# LEGISLATIVE COMMENT – THE COMPETITION (AMENDMENT) BILL, 2022: CONUNDRUMS OF THE APPLICATION OF SUPPLY SIDE SUBSTITUTABILITY TO DEFINE RELEVANT MARKET

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**Abstract**: *The Competition (Amendment) Bill, 2022*[1] *introduced in the Lok Sabha during the recently concluded monsoon session of Parliament proposed multiple changes to the Indian Competition Act, 2002 with far reaching implications. One of such proposal is with respect to the definition of relevant product market (RPM). Currently, the Act defines RPM as a market of products or services that are considered as substitutable by the consumer. The Bill proposes to add 'cost of switching supply' as a factor in the delineation of RGM and RPM under section 19(6) and 19(7) of the Act respectively. In the present article, the authors have examined the implications of the proposed insertion in section 19(7). The article argues that although the Bill includes supply substitutability as a factor to delineate relevant market, the application of the same should be conditional and can only be applied under certain circumstances.*

## I. INTRODUCTION: IMPORTANCE OF THE DEFINITION OF 'RELEVANT MARKET'

The concept of relevant market plays a crucial role in the implementation of Competition Act, 2002 ('**the Act**'). The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face.[2] It can also help assess the effect of a conduct under investigation. The concept of relevant product market implies that there could be an effective competition between the products which form a part of the relevant market and this pre-supposes that there is a sufficient degree of interchangeability between

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[1] On 17th August, 2022, the Competition (Amendment) Bill, was referred to the Parliamentary Standing Committee on Finance led by BJP leader Jayant Sinha for review. The standing committee has been asked to examine the Bill and give its report in three months. <https://prsindia.org/billtrack/the-competition-amendment-bill-2022> accessed 23 August 2022.
[2] European Commission, 'Commission Notice on the definition of relevant market for the purposes of Community competition law' (1997) 97/C Official Journal of the European Communities 372/03 ('**EU Relevant Market Notice**').

them. The reason for 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.[3]

The Indian Supreme Court in *Co-ordination Committee*[4] noted that an appreciable adverse effect on competition has to be seen in the context of 'relevant market'. Further, it is crucial to delineate relevant market before abuse of dominance can be established. The application of the provision on abuse requires the existence of a dominant position in a given market which presupposes that such a market has already been defined. It is also essential to the assessment of proposed combinations vis-à-vis its effect on competition. Competition regulators have defined the relevant market in terms of substitutability or interchangeability. Section 2(r) of the Act defines relevant market in reference to relevant product market ('**RPM**') and relevant geographic market ('**RGM**') defined under Section 2(s) and section 2(t) respectively. The Competition (Amendment) Bill, 2022 ('**the Bill**') introduced in the Lok Sabha recently proposes certain key changes to the definition of relevant market which includes insertion of a clause on 'supply-side substitutability' within the current definition of RPM and the addition of factors to delineate RGM[5] and RPM[6] under Section 19(6) and 19(7) respectively.

Supply side substitutability is intended to measure the extent to which businesses that do not currently produce demand substitutable products would switch to such products in response to a small but permanent increase in prices on market for those products. In this article, the authors argue that the delineation of relevant market cannot be based independently on the basis of supply-side substitutability and will still have to first examine demand-side substitutability. Thus, the inquiry in to supply side substitutability is conditional and is subject to pre-existing factors. The competition authority, therefore, must not factor supply side substitutability into the definition of 'market' unless it is reasonably likely to take place and already has an impact by constraining the supplier of the product or group of products in question. It is thus argued that the proposed amendment to the definition of relevant market does not factor the conditional

[3] *Competition Commission of India v Coordination Committee of Artistes and Technicians of West Bengal Film and Television* (2017) 5 SCC 17 (Supreme Court of India).
[4] ibid.
[5] As per Clause 14(c) of Competition (Amendment) Bill, 2022, in S. 19(6), after clause (h), the following clauses shall be inserted: "*(i) characteristics of goods or nature of services; (j) costs associated with switching supply or demand to other areas.*"
[6] As per Clause 14(d)(ii) of Competition (Amendment) Bill, 2022, in S. 19(7), after clause (f), the following clauses shall be inserted: "*(g) costs associated with switching demand or supply to other goods or services; (h) categories of customers*;"

nature of supply-side substitutability and makes it mandatory for the Competition Commission of India (‘**CCI**’) to consider it in all cases which in turn affects the correct delineation of relevant market.

The first part of the article examines the various sources of competitive constraints and explores the reasons behind ‘demand substitutability’ constituting the essence of market definition. Further, it is argued that while ‘supply-side substitutability’ may be a part of market definition, its application is conditional on the delineation of relevant product market based on demand substitutability. The second part of the article examines the proposed inclusion of supply substitutability in the definition of relevant market under the Bill and presents the issues related to its implementation in the current form.

## II. COMPETITION CONSTRAINTS AND THE PROMINENCE OF DEMAND SUBSTITUTION

### A. Sources of Competition Constraints

RPM classifies all those products or services which act as competitive constraints on each other to keep the conduct of market players under check.[7] The delineation of the market is not an end in itself. It is an analytical tool that assists in determining the competitive constraints upon undertakings. Undertakings face competition constraints from three potential sources[8]:

1. Demand side substitutability, i.e., the extent to which consumers consider other products as effective substitutes. Demand substitutability acts as a competitive constraint to keep the conduct of market players under check. By exerting pressure of providing cheaper or better-quality competitive products, competitors present within the market prevent other players from acting independently of competitive forces. The current definition of RPM under section 2(t) of the Act takes into account this functional substitutability/interchangeability yardstick based on qualitative criteria of characteristic, use or price of the product or service in question. Demand substitutability occurs when consumers switch to other products in response to changes in the relative prices of the product.[9] Interchangeability is gauged by measuring the cross-elasticity of demand.[10]

[7] *Mr Pankaj Aggarwal v DLF Gurgaon Home Developers Private Ltd* (2015) SCC Online CCI 77 (CCI).
[8] EU Relevant Market Notice (n 2) para 13.
[9] *Maharashtra State Power Generation Company Ltd v Mahanadi Coalfields Ltd* (2013) SCC Online CCI 85 (CCI).
[10] The extent to which consumers would substitute one good with another in the event of such a price rise is measured by the cross-elasticity of demand. The cross-elasticity of demand measures the extent to which an increase in the price of one product would lead to an increase in the consumption of substitute product. A 5-10% rule has been adopted by competition regulators as the relevant price rise to consider for assessing substitutability

2. Supply-side substitutability, i.e., the extent to which productive assets outside the control of the monopolist can be rapidly re-directed for the production of directly competing products. Supply-side substitutability is concerned with the ability of the producer of similar products to switch to producing the relevant product. Supply-side substitutability is possible only where producers make products which while not substitutes for one another from the consumer perspective, are nonetheless similar.[11] For instance, if a shoe manufacturer attempts to raise the price it charges for size 8 shoes, other shoe manufacturers could easily and quickly increase their own production for size 8 shoes, thereby increasing the supply and in process constraining the price increase.
3. Potential Competition, i.e., the extent to which new firms are able to enter the market. The behaviour of an undertaking on a market will be constrained if potential competitors are easily able to enter the market. As per ECR,[12] potential competition is taken into account, not at the stage of market definition but later on in the competitive assessment when considering an undertaking's position on the already defined market.

   The European Commission ('**EC**') distinguishes supply-side substitutability and potential competition on the basis of time scale. If a producer of one product can switch production to another in the short term without significant costs or risks, then those products will be found to be in the same market. If a producer can enter the market but only in the longer term after incurring some costs, then that producer is not relevant at the stage of market definition. The competition authority may consider barriers to entry at this position. Low to no entry barrier implies faster and less costly entry while the pressure of significant barriers may render potential competition unfeasible.[13]

### B. Supply-Side Substitutability as a Competitive Constraint

Substitutability especially in the context of demand allows the consumer to switch to an alternate product in response to any attempted increase in price. Demand-side substitutability, therefore, acts as a competitive constraint for the incumbent firms. It might be possible however

of products. Competition authorities of many countries including the United States ('**US**'), the United Kingdom ('**UK**'), and Canada use the SSNIP test as a method for measuring cross-elasticity of demand. *See*, EU Relevant Market Notice (n 2) para 15. *See also*, *Astrazeneca v Commission* [2010] ECR II-2805 (European General Court).

[11] *See*, *Amann & Sohne GmbH & Co KGV v Commission* [2010] ECR-II 1255 (European General Court).

[12] *See*, EU Relevant Market Notice (n 2) paras 20-23. *See also*, *Atlantic Container Line v EC Commission* [2003] ECR II-3155 (European General Court).

[13] D Geradin, AL Farrar, and N Petit, *EU Competition Law and Economics* (OUP 2012) 180.

that there is no immediate response to the price hike or there are no alternative products available to the consumers to switch. Delineation of RPM without considering the effects on the supply side of the market may lead to an incorrect delineation of the relevant market. Some producers may quickly tinker with their production facilities without undertaking any significant cost to immediately start producing the product, thus exploiting the price increase of the product or service in question. This may help in constraining the behaviour of the incumbent producer similar to that caused by demand side substitution. The question is of time scale. Therefore, if a producer can enter the market but only in the longer term and after incurring some cost, then that producer is not relevant at the stage of market definition.[14] It will be important nonetheless in the assessment of market power i.e. if the manufacturer can enter the market then it is a potential competitor and its existence will have a constraining effect on those operating in the market. The EC in *Atlantic Container Line*[15] noted that "*although potential competition and supply-side substitution are conceptually different issues….those issues overlap in part, as the distinction lies primarily in whether the restriction of competition is immediate or not.*"[16]

### C. Prominence of Demand Substitutability

The definition of relevant market focuses on the first two constraints, with the primary focus being on the demand side substitutability.[17] The EU Notice on Relevant Market states that "*demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to the pricing decisions*."[18] Similarly, it is evident from the current wording of Section 2(t) of the Act that demand substitutability is the essence of market definition. It is understood that the availability of demand substitutes constrains a producer that may at first appear to be dominant. 'Supply substitutability'[19] is the production counterpart of the availability of demand substitutes and which may also prevent the alleged dominant player from exercising market power like supra-competitive pricing. Supply substitutability, however, is generally of secondary importance to demand-side

[14] *Michelin v Commission* [1983] ECR 3461 [41] (European General Court).
[15] *Atlantic Container Line v Commission* [2003] ECR II-3275 (European General Court).
[16] *See also, Enso/Stora* [1999] OJ L 254 [37]–[40] (European Commission).
[17] EU Relevant Market Notice (n 2) para 13.
[18] ibid.
[19] Supply substitutability occurs when a firm engaged in the production of one good can shift its operations quickly and inexpensively to producing another good. *See*, Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 28.

substitution in defining the relevant market.[20] As per Whish, "*In some, albeit fairly narrow, circumstances supply substitutability may also be part of the market definition; however normally supply substitutability lies outside market definition and is an issue of potential competition".*[21] Therefore, in most cases, interchangeability has been determined by examining the market from the customer's perspective.

Delineation of RPM has largely been centred around demand substitutability and considered a matter of interchangeability. The EC in its Notice on the definition of relevant market[22] has adopted the hypothetical monopolist test for defining markets.[23] While the EC Notice includes supply substitutability as a source of competitive constraint along with demand substitutability and potential competition, it also notes:

> "*13…From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere.*"

Further, as per the Notice, the competitive constraints arising from supply side substitutability, except in certain circumstances, and from potential competition are in general less immediate and in any case, require an analysis of additional factors.

## III. SUPPLY SIDE SUBSTITUTABILITY ADDED TO THE DEFINITION OF 'RELEVANT MARKET'

The definition of RPM under the Act focuses on 'demand side substitutability' of the product or service from the standpoint of the consumer. Section 19(7) gives the various factors that the CCI is required to consider while defining the RPM: (a) physical characteristics or end use of

[20] *See*, *Unilever/Sara Lee Body Care* [2010] Case No COMP/M.5658 [108]–[112] (European Commission); *National Grid plc v The Gas and Electricity Markets Authority* [2009] CAT 14 [39] (UK Competition Appeal Tribunal).
[21] Whish and Bailey (n 20) 28.
[22] EU Relevant Market Notice (n 2).
[23] The Competition and Markets Authority of the UK follows a similar approach as that of the European Commission. *See*, Office of Fair Trading, 'Market Definition' (2004) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf> accessed 24 August 2022.

the goods; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; and (f) classification of industrial products.

The Competition (Amendment) Bill, 2022 seeks to add supply side substitutability as an alternate means to delineate RPM. Accordingly, RPM would also mean:

> "*A market comprising of all those products and services, the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.*"[24]

In addition, "costs associated with switching supply or demand to other areas" has been added as a factor under Section 19(7) to delineate RGM. The inclusion of 'supply side substitutability' was also recommended by the Competition Law Review Committee ('**CLRC**').[25] Although the CLRC recognized that there is no enforcement gap in the current provision, it favoured the inclusion of supply side-substitutability, in the interests of comprehensiveness. The CCI itself has employed the test of supply-side substitutability in a handful of cases.[26] The 2022 Bill, however, does not clearly explain concepts and criteria that are pivotal to correctly determining whether supply-side substitutability applies to market definition in specific cases. For instance, the concepts of *"significant additional costs"*, "*short term*", and other terms which are relevant when it comes to testing the equivalence of supply-side substitution and demand-side substitution lack specificity and can be interpreted in different ways,[27] potentially producing inconsistencies in case law.

It has to be noted that the application of supply-side substitutability to delineate RPM is conditional. The proposed amendment tries to mimic the European Commission Notice[28] on

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[24] The Competition (Amendment) Bill 2022, s 3(f).
[25] Ministry of Corporate Affairs, Government of India, *Report of the Competition Law Review Committee* (July 2019) 50 <www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 9 December 2022.
[26] *Sh Dhanraj Pillay and Others v Hockey India* (2013) Case No 73 of 2011 (CCI); *Department of Sports v Athletics Federation of India* (2016) Reference Case No 01 of 2015 (CCI); *JK Tyre & Industries Limited and J.K. Asia Pacific (S) Pte Ltd*., Combination Registration No. C-2015/10/322 (CCI).
[27] There is a lack of guidelines on what amounts to 'significant' additional cost or 'short' term. Significant or insignificant additional cost may depend on a manufacturer's access to capital or potential profits from shifting production. Similarly, what amounts to 'short' term may also vary depending on facts of the case.
[28] EU Relevant Market Notice (n 2).

the definition of RPM as far as supply-side substitutability is concerned but fails to incorporate the conditions in which supply-side substitutability is considered by the European Commission. According to the European Commission's Notice, supply-side substitutability may be taken into account when defining markets in "*those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy"*. Substitutability must therefore be looked at not only from the supply side but also from the demand side, which remains, in principle, the most effective assessment criterion.[29] In other words, supply substitution is considered only in cases where it is at least equivalent to demand-side substitution in terms of effectiveness and immediacy.[30] The determination is of whether other producers will start supplying the product in question if there is a small but significant and non-transitory increase in price (SSNIP) by current producers. In addition, whether firms not currently competing in the market would be able to switch to production of the product in question almost immediately and without incurring substantial costs.

Therefore, the ability to switch between product market or services in short term without significant adjustment of existing tangible and intangible assets, incurring significant costs/risks in response to small and permanent changes in relative prices will be crucial. This is because it is only then that the additional production put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Supply-side substitutability may be considered where the manufacturer produces a wide array of versions of the same product, for example, tyre or paper. This may also hold true in supply of certain services like consultancy or publishing. Even though there is limited substitutability from a demand point of view, production in itself can be adjusted quickly and without significant costs to switch between different varieties of the product. A separate market for each grade of product will then not be defined. Therefore, instead of delineating multiple fragmented markets, supply-side considerations help in aggregating a wider market to reflect the true conditions of competition. As per the European Commission,

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[29] *easyJet v Commission* [2006] ECR II-1931 [99] (European General Court): The General Court explicitly instructed that, both from an economic perspective and for the purposes of a market definition, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular with respect to their pricing decisions. The court further explained that demand substitution 'remains, in principle, the most effective assessment criterion', and concluded that in that particular case (considering the substitutability between airports), it was not sufficient to look at supply substitutability but demand substitutability needed to be assessed.

[30] Camila Ringeling and others, 'European Commission's Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University', (2020) George Mason University Law & Economics Research Paper No. 20-28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708528> accessed 24 August 2022.

"*Supply-side substitutability is likely to be of relevance in situations when companies market a wide range of qualities or grades of one product; even if for a given final customer or group of customers, the different qualities are not substitutable, the different qualities will be grouped into one product market provided that most of the suppliers are able to offer and sell the various qualities under the conditions of immediacy and absence of significant increase in costs…*".[31]

Switching costs will include distribution, advertising and product testing. The competition authorities do not really factor supply side substitution into market definition unless it is reasonably likely to take place, and already has an impact by constraining the supplier of the product or group of products in question.[32]

The UK Competition Authority follows a similar approach with respect to supply side substitutability. The erstwhile Office of Fair Trading (UK) in its Guidelines on market definition 2004,[33] noted:

"*3.18 The OFT will not factor supply side substitution into market definition unless it is reasonably likely to take place, and already has an impact by constraining the supplier of the product or group of products in question. What matters ultimately is that all competitive constraints from the supply side are properly taken into account in the analysis of market power. Whether a potential competitive constraint is labelled supply side substitution (and so part of market definition) or potential entry (and so not within the market) should not matter for the overall competitive assessment. If there is any serious doubt about whether or not to account for possible supply side substitution when defining the market and calculating market*

[31] EU Relevant Market Notice (n 2).

[32] European Commission, 'Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997' (2021) SWD 199 <https://competition-policy.ec.europa.eu/system/files/2021-07/evaluation_market-definition-notice_en.pdf> accessed 12 November 2022.

[33] Office of Fair Trading, 'Market Definition' (2004) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/oft403.pdf> accessed 9 December 2022.

*shares, the market will be defined only on the basis of demand side substitutability, and the supply side constraint in question will be considered when analysing potential entry.*"

In the US, supply-side substitutability is explicitly excluded from market definition. The American courts have not considered supply-side substitutability in the assessment of the relevant market. The same is taken into account only at the subsequent step of assessment of the impact of the transaction on competition, once the relevant markets have already been identified based on demand-side substitutability. Supply-side substitutability has been used only to assess actual and potential market participants in order to calculate market shares and market power. Universality of supply-side substitutability is another factor taken into consideration in market aggregation. For instance, the US DoJ Horizontal Merger Guidelines[34] requires investigation of the universality of supply substitutability i.e. whether production substitution among a group of products is found to be technologically feasible and economically viable for most, if not all, firms selling one or more of those products. Further, as per Merger Guidelines, "*market definition focuses solely on demand substitution factors, i.e. on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.*" The US Horizontal Merger Guidelines acknowledges the importance of supply-side factors for the competitive assessment, but they are not addressed at the market definition stage.

### A. Pre-Requisites to be Considered 'Substitutable'

Some conditions, therefore, must be met for supply side substitution to be relevant.[35] Most importantly, the assets needed to produce, distribute and commercialize the substitute product must be readily available to the suppliers; the suppliers must have an incentive to make rapid production adjustments in the face of significant but small price increases; and consumers must see the resulting goods as viable substitutes. In addition, enough suppliers must be able to switch production in this rapid fashion to provide a meaningful constraint on prices. The competition authority will not factor supply side substitution into market definition unless it is

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[34] US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (2010) <www.justice.gov/atr/horizontal-merger-guidelines-0#:~:text=If%20the%20process%20of%20market,is%20considered%20to%20be%20horizontal> accessed 9 December 2022.

[35] *See*, Market Definition (n 34) para 3.16; *Mannesmann/Hoesch* (1992) OJ L 114 (European Commission); *Nestle/Perrier* (1992) OJ L 356 (European Commission).

reasonably likely to take place, and already has an impact by constraining the supplier of the product or group of products in question.

In order to consider products or services as supply-side substitutable, it is pertinent that the producer/supplier of one product has the wherewithal to produce the other in terms of production, marketing and distribution assets. It should be possible for the producer to pivot almost immediately at no or very low switching cost.[36] Further, the switching or redeployment of assets to produce the substitute should not involve additional investment, especially in the form of sunk costs. The analysis of supply side substitutability will therefore require an assessment of the producer's facilities, technological capacity, infrastructure, distribution network and marketing capabilities. In *Volvo*,[37] the EC considered the relevant market of all heavy trucks despite there being several non-interchangeable types. The Commission held that "*any major European truck manufacturer is in a position to offer a complete range of different types of heavy trucks*" and there would not be substantial switching costs.[38] Similarly, in *Kish*,[39] the Commission noted that the production of 4 mm glass was technologically identical to the production of glasses of other thicknesses and that the manufacturers could easily switch production without excessive costs. In contrast, in *Microsoft*[40] and *Intel*,[41] the Commission, after establishing that there were no realistic substitutes on the demand side, examined potential supply-side substitution in the provision of client personal computer operating systems and central processing units respectively. The Commission concluded that there was no supply-side substitution because of substantial switching costs with respect to marketing and development of technology.

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[36] In *Industri Kapital (Nordkem)/DYNO* (2000) Case COMP/M.1813 (European Commission), the Commission did not include supply-side substitutes into the relevant market, because it considered that switching production capability was "time-consuming and costly." *See also*, *Boeing/Hughes* (2000) Case COMP/M.1879 (European Commission). The Commission rejected supply-side substitutability between satellites with different orbits because it took three to five years for a producer to develop the technical capacity to develop a new satellite. *See also*, *BASF/Eurodiol/Pantochim* (2001) Case COMP/M.2314 (European Commission); *Wanadoo España v Telefónica* (2007) Case COMP/38.784 (European Commission): The Commission held that local loop unbundling and regional wholesale access were not substitutable since a new operator would have to incur substantial network roll-out investments, which would be extremely time consuming and even then would only be economically viable if the operator achieved a sufficient customer base, which was neither certain not immediate.
[37] *Volvo/Scania* (2000) Case COMP/M.1672 (European Commission).
[38] *Electrolux/AEG* (1994) Case IV/M.458 (European Commission).
[39] *Kish Glass & Co Ltd v Commission* [2000] ECR II-1885 (European General Court).
[40] *Microsoft v Commission* [2007] ECR II-3601 [527]-[531] (European General Court).
[41] *Intel v Commission* [2014] Case T-286/09 [547] (European General Court).

In *Continental Can*,[42] the European Court of Justice asked how easily the makers of cylindrical cans could begin making the varying shapes customary for canned meat and fish. Again, in *Tetra Pak,*[43] the Commission "*looked at various alternatives for milk packaging (glass bottles, plastic bags, plastic bottles, and cartons) and found that competing suppliers could not readily convert their output without onerous investment in new equipment and know-how*."[44] It was therefore concluded that the relevant market was solely the market for UHT packaged milk, as opposed to the general milk market or beverage market, because to package UHT milk, a producer could switch to aseptic packaging only through burdensome investment in new technology. Similarly, in *Aerospatiale-Alenia/de Havilland,*[45] the Commission considered the ability of aircraft manufacturers producing commuter aircraft in the twenty to thirty-nine seat aircraft category to produce commuter aircraft in the forty to fifty-nine seat category, and vice versa, as part of its process of defining RPMs. However, the Commission noted that the manufacturers would take considerable time to switch to a modified version of aircraft and thus denied considering modifying the definition of relevant market on the basis of supply substitutability.

The economic viability of switching may also be examined by the competition authorities. Evidence that conversion takes place fairly often not only suggests that changeover in the real world is not prohibitively costly but also may indicate that supply substitutability actually occurs with some frequency.[46] Supply side substitutability will take into account both technical capacity and financial incentives of the producers.

Thus, supply-side substitution requires consideration of the following factors:

1. the assets needed to produce, distribute and commercialise the relevant products are readily available;
2. the firm can purchase or lease additional necessary assets without incurring sunk costs;
3. suppliers of supply side substitutes have the economic incentive to engage in production of the relevant goods/services[47];

[42] *Europemballage v Commission* [1973] ECR 215 [238]-[40] (European General Court); [1973] C.M.L.R. 1999.
[43] *Tetra Pak Comm'n Decision* [1988] OJ L 272 (European Commission).
[44] ibid 37.
[45] *Aerospatiale-Alenia/de Havilland* [1992] Case IV/M. 053 (European Commission); *See also, Mannesmann/Hoesch* [1993] OJ L 114 (European Commission).
[46] BAK, 'The Role of Supply Substitutability in Defining the Relevant Product Market' (1979) 65(1) Virginia Law Review 129.
[47] *Saint-Gobain/Wacker-Chemie/NOM* [1996] Case IV/M.774 (European Commission).

4. other suppliers are able to divert production from supply-side substitutes to the relevant products because, for example, they possess unused plant capacity that can be brought into production at a reasonable cost;
5. consumers regard their products as valid substitutes for the existing set of products;
6. a sufficiently large number of suppliers can switch production to the relevant product in response to a modest price increase.

## IV. CONCLUSION

Based on the discussion above, it is clear that while supply side substitutability is an economic factor that can be applicable for defining the relevant product market in certain circumstances, it will be a folly to apply it indiscriminately without specifying the circumstances in which it should be considered. The authors, in their humble opinion, believe that including supply side substitutability as a factor in 19(7) of the Act without the requisite checks and balances may lead to unwanted consequences. Section 19(7) of the ICA, before specifying the factors for defining the relevant product market states that the CCI 'shall' consider the factors. Hence, CCI does not have a discretion as to the factors and must consider all of them. The proposed amendments, in their present form, will make it mandatory for the CCI to consider supply side substitutability in all cases. This will diminish the importance of demand side substitutability as the primary consideration while defining the relevant product market. Hence, it is strongly recommended that the Amendment bill should be modified suitably to incorporate the circumstances in which supply side substitutability may be considered by the CCI. The authors accordingly recommend that supply side substitutability may be added as a proviso to section 2(t):

'*Provided that the Commission may also consider the 'costs associated with switching demand or supply to other goods or services' in the following circumstance*-'