/inter-generational products: Customers may defer expenditure on present products because they believe innovation will soon produce better products or they own an earlier version of the product, which they consider to be a close substitute for the current generation.
- 6.2 A time dimension may be appropriate where:
- 6.2.1 it is not possible for customers to substitute between time periods; and
  - 6.2.2 suppliers cannot substitute between time periods.
- 6.3 To some extent, the time dimension is simply an extension of the product dimension, quality and packaging.
- 6.4 Throughout these guidelines, the test has been couched in terms of a hypothetical monopolist profitably sustaining prices above competitive levels. Where an enterprise has market power, it may operate in a market where the current price is substantially different from the competitive price.
- 6.5 An enterprise with market power may well have already raised prices above competitive levels to its profit maximising level. If so, the enterprise would not profitably sustain prices above current levels. If it tried to sustain higher prices, consumers would switch to purchasing other products. However, it would be wrong to argue that these products prevented the enterprise from exercising market power and so it would usually be inappropriate to include them in the relevant market.<sup>31</sup>

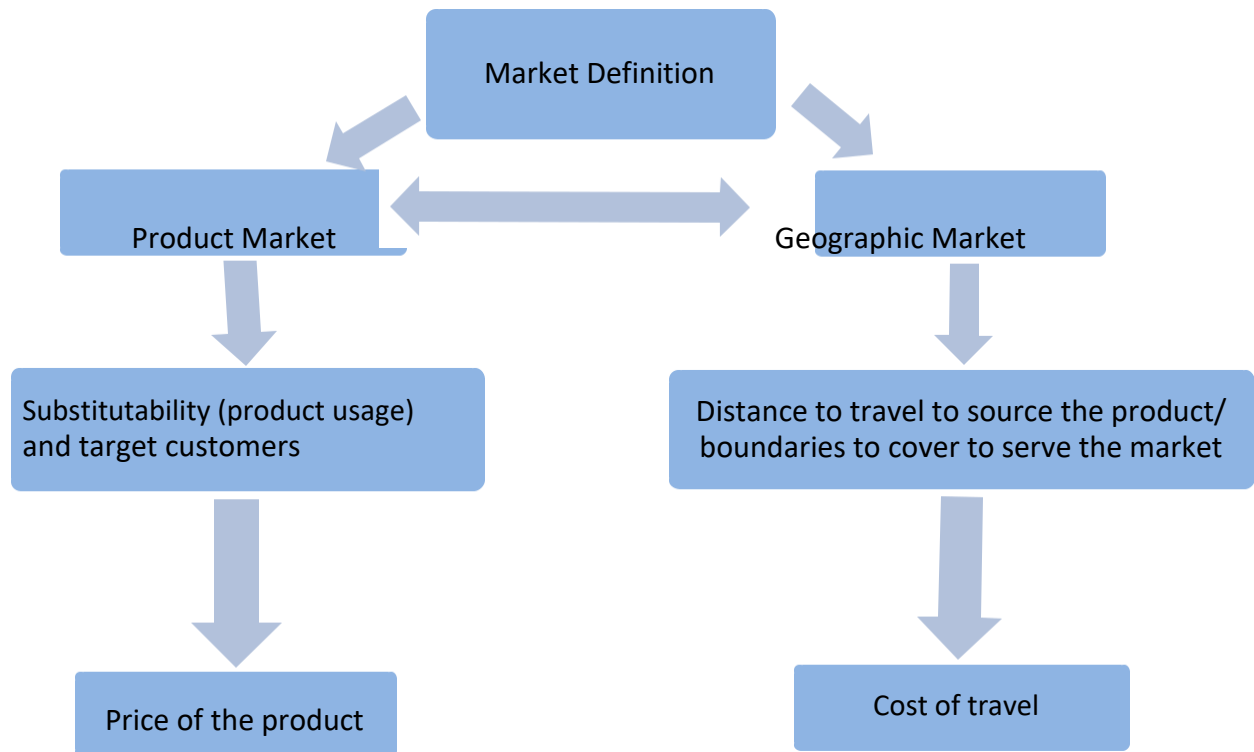
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<sup>30</sup> Refer to Competition (Jersey) Law 2005 Guidelines, *Market definition*, also available on <http://www.jcra.je/pdf/050811%20Competition%20guideline.%20Market%20definition.pdf>. Temporal markets are simply an extension of the product dimension: a product could, for example, be defined as the supply of bus services at a certain time of the day.

<sup>31</sup> Competition Law Guideline 2004. *Market Definition*. *Understanding Competition Law*, Office of Fair Trading.

## 7.0 SUMMARY OF MARKET DEFINITION PROCESS

7.1 In summary, Market Definition flow chart is as follows:



## 8.0 CONCLUSION

8.1 It is essential that, in assessing cases of abuse of dominance and mergers, the Competition and Consumer Authority adheres to the statutory provisions of market definition and relevant market as per section 72 of the Act. In determining dominance, abuse and merger cases, this section should be read together with Regulation 4 of the Competition Regulations of 2011.

8.2 Competition does not occur in a vacuum, but in a market; therefore, behaviour of enterprises affecting competition can be found and analysed in the context of an identifiable market.



- 8.3 These guidelines are a crucial consideration for any competition analysis that seeks to identify the boundaries of the area of competition or market relevance on the issue under investigation.<sup>32</sup>
- 8.4 The Competition and Consumer Authority will, therefore, be alive to the fact that the relevant market will not necessarily be the same in another case involving the same industry or enterprise. That means the market definitions shall vary depending on the facts of the case being considered.
- 8.5 Staff of the Authority or any party using or referring to these Guidelines needs to ensure that they compare the process or conclusions herein with latest decisions or judgments of the Commission, competition tribunal/s, or superior courts in Botswana or other relevant comparable jurisdictions.

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<sup>32</sup>Motta, M. (2004) *The Antitrust Revolution*. Oxford University Press.