suppliers outside the relevant geographic area could start to supply within it may also be taken into account where its effects are sufficiently direct and immediate.

4.020 Potential competition. When potential supply-side considerations are not sufficiently direct and immediate to qualify as supply-side substitution, they are regarded as potential competition and are therefore taken into account at the stage of substantive assessment of market power and not when defining the relevant market. The significance of potential competition depends on various considerations, in particular the barriers to entry. There may also be relevant competition (from both demand- and supply-side perspectives) from products or services that are outside the relevant market. By definition, such products or services do not provide a close and immediate competitive constraint on products or services within the market. However, this does not mean that they exercise no competitive constraint and such products or services may therefore still be relevant to the overall assessment of competition.

4.021 Market definitions are contextual. Market definitions may differ depending on the context in which they arise because they are simply a means of identifying the close competitive constraints faced by the supplier, or suppliers, of a particular set of products in a particular area and in the particular circumstances under review. Thus, given that behavioural cases are essentially retrospective (assessing, broadly speaking, whether consumers have suffered in the past) whereas merger control and sectoral regulation are essentially prospective (assessing, broadly speaking, whether consumers will suffer in the future), different market definitions may be adopted in different cases in the same industry. On a prospective basis, the proposed liberalisation of a market or the launch of a new technology may mean that a different market definition is appropriate. The activities of the parties to a merger may affect the relevant market definition when examining whether the merged group would be able profitably to harm consumers through price increases, reductions in quality, choice or innovation (rather than whether each of the parties separately could do so). For example, markets for glass packaging

4.022 'One-way' markets. Market definitions are not necessarily symmetrical. It does not follow from the fact that product X exerts a close competitive constraint on product Y, that product Y exerts a close competitive constraint on product X; whether it does so is an empirical question in each case. For example, in Group A Falck/Securicor, the Commission found that suppliers of service A could readily commence the supply of service B, whereas the reverse was not true, and stated that, since the merger related exclusively to the supply of service B, the market should include both service A and service B (while noting that a different market definition might be appropriate in a merger affecting the supply of service A).

Market definitions are not static. Market definitions may change over time, for example because of changes in the structure of demand or supply or as a result of technological or legislative changes. It is therefore necessary to consider the market afresh as each case arises. Accordingly, under the regulatory framework for electronic communications introduced in 2002, the Commission is under an obligation regularly to review its recommendation on relevant product and service
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markets and NRAs are expected periodically to review their decisions as to whether markets are competitive.21

(iii) The SSNIP test

4.024 SSNIP test. The SSNIP test involves identifying the smallest group of products sold over the smallest area22 in which a hypothetical monopoly supplier could profitably apply a 'Small, but Significant, Non-transitory Increase in Price'.23 For that reason, it is also known as the 'hypothetical monopolist' test. The SSNIP might be defeated (ie rendered not profitable) by customers switching to alternative products or locations (demand-side substitution) or suppliers of other products, or suppliers present in other locations commencing supply (supply-side substitution). The test therefore focuses on the question of economic substitutability. It is analytically rigorous because the objective of market definition is to identify close competitive constraints. The test assumes, in summary, that a market is 'something worth monopolising'.24 The test is usually applied on the basis of a 5 to 10 per cent increase in the hypothetical monopolist's prices,25 with the prices of other products remaining constant. The postulated increase in price is considered on a 'non-transitory' basis, meaning that buyers would not be able to avoid the hypothetical price increase by merely delaying purchases until the price returns to its previous level.

4.025 The SSNIP test focuses on marginal purchasers and suppliers. A relevant market will be found when the application of the SSNIP test reveals that the number of purchasers that would switch to alternative products or would cease purchasing (and/or the number of suppliers that would commence supplying) within a relatively short time frame is sufficiently small that the price increase would be profitable. Therefore, looking at the demand side by way of illustration, the SSNIP test does not examine whether all customers would switch, or even whether a majority would switch.26 Rather, it asks whether a sufficient number of customers would switch to render the price increase unprofitable. Switching to other products by a relatively small proportion of customers may be sufficient to render the price increase unprofitable. The existence of a significant proportion of customers that is unwilling or unable to switch to alternative products is significant (unless such customers in themselves constitute a distinct market). The same principles apply in relation to supply-side substitution: the issue is whether all potential suppliers would commence production, but whether a smaller number would do so to render the SSNIP unprofitable for the hypothetical monopolist. The logic behind focusing on the actions of marginal purchasers and suppliers is that, in the absence of price discrimination, non-marginal purchasers are protected from anti-competitive price rises by the willingness of the marginal purchasers to switch to alternative products or the willingness of marginal suppliers to commence supply. The time period in which the substitution occurs will depend on the industry in question but it is clear that it must be within the short-term since the market comprises only direct competitive issues: a one year period may be taken as a working starting point.27

If the test focuses on whether a price increase would be profitable. The test is applied to determine whether a price increase by a hypothetical monopolist would be profitable, assuming that all other conditions remain the same. The test of 'profitability' is important because suppliers can (leaving legal issues aside) set their prices at any level they choose, but are incentive to raise prices only if this increases their profitability. Whether a price increase would be profitable will depend on whether the increased revenues from charging a higher price and the savings in costs derived from reduced output exceed the costs that are not passed on to customers. For example, in the case of a monopoly supplier of a product, if the monopoly supplier can keep the increased revenue after all variable costs have been deducted, the increased revenue will represent a profit to the monopoly supplier. However, if the monopoly supplier cannot keep the increased revenue after all variable costs have been deducted, the increased revenue will not represent a profit to the monopoly supplier. The test of 'profitability' is important because it determines whether a price increase will be profitable to the monopolist. If the test focuses on whether a price increase would be profitable, the test is applied to determine whether a price increase by a hypothetical monopolist would be profitable, assuming that all other conditions remain the same. The test of 'profitability' is important because suppliers can (leaving legal issues aside) set their prices at any level they choose, but are incentive to raise prices only if this increases their profitability. Whether a price increase would be profitable will depend on whether the increased revenues from charging a higher price and the savings in costs derived from reduced output exceed the costs that are not passed on to customers. For example, in the case of a monopoly supplier of a product, if the monopoly supplier can keep the increased revenue after all variable costs have been deducted, the increased revenue will represent a profit to the monopoly supplier. However, if the monopoly supplier cannot keep the increased revenue after all variable costs have been deducted, the increased revenue will not represent a profit to the monopoly supplier.

71 Framework Directive (n 40, above) Arts 15(1) and 16(1); SMP Guidelines (n 42, above) para 28 and see paras 4.093 et seq. below.

72 It may also be necessary to identify the time period in question, ie the temporal dimension of the market (see paras 4.089–4.090, below).


74 For a theoretical application of the SSNIP test in a very local market, see the judgment of the UK Competition Appeal Tribunal in J Burgess v Office of Fair Trading [2005] CAT 25, [2005] CompAR 1151 (funeral services in Stevenage and Knebworth) para 216.

75 See the discussion in the ICN Project on Merger Guidelines, Chap 2, para 1.32 (n 1, above) about the circumstances in which a smaller price increase might be relevant. The UK OFT Guidelines on Market Definition (n 12, above) state that 5 to 10 per cent is merely an 'indicative range'.

76 Refer to this respect Case M.3779 Pernod Ricard/Allied Domecq (24 June 2005), para 12.

29 Market Notice (n 44, above) paras 16 and 20; SMP Guidelines (n 42, above) n 37. For the report Case M.2420 Mitsui/CYRD/Gaemi, OJ 2004 L92/50, n 29 to para 111; cf Case Commission v Abellard Havilland, OJ 1991 L334/42, [1992] 4 CMLR M2, para 14, ruling out the possibility that the possibility of a group of consumers constituting a distinct market, relying on Market Definition (n 12, above) paras 3.6 and 3.15.

29 Market Notice (n 44, above) paras 16 and 20; SMP Guidelines (n 42, above) n 37. For the report Case M.2420 Mitsui/CYRD/Gaemi, OJ 2004 L92/50, n 29 to para 111; cf Case Commission v Abellard Havilland, OJ 1991 L334/42, [1992] 4 CMLR M2, para 14, ruling out the possibility of a group of customers constituting a distinct market, relying on Market Definition (n 12, above) paras 3.6 and 3.15.