

# **ESWATINI COMPETITION COMMISSION**



**Eswatini  
Competition Commission**

## **MARKET DEFINITION GUIDELINES**

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## **A. Introduction**

1. This guide is a guide that merely provides a base of what should be commonly applied across the board as a minimum approach and not the penultimate approach. The Guideline does not replace the principal legislation or Regulations to the extent where there may be inconsistencies. It is also important to use the guide in light of:
  - Decisions/interpretations made by the Courts in Eswatini
  - Decisions/interpretations made by the Courts in comparable jurisdictions
  - Decisions/interpretations made by overriding regional and international bodies to which Eswatini is a confirmed or participating member (judicial, quasi-judicial or administrative)
  - Any other persuasive case law from jurisdictions with comparable legal provisions.
2. Why a separate guide on Market Definition? Market definition is easily glossed over especially for a competition authority that has not been challenged and tested on the efficacy of its relevant market analysis. The conceitedness of experience may also unconsciously make an investigator or analyst use “personal views” into the analysis, instead of a judicially defensible methodology. Further, having a guide is vital for new staff as they do not have to run to their supervisors all the time to confirm their analysis. It equally eases a supervisor’s work.
3. Market definition is an important and indispensable part of all mergers and rule of reason cases. Its exhaustive analysis may be dispensed with from outright prohibitions, including consumer protection cases.

## **B. What is a Market?**

4. There is no definition of a market in the Competition Act 2007 of Eswatini. From economic theory as well as the practical school of life, we note that competition or consumer choices does not operate in a vacuum but in an identifiable place. Competition and consumption are related to products, goods or services. Products, goods or services are produced to be sold and/or consumed somewhere. Such a place is a physical place that can be identified and where independent entities and buyers/consumers who find themselves in such a place exchange value for money.
5. The general best practice approach adopted by competition authorities is to define a market from the product side and from a geographical point of view. In the

*United Brands v EC*, Case 27/76 it was emphasized that a market has to be defined “both from the standpoint of the product and from the geographic point of view” (para. 10).

### C. Why We should be concerned about a Market

6. Success of any economy depends on how effective and efficient markets are. Where markets fail, there are adverse effects on socio-economic as well as political well-being. A competition authority is therefore to identify a clear market that is sufficiently homogenous and protect and promote competition in that market for the good of all the market actors. It is in a market where “trade practices” are implemented. Section 2 of the Act defines “trade practice” as:

*“any practice related to the carrying on of any trade and includes anything done or proposed to be done by any person which affects or is likely to affect the method of trading of any trader or class of traders or the production, supply or price in the course of trade of any goods, whether real or personal, or of any service.”*

7. Markets therefore provide a useful arena for observation of phenomena arising out of the interplay between visible and invisible market forces. Eswatini has taken a market-economy developmental model. This means that the “invisible market forces” should be at play to assist in achieving desired outcomes. Notably, the preamble/object clause of the Competition Act holds, *inter alia*, that this is an Act:

*to provide for the encouragement of competition in the economy by controlling anti-competitive trade practices, mergers and acquisitions, protecting consumer welfare...*

8. The Government of the Kingdom of Eswatini has thus come up with the Competition Act to monitor acts that prevent competitive outcomes in the economy. Economic outcomes and their desired effects are measured by observing certain factors/behaviours in a market. An economy without a market is perhaps non-existent. It is therefore very important to identify a particular and peculiar market to ensure that any regulatory intervention does have a certain desired impact to address identified failures. All markets are unique. It is therefore important to outline those unique features about a market that makes it distinct from other markets and enable players act or strategise in a manner different from how they behave in different markets.

## D. Identifying a Relevant Market

9. The market arena provides the practical implementation of State laws, Regulations and other instruments meant to regulate conduct of various stakeholders in the marketplace. Therefore, an inquiry, research or investigation assists the competition authority to understand how a particular arena called “a market” works and role of all the relevant or targeted actors therein.
10. The first port of call for identifying a market is identifying the goods or services. It is an established principle in competition law and policy that a relevant market comprises products and the area in which the product is sold or where enterprises trade their goods. These two components are indisputably referred to as the product market and the geographic market. Practice shows that these must be analysed separately but geographic market cannot be engaged in before first exhausting an analysis of the product in question.
11. The Competition Act 2007 does not define what a product is but has a definition of “goods or services” - which is, for all intents and purposes, the same as “products”. Section 2 of the Act defines “goods or services” as *including any other goods or services that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints*.
12. Using this definition in the Act of goods or services, the following **components/elements** must distinguish such as peculiar:
  - (i) The good or service (herein to be referred to collectively as “product”)
  - (ii) **Includes** any **other products** **reasonably capable** of being **substituted** for them in light of:
    - Ordinary commercial practice
    - Geographical
    - Technical, and
    - Temporal constraints
13. For purposes of this guide, and based on international best practice and using the definition of products above, the Market definition components that will assist to distinguish products and thus identify them as a distinct market shall be as follows:

- Product Market, which will be analysed in view of the statutory tests of:
  - (a) Identification of product
  - (b) Identification of substitutes (i.e., reasonably capable of being so to the product)
  - (c) Identification of commercial practices peculiar to the product and substitutes
  - (d) Identification of Technical Constraints peculiar to the product
  - (e) Identification of Temporal Constraints peculiar to the product.
  
- Geographic Market, which shall be analysed in accordance with the statutory tests of “Temporal” constraints.

14. The above are explained in detail below.

## **E. Product Market Analysis**

### *The Product*

15. The product has to be described and classified in sufficient language that self-evidently makes it, in the report, stand out as having unique characteristics from other products. Such characteristics would include but not limited to the following:

- Appearance
- Usage
- Food value
- Taste
- Characteristics, etc

16. Sources of such information will be from but not limited to the following:

- Principal/mainstream consumers/users of the product: High heeled shoes (women); toys (children)
- Product marketers (they profile messages based on certain product attributes)
- Product publications (e.g., magazines, brochures (e.g., cars, high end clothes))

- R & D reports about the product (also if it is pharmaceuticals or foods, there may be UN agencies such as WHO, FAO, etc who have engaged consultants to provide public information about the product).

*The Substitutes*

17. Substitutes will be products that have the same attributes as indicated above for the product. However, it is not enough to show that the product has the same features. Maize meal and cassava meal may appear the same and marketed through the same medium. The investigator/analyst must go to the same identified consumer and observe or learn about their actual market behavior. Do they, in the main, substitute cassava meal for maize meal?
18. It is the view or position of the consumer (not of the investigator/analyst) that should be analysed.
19. Substitution has supply and demand side. The supply side pertains to an empirical inquiry into the possibility and sustainable capacity for the same manufacturers or suppliers using available processes to switch and produce or supply the substitute product that meets the same consumer needs in the event that the mainstream or other large supplier discontinued to supply the product, or where the usual product was constrained for other factors such as high price. The supply-side substitution approach therefore would look at:

<i>Supply Side Substitution Inquiry</i>	<i>Whereto</i>	<i>Existing Possibility</i>		<i>Effectiveness/Sustenance of Production</i>	
		Yes	No	Yes	No
Past behavior of the manufacturers/Suppliers	<ul style="list-style-type: none"> <li>• Ex-industry players</li> <li>• Review market history/past trends</li> <li>• Interview relevant consumers: old, sophisticated</li> </ul>				
Present Substitute Product Industrial Capacity to meet substitute product needs	<ul style="list-style-type: none"> <li>• Review current industrial capacity by interviewing existing industry experts based within the companies or elsewhere e.g., can an orange juice processor</li> </ul>				

	<ul style="list-style-type: none"> <li>change to a mango juice processor?</li> <li>• Review Annual reports for PLCs</li> <li>• Industry Studies</li> <li>• Academic papers</li> </ul>				
<p>Quantitative Analysis:</p> <ul style="list-style-type: none"> <li>• Price Trend Analysis: At what price differential would they switch?</li> </ul>	<ul style="list-style-type: none"> <li>• Review prices at which the switch occurred (NOTE that the SSNIP is not useful where inflation rate or general price increases are above the 5-10% threshold)</li> <li>• Review past consumer responses</li> </ul>				

20. Demand side substitution should also be looked at with the same lens as that of the supply side. The possibility of substitution must be identified, but the next step is to find out how sustainable or effective such substitution would be. It is therefore not enough to identify the substitution, but to qualify it as effective to the extent of influencing the mainstream product’s pricing and other marketing variables. Again, the focus should not be on SSNIP, rather first see what has happened in the market, what actually is happening and may likely happen. The demand-side substitution approach (with a focus on consumers/users/customers) would look:

<i>Demand Side Substitution Inquiry</i>	<i>Whereto</i>	<i>Existing Possibility</i>		<i>Effectiveness of Use/ Consumption Sustainance</i>	
		Yes	No	Yes	No
Past behavior of the customers/consumers	<ul style="list-style-type: none"> <li>• Ex-industry players</li> <li>• Review market history/past trends</li> <li>• Interview relevant consumers</li> </ul>				
Presence of Substitute to meet consumer/ user needs	<ul style="list-style-type: none"> <li>• Consumer Survey e.g., Does/Can/Will orange juice substitute mango juice?</li> <li>• Review Consumer Behaviour reports on the product</li> </ul>				

	<ul style="list-style-type: none"> <li>• Interview suppliers of substitute products</li> <li>• Academic papers</li> </ul>				
<p>Quantitative Analysis:</p> <ul style="list-style-type: none"> <li>• Price Trend Analysis: At what price differential have they/would they switch?</li> </ul>	<ul style="list-style-type: none"> <li>• Review prices at which the switch occurred (NOTE that the SSNIP is not useful where inflation rate or general price increases are above the 5-10% ratio)</li> <li>• Review past consumer responses</li> </ul>				

*Commercial Practices peculiar to the Product*

21. The definition of “trade practice” in section 2 of the Act will assist us to equally understand “commercial practice”. In short, these are related to what in Marketing (micro-economics) are referred as the 4Ps: Product itself, Place (distribution), Price, Promotion (discounts, cash, credit, etc.).

22. Each product has certain commercial practices around it that are used differently and therefore these will have to come out to ensure that there is sufficient identification of how peculiar such are to the product. How is the product produced, stored, priced, delivered sold, where is it sold? These will affect the exercise of market power and successful but unfair exercise of such power may lead to abuse.

23. To find out these commercial practices, the investigator/analyst must have proof/evidence by a wide range of product information sources, including:

- Interviewing market actors: Sales/Marketing Directors/Managers (serving or retired)
- Reviewing Annual Reports for listed companies (they usually explain something about their commercial practices) - which are usually posted on websites
- Market research reports by consultants or organizations (national, regional, global ones such as UN agencies, USAID, JICA, etc.)
- University Project papers/Thesis/Dissertations
- Internet search
- Industry/Trade organization

### *Technical Constraints peculiar to the product*

24. In the general understanding of English, a constraint is something that controls or affects something. In this case, our understanding is that such constraints would include but not limited to regulatory aspects that specify how the product is to be produced, distributed, packaged, etc. Such regulatory issues may make the product have different strategies for sales and marketing. They may also affect pricing.

### *Temporal Constraints peculiar to the product*

25. Product marketing may be a subject of temporal setbacks, which may be natural, unnatural or routine. Maize for instance is not a product that is widely and readily available all year round for a miller and this raw product may require huge storage when it is available. The miller will plan to buy it in large quantities when it is available in order to ensure that he has a ready supply of maize meal to his customers.

26. Why has the Act included temporal constraints as part of understanding the product? This peculiar feature will distinguish the product from others, especially when dealing with substitution. Temporal constraints also have an effect on pricing.

27. In *United Brands Corporation v European Commission*, the Court noted that:

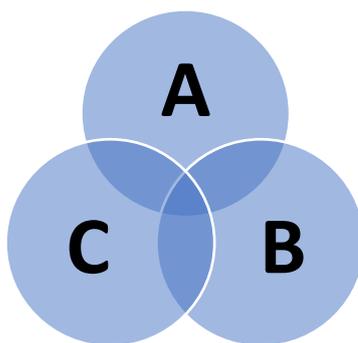
*the influence of the prices and availabilities of other types of fruit on the prices and availabilities of bananas on the relevant market is very ineffective and that these effects are too brief and too spasmodic for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefor*

## **F. Geographic Market**

28. The Competition Act does not define what “geographic market” is. We can learn from the European Court of Justice (ECJ), who, in Case 85 /76, *Hoffmann-La Roche* [ 1979] ECR 461, defined the relevant geographic market:

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”

29. To find geographic market, competition authorities use reasonable substitution test based on reasonable distance around a certain circumference that would make the most consumers move to purchase a product. For instance, it is possible that some Emaswati would travel to neighbouring towns in South Africa to buy some groceries or household items? To what extent would these be so many and consistent with purchasing power to actually consider neighbouring South African markets as part of the geographic market for a competitor in Eswatini? Perhaps they may be included as “import competition” in merger or abuse case analysis.
30. The classical test for this is the Hypothetical Monopolist Test. Although it is hypothetical, its genesis starts from the actual behavior of buyers/consumers in a given circumference. To what extent would one move to buy a loaf of bread outside the vicinity of their office or home if the price of bread went up above competitive levels in their vicinity? Understanding the characteristics of the product and the nature of the consumer would provide us with sufficient base in which to interview consumers and major buyers in this regard.
31. The illustrations below can be of assistance:



32. Hypothetically, A, B and C are monopolists in the geographic sense in the lighter areas and therefore are assumed, *ceteris paribus* (i.e., all things being equal) to exercise monopoly power in their respective light-shaded areas. However, each of them would be expected to be cognizant of the presence of competing products in the darker shaded areas where there are overlaps. To what extent and how further

will someone from A move to B and C and vice-versa or interchangeably from these points) to buy the same or competing products (substitutes?) if it were increased to an unacceptable level - note “unacceptable level” is a question of prevailing socio-economic conditions (therefore use SSNIP in this context).

33. Another factor is that of distance. One may travel far in search of expensive one-off products such as furniture, cars (one may even go to a neighboring or far flung country for cars). A mother may travel a bit further to stock up on her supplies of baby-diapers. Therefore, identifying the geographic market will have to be a case by case approach where relevant market actors are spoken to and behavior recorded.

34. The investigator/analyst must therefore assist the adjudicator to understand, in very simple language, how it has arrived at a certain conclusion regarding the geographic market, which conclusion must be supported by evidence from the market - not merely theoretical conjecture:

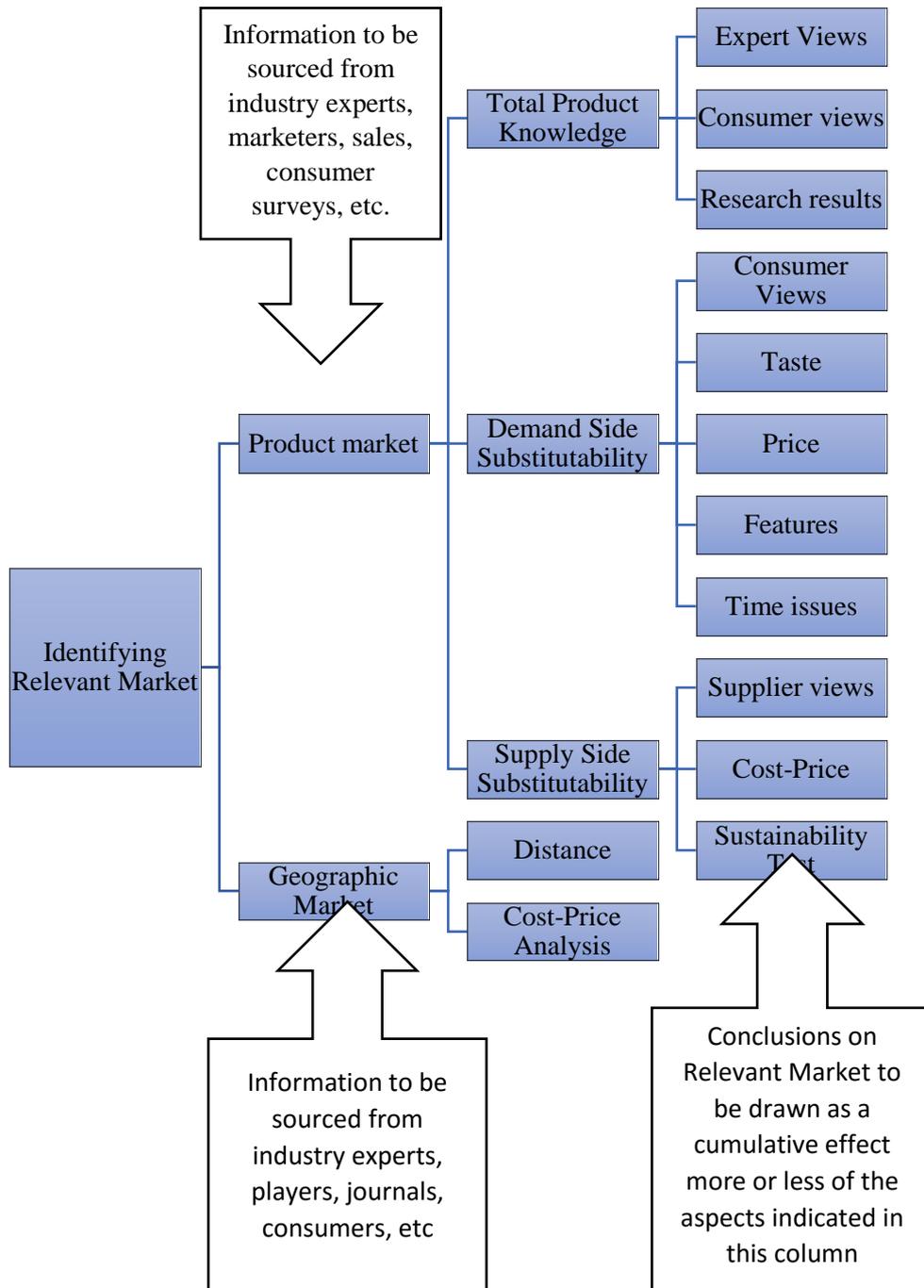
<b><i>Geographical Market Inquiry</i></b>	<b><i>Whereto</i></b>	<b><i>Existing Possibility</i></b>		<b><i>Effectiveness / Sustainance by consumer</i></b>	
		<b><i>Yes</i></b>	<b><i>No</i></b>	<b><i>Yes</i></b>	<b><i>No</i></b>
Past behavior of the customers/consumers	<ul style="list-style-type: none"> <li>• Ex-industry players</li> <li>• Review market history/past trends</li> <li>• Interview relevant consumers</li> </ul>				
Present behavior of the Consumers					
Distance to neighboring markets	<ul style="list-style-type: none"> <li>• Consumer Survey e.g., Does/Can/Will move from A to B or C to buy orange juice if mango juice was not available or its price intolerable?</li> <li>• Review Consumer Behaviour reports on the product</li> <li>• Interview suppliers of the product</li> <li>• Academic papers</li> </ul>				
Quantitative Analysis: <ul style="list-style-type: none"> <li>• Price Trend Analysis: At what price differential</li> </ul>	<ul style="list-style-type: none"> <li>• Review prices at which movement to B or C was triggered? (NOTE that the SSNIP is not</li> </ul>				

<p>have they/would they move From A to B or C?</p>	<p>useful where inflation rate or general price increases are above the 5-10% ratio)                  • Review past consumer responses</p>				
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### G. Re-Emphasis

35. As noted, this guide is meant to provide direction as well as a benchmark for supervisory audit of dealing with market definition. It is to be emphasized that the conclusions on market definition, with all the debate that can go on, depend on information that has been obtained from the market.
36. It is possible that where the Commission staff have undertaken uncontested market definition analyses on a particular product before, they may be tempted to reproduce the same old analysis in future cases. This is tempting for a busy officer and an un-alert supervisor or where there are staff constraints.
37. The principle and policy being advanced in this guideline is that let the facts speak for themselves. Market actors are the sources of information, hence the need to regularly analyse that information and make informed opinions or conclusions out of them.

## H. Summary of Process



**I. Review of the Guidelines**

38. These Guidelines may be reviewed from time to time to reflect changing market circumstances and law governing their implementation.

**J. Entry into Force**

39. These Guidelines shall enter into force upon approval by the Board.

**DATE OF COMMISSION APPROVAL: 20 APRIL 2021**