



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Validity of the SSNIP Test to delineate the Relevant Market

Anuncia William^a Bhakti Khule^b

^aSymbiosis Law School, Hyderabad, India ^bSymbiosis Law School, Hyderabad, India

Received 09 February 2022; Accepted 25 February 2022; Published 01 March 2022

Identifying the relevant market is the most pivotal aspect of the competition law by the specialists. In recent times there has been a spike in the number of cases of abuse of dominant position by companies at the Competition Commission of India, and the “SSNIP test introduced with the 1982 US Merger Guidelines is known to be the globally accepted golden standard”¹ that can be used to define the concept of the relevant market. The SSNIP test “is based on two notions, perfect monopoly and perfect competition do not exist, and the firm can possess power over a particular market.”² One of the instruments utilized by the experts to characterize the relevant market is the Small However Significant Non-Transient Increase in Price Test that is the SSNIP Test. The price of the product is the central aspect of consideration. “The SSNIP test is a tool in product market definition in which a minimal possible sub-set of products is taken for analysis of finding out relevant product market.”³ In any case, the players in the advanced business sectors can make use of the zero-pricing procedures for the specific buyer as in cases like these, the application of the SSNIP Test on a prima facie basis isn’t accepted. The authors of this article have examined the concept of the SSNIP test, its essential features, and limitations and have come up with suggestions for the same.

¹ Oystein Daljord, Lars Sørsgard, & Oyvind Thomassen, ‘The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Kartz and Shipro’ (2008) 4 (2) Journal of Competition Law and Economics <https://www.researchgate.net/publication/31289431_The_SSNIP_test_and_market_definition_with_the_aggregate_diversion_ratio_A_reply_to_katz_and_shapiro> accessed 01 January 2022

² Anubhav Sharma & Chirag Jindal, ‘Digital Market and Zero-Pricing: Is SSNIP Test Applicable?’ (India CorpLaw, 2 October 2019) <<https://indiacorplaw.in/2019/10/digital-market-zero-pricing-ssnip-test-applicable.html>> accessed 05 January 2022

³ Lina M. Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126 (3) The Yale Law Journal, 564-907 <<https://www.yalelawjournal.org/note/amazons-antitrust-paradox>> accessed 05 January 2022

Keywords: *SSNIP test, relevant market, competition law.*

INTRODUCTION: THE SSNIP TEST AND ITS HISTORICAL BACKGROUND

The Small but Significant and Non-Transitory Increase in Price test is undertaken by completion analysis experts to determine the substitutability of the products and services in question. The use of the SSNIP test starts with characterizing the potential business sectors both in the product and geographic sphere, where a Hypothetical monopolist firm could productively raise the cost of the items by 5 to 10 % over the level of competition. The relevant market would then incorporate the things that the shopper would view as adequately compatible or substitutable to combat any chance of increment in cost. To apply the aforementioned test quantitatively, the exact monetary information must be made accessible to decide “(a) the competitive level of costs which ought to be utilized for the test, (b) the overall revenue of the Hypothetical monopolist and (c) the cross-elasticity of interest and supply between the products/areas.”⁴ The concept mentioned above was “included in the 1982 US merger guidelines as Adelman expressed the core idea in 1959.”⁵ In general, the SSNIP percentage is either 5% or 10%, and hence, it is also known as the 5-10 percent test. The court in the case of *MCX v NSE* observed that the application of SSNIP was “technical, arcane and held that it would be better applicable only in the cases of combinations.”⁶ The Commission further stated that they found the test to be very technical and that it gets more technical as there are not much available historical data of these tests. In the *DLF case*, the court had a completely different opinion, wherein the CCI found that the test was usually applied in abuse of dominance cases and it was concluded that “in the absence of economic analysis, it would lead to the same relevant market as delineated otherwise by CCI.”⁷ It is important to note that in the case of *MCX v NSE* the competition commission had defined the relevant market to be a stock exchange service in respect of the CD segment in India.⁸ In contrast, in the “*DLF case*, it was market for developer

⁴ Oystein Daljord, Lars Sjørgard, & Oyvind Thomassen (n 1)

⁵ Morris A. Adelman, ‘Economic Aspects of the Bethlehem Opinion’ (1959) 45 VA. L. REV., 684, 688

⁶ *Mcx Stock Exchange Ltd. & Ors v National Stock Exchange of India* (2011)

⁷ *Belaire Owners’ Association v DLF Limited, HUDA & Ors.* (2010)

⁸ *Mcx Stock Exchange Ltd.* (n 6)

service in high and residential accommodation in Gurgaon.⁹ In the case of “*Surendra Singh Barmi v BCCI*”¹⁰, the court observed that upon consideration of consumer behavior in the SSNIP test for a cricket event, the possibility of a consumer substituting cricket for another sport seemed quite unrealistic. The court, in this case, after applying the SSNIP test, was of the view that no other sport could take the place that cricket has occupied and that cricket indeed was not substitutable.

RELEVANT MARKET AND RELEVANT PRODUCT MARKET

Relevant market refers to the interaction of demand of supply at a particular place. The factors that are taken into consideration to determine this relevant market are the factors that determine the demand and supply of products/services. “The term relevant market is defined under *Section 2(r) of the Competition Act, 2002* as the market the Commission may determine concerning relevant product market and relevant geographic market or concerning both the markets.¹¹” In order to find determine the influence that a firm or a group of firms have on the market power, the product and geographical area in concern must first be identified and defined. It is vital to have a proper understanding of what comes under the relevant market concept. Analyzing the constraints imposed by the competition that one product has over the other in that particular product market can be done without much hassle. To determine what comes under the relevant market in the case of “*M/s Saint Gobain Glass India Ltd. v M/s Gujrat Gas Company Limited*”, the CCI observed the factors that are to be considered when it comes to the determination of the product market and relevant geographic market. Due regard of the Commission to all the factors such as the physical characteristics of the goods, the uses of the good, its price, etc.¹² must be considered to understand the relevant product market according to the conditions provided under “*Section 19(7) of the Competition Act, 2002*”¹³. The term relevant product market has been defined under “*Section 2(t) of the Competition Act, 2002*, to be a market comprising all those products or services which are regarded as

⁹ *Belaire Owners’ Association* (n 7)

¹⁰ *Surinder Singh Barmi v The Board of Control for Cricket in India* (2010)

¹¹ *Competition Act, 2002*, s 2(r)

¹² *M/s Saint Gobain Glass India Ltd. v M/s Gujrat Gas Company Limited* (2013)

¹³ *Competition Act, 2002*, s 19(7)

interchangeable or substitutable by the consumer because of characteristics of the products or services, their prices, and intended use.¹⁴”

“According to Section 19(7) of the Competition Act, 2002, the factors that to be considered by the CCI when determining the relevant product market are:

- Physical characteristics or end-use of goods;
- Price of goods or services;
- Consumer preferences;
- Exclusion of in-house production;
- Existence of specialized producers;
- Classification of industrial products.¹⁵”

The concept of the relevant geographic market has been defined under “Section 2(s) of the Competition Act, 2002¹⁶”. According to the act, relevant geographic market refers to the area where there is a distinct homogenous supply or demand of goods or services, and they are distinguishable from the ones available in the vicinity. “Section 19(6) of the Competition Act, 2002 provides a list of factors to be considered by CCI while determining the relevant geographic market. The factors to be considered are listed hereunder:

- Regulatory trade barriers;
- Local specification requirements;
- National procedure policies;
- Adequate distribution facilities;
- Transport costs;
- Language;
- Consumer preferences;

¹⁴ Competition Act, 2002, s 2(t)

¹⁵ Competition Act, 2002, s 19(7)

¹⁶ Competition Act, 2002, s 2(s)

- Need for secure or regular supplies.¹⁷

Delineation of the relevant market is undertaken primarily to set out the product and the geographic degree within which the business performance's competitive impact must be surveyed to gain a fair idea of the antitrust purposes. The most common way of characterizing the relevant market fundamentally refers to deciding the closely substitutable items and the geographical degree within which they compete.

INTERCHANGEABILITY OR SUBSTITUTABILITY

One of the very tests which we use to identify the relevant product market is the “Reasonable Interchangeability of Use or Demand Substitute”, which refers to a market that includes all goods and services that the consumer considers “interchangeable or substitutable” based on product features, and destined use. “*Hoffmann-La Roche vs Commission*¹⁸” was the major landmark case in which the court tried to deal with the concept of a product's 'interchangeability' or 'substitutability'. Where concern was if two nutrients are readily available on the market but going to perform different functions constitutes the same industry for satisfying purchasers. The Trial Court determined that because both vitamins (Vitamin C and Vitamin E) had different roles in terms of bio-nutritive usage, they could not be regarded to have formed the same relevant market. The bio-nutritive usage of the very both named vitamins was emphasized by the court. Which played a major key part in evaluating whether they fell into the relevant market of vitamins entirely. Typically, substitutability is determined on a two-sided basis, i.e., if X can be substituted for Y, Y can also be substituted for X. However, there may be cases where substitutability is asymmetric, in which X is seen as substitutable with Y but Y is not. Asymmetric economies can exist for a variety of reasons. Asymmetric replacement is usual in markets that feature items at various quality levels. The high-quality version of the product may have a significant competitive impact on the cost of the low-quality version, but the opposite may not be correct. Depending on the context of the investigation or regions of overlap, the regulator may designate two different product

¹⁷ Competition Act, 2002, s 19(6)

¹⁸ *Hoffmann-La Roche v Commission* (1979)

markets: one that includes both low and high-quality versions, and another that only inclusive high-quality versions. The European Commission (EC) highlighted that both Bayer and Aventis were engaged in the market for crop protection chemicals such as herbicides, pesticides, fungicides, and other plant diseases management agents in the case of *Bayer vs Aventis Crop Science*¹⁹. The European Commission split the pesticide market into foliar and soil insecticides based on the kind of crop. The EC examined one of the pests for medicines meant to protect cereals from the fungus *Gaeumannomyces Graminis*, popularly known as "take-all disease." There were only two products available to guard against this disease: Jockey (an Aventis Fluquinconazole-based medication) and Latitude (another Aventis Fluquinconazole-based product) (a comparable product manufactured by Monsanto). While both Jockey and Latitude might guard against the 'take-all-disease,' the EC pointed out that Latitude exclusively treated the 'take-all-disease,' where Jockey treated a broader range of diseases. The European Commission described this as a classic instance of asymmetric substitution, in which Latitude could always substitute for Jockey as Jockey could not always substitute for Latitude.

This case is similar to the current situation of Adani Gas Limited, in which the Commission and COMPAT were all in agreement on the asymmetric substitution of plumbed natural gas. This was delivered by Adani Gas Limited as another source of power, as supplied and transmitted by other organizations in the Faridabad District. By furtively forming the same appropriate product market and furtively forming the same sustainable product. Furthermore, the only thing that matters in establishing the relevant market is whether a consumer may move from one brand to another at someplace, and whether a brand is higher or not. The features, costs, and intended usage concerning interchangeability are the key variables, not superior traits. Piped natural gas (PNG) is said to be interchangeable with some other fuels. As a result, natural gas is distinct from all other hydrocarbon fuels due to its exceptional characteristics. Hence all the 'related product market' above is the planned use of the fuel by the industrial customers in Faridabad, natural gas can indeed be interchanged or substituted with every other hydrocarbon fuel, and PNG very well represents the relevant product

¹⁹ *Bayer v Aventis Crop Science* [2004] OJ L107/1

industry with no better replacements. Although that sort of the very economic test is something very recognized approach for identifying the market at the question, it is only one open to the very specific Commission, the EC stated in Topps *Europe vs Commission*²⁰. Other techniques for determining the relevant market, such as other market research or any sort of an assessment of the very consumers and other rival's viewpoints, may also be considered. This concept emphasizes three elements that should always be used to determine if the very market we talked about is relevant: product features, pricing, and intended usage. In every case of Google Shopping, the presented application was deemed the most significant aspect in determining the platform market. Because SSNIP is not relevant in the called zero-pricing, the SSNDQ “Small but Significant Non-Transitory Decrease in Quality” Test is suggested. Another option is to use the SSNIC “Small but Significant Non-Transitory Increase in Costs” Test, which considers both information and concentration costs. This test has never been utilized before in any scenario. It may, however, be considered a feasible alternative when the economy moves from cost to data.

THE LIMITATIONS OF THE SSNIP TEST

There is no further room for price increases if the HM is already charging monopolistic profits. As a result, the SSNIP might lead to a huge large market. This is referred to as the "cellophane fallacy and as a result, when a business already has market power, the SNIIP test fails.” This is well-known as a result of the *Du Pont case*²¹. Du Pont claimed that cellophane was not at all any different market that needed to be considered. Cellophane has a strong cross-price quantity demanded with flexible product packaging such as “aluminium foil, wax paper, and polyethylene at current costs”. These were goods, on the other hand, which were only considered effective competitive restraints that prevent Du Pont from raising the very price beyond competitive levels if at all the current price is competitive. “The Supreme Court of the United States” failed to acknowledge that a high own-price elasticity” and the development of an efficient replacement for current pricing might easily be the consequence of existing market power. Another error is to focus just on the specific behavior of certain groups and individuals

²⁰ *Topps Europe v Commission* [2017]

²¹ *U.S. v El du Pont de Nemour and Co.* [1956] 351 US 377

of customers or on average or moderate consumers when identifying the very basis of the relevant market. This is known as the "toothless fallacy." This is in response to the European Union's judgment on United Brands²².

This isn't to say that this results in poor market definition. At the very least, there is a yardstick to use to determine the marketplace in a step-by-step way. If this procedure does not exist, the market definition will become very subjective. At the very least, an attempt is being made to make the market-defining process as realistic as feasible. In actuality, removing the SSNIP test's reliance on empirical evidence and experiences would be almost difficult. As stated before in the preceding paragraphs, commodity market definition is an incremental method. The goal of the SSNIP testing is to assess and define the limits of competition between businesses in as scientific and methodical a manner as feasible. "The SSNIP test can be used as a categorization tool." Regardless of the ideal demarcation, it is impossible to locate such a watertight clear distinction in the imagination of a competition analyst. The features or service qualities of all products/services are used to identify them. There may be no such thing as a "zero-one" boundary. This test somehow doesn't advise which items "should be added to the SSNIP candidate market" and in what order. The way characteristics are compared or distinguished determines the classification and potential of most products/services. The feature performance of a specific product will have a major impact.

It is noticed that the very evidence used to identify relevant markets comprises elements in the product dimension, which varies greatly depending on the features and uniqueness of the sector and the products or services under consideration. "Two items cannot be deemed replacements if their physical characteristics are so dissimilar that they cannot be utilized for the same purpose." "In *Volvo vs Scania*, the EC created distinct markets for trucks weighing 5 to 16 tonnes.²³" There have been instances where physical similarities or intended uses have been used to imply the possibility of viable replacements. "In *Nestle vs Perrier* the parties contended that the product market encompassed other non-alcoholic beverages in addition to

²² *United Brands Co. v Commission* [1978] ECR 207

²³ *Volvo v Scania* [1999]

bottled water since all goods essential purpose of relieving the consumer's thirst.²⁴ The EC said that when people buy bottled water, they're not just trying to relieve their thirst; they are also trying to get a drink from a healthy source. "However, based on this definition, the market appeared to include pure tap water (implying that Coca-Cola would be a possible entrant, as all Coca-Cola bottlers must start with filtered tap water before introducing the Coca-Cola syrup and bubble)." To rule out this option, the very specific Commission stated that customers wanted to satisfy their very thirst with water from a natural health product that was mineral-rich.

CONCLUSION

In the event of the very digital platforms being "two-sided or multi-sided", we recommend that the SSNIP test tends not to fail. On a single group of customers "Consumers B that is sellers". Other criteria, such as intentional use, product features, and the "new SSNDQ and SSNIC tests", can play a critical role for another set of customers if authorities evaluate them properly. By categorizing customers into distinct categories and taking into account all of the variables listed above, a comprehensive and detailed framework of the market characteristics for digital platforms. Before implementing any of these elements in real-world situations, we also urge a thorough economic examination of platform marketplaces. As a result, the SSNIP test is an important tool for determining the suitable product market. In the very lack of SSNIP, product markets were newly established before the test was introduced about 1959 maybe even before it became widespread. These, on the other hand, would be the result of a very intuitive and relevant process. The SSNIP test has offered a framework for determining the concept of "relevant product market" in a systematic manner. It does not rule out the possibility that competition legislation existed before SSNIP. Yes, it did. The sole distinction was that it added another instrument to a competition law analyst's toolbox. As a result, SSNIP should be seen as what it is: an important instrument rather than the be-all and end-all of competition law analysis.

²⁴ *Nestle v Perrier* [1993] 4 C.M.L.R. M 17