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Methodology for Defining the Product Market and the Monopoly (Dominant) Position of Undertakings on the Market

I. General Provisions

1. This Methodology establishes the procedure for defining, by the bodies of the Antimonopoly Committee of Ukraine (hereinafter – the Committee bodies), the product market and the monopoly (dominant) position of undertakings on the market.

2. In accordance with this Methodology, the product market shall be defined:

during the consideration of applications and cases concerning concerted actions and concentrations involving undertakings;

during the consideration of cases concerning infringements of the legislation on the protection of economic competition in the form of abuse of a monopoly (dominant) position and the implementation of concentrations by undertakings without obtaining the relevant permission from the Committee bodies, where such permission is required;

if necessary – during the consideration of applications and cases concerning infringements of the legislation on the protection of economic competition in the form of anticompetitive concerted actions by undertakings and anticompetitive actions by state authorities, local self-government bodies, and administrative and economic management and control bodies; during market studies; and in other cases provided for by law, when the Antimonopoly Committee of Ukraine (hereinafter – the Committee) and its regional offices exercise state control over compliance with the legislation on the protection of economic competition.

3. The determination of the monopoly (dominant) position of undertakings in accordance with this Methodology shall be carried out:

within the framework of the consideration of cases concerning the abuse by undertakings of a monopoly (dominant) position on the product market;

during the consideration of applications concerning the abuse by undertakings of a monopoly (dominant) position; applications and cases concerning anticompetitive concerted actions by undertakings; anticompetitive actions by state authorities, local self-government bodies, and administrative and economic management and control bodies; applications and cases concerning concentrations involving undertakings; during market studies; and in other cases provided for by law, when the Committee (its regional offices) exercises state control over compliance with the legislation on the protection of economic competition, where necessary.

4. In this Methodology, the following terms are used as defined below:

multi-sided market – a product market in which an undertaking facilitates interactions between two or more distinct groups of customers in such a way that the demand of one group affects the demand of another group (or other groups);

barriers for exiting the market – circumstances that prevent or restrict undertakings operating on a market from exiting it, whereby the economic costs associated with market exit may exceed those that would be incurred if the undertaking remained on the market, as well as administrative factors preventing undertakings from ceasing their activities on the relevant product market;

barriers for entering the market – circumstances that prevent new undertakings from beginning to compete with undertakings already operating on a particular product market;

product substitutability – the ability of one or more products to substitute for one another;

upstream market – a market for products whose production (sale) is necessary for the production (sale) of products traded in another related market;

relevant market – a product market, including a relevant market, defined within specific relevant product, relevant geographic and timeframe boundaries;

countervailing market power of the buyer (supplier) – the ability of a buyer or supplier to constrain the ability of an undertaking (buyer or supplier) operating on the relevant market to exercise its market power, including by independently determining the conditions under which products are traded on the relevant market, inter alia, by virtue of its significant share of the undertaking's sales or purchases or its ability to refuse to purchase or supply products;

discrimination of customers by suppliers – relationships between suppliers and customers in which suppliers, without objective justification, place certain customers or groups of customers at a competitive disadvantage compared with other customers of the same supplier under identical or comparable conditions;

differentiated products – products distinguished by particular characteristics, including differences in consumer properties, appearance, quality, duration of use, the scope and quality of supplementary services and after-sales services, or trade marks, enabling customers to distinguish the advantages of a particular product produced or supplied by an undertaking from similar or comparable products. Where the location of particular customers and/or suppliers is relevant to the choice of supplier, products shall be regarded as geographically differentiated.

complementary product – a product that complements the primary product and is consumed (used) together with the primary product. A complementary product is acquired in connection with the purchase of the primary product;

national market – a product market whose relevant geographic market covers the territory of the State;

relevant product market (product market) – a product market in which a concentration of undertakings occurs, or which is or may be affected by such a concentration, or by a violation of legislation on the protection of economic competition, with product, timeframe and geographic boundaries defined in accordance with this Methodology;

substitutability of products – the ability of a particular product to substitute for another product, where the other product cannot substitute for the product replacing it;

customer – a legal or individual person (including a purchaser) engaged in the acquisition and use of products, services or works on the relevant product market (markets);

chain of substitution – a form of substitutability in which two products are not directly substitutable (interchangeable) with each other, but each of them may be substituted by a third product. A chain of substitution shall consist of at least three products;

network effects – the dependence of the value of a product (service) to users on the number of other users belonging to the same group (direct network effect) or users belonging to another group (indirect network effect), whose demand is interdependent;

monopoly (dominant) position of undertaking – the position of undertaking on the market that gives market power upon it, in particular because the undertaking:

has no competitors on the product market or is not exposed to significant competition as a result of limited access of other undertakings to the procurement of raw materials and supplies, the distribution of products, the existence of market entry barriers, privileges, or other circumstances;

is one of two or more undertakings operating on the product market, where there is no competition or only insignificant competition between them, and where they, taken together, have no competitors on the product market or are not exposed to significant competition as a result of limited access of other undertakings to the procurement of raw materials and supplies, the distribution of products, the existence of market entry barriers, privileges, or other circumstances. In particular, an undertaking shall be deemed to belong to such a group where the undertakings concerned collectively hold the largest market shares and their combined market shares exceed 50 per cent where the group consists of no more than three undertakings, or 70 per cent where the group consists of no more than five undertakings;

is not subject to countervailing market power of buyer (supplier);

downstream market – a market for products whose production (sale) requires the use of products traded in another relevant market;

primary product – a product that is consumed (used) together with a complementary product and directly satisfies the needs of the consumer;

demand – the ability and readiness of customers to purchase a certain quantity of products at a certain price within a certain territory over a certain period;

supplier – an undertaking engaged in offering products for sale on the relevant product market (markets);

supply – the ability and readiness of suppliers to produce and/or offer a certain quantity of products for sale on the product market at a certain price within a certain territory over a certain period;

regional product market:

a product market whose relevant geographic market covers the territory of a single region (the Autonomous Republic of Crimea, the regions, or the cities of Kyiv or Sevastopol), including parts of such region;

a product market whose relevant geographic market covers the territory of two or more regions (the Autonomous Republic of Crimea, the regions, or the cities of Kyiv or Sevastopol), including parts of such regions;

market power – the economic strength of an undertaking that enables it to act to a significant extent independently of its competitors, customers or suppliers, including by increasing prices and maintaining them above the level that would prevail under conditions of effective competition, and enables it to prevent effective competition on the relevant product market;

market share – the percentage of the total volume of the relevant market accounted for by the products sold (or acquired) by a particular undertaking;

consumer – a customer (a legal or individual person) who uses a product without further resale to other persons;

market structure – the number of market participants (suppliers and customers), their market shares, and market entry and market exit barriers;

participants in the product market – customers and suppliers operating on the relevant product market, as well as state authorities, local self-government bodies, and administrative and economic management and control bodies whose decisions affect the conditions under which products are traded in the market;

related product market – a market that is upstream and/or downstream of the relevant target product market;

territorial (geographical) boundaries of market – the territory (or set of territories) in which there is demand and supply for the relevant product and where competitive conditions are largely homogeneous, and which can be distinguished from related territories due to significant differences in competitive conditions;;

product – any object of commercial turnover, including products, works, services, and documents evidencing obligations and rights (including securities). A product also includes, inter alia, products (works or services) provided free of charge (at a zero monetary price) to certain groups of users on multi-sided markets, provided that such products (works or services) have economic value;

product boundaries of the market – a group of similar, homogeneous objects of commercial turnover (a product group) within which a customer may, under normal conditions, switch from purchasing one type of product to purchasing another;

transaction costs – costs associated with obtaining the necessary information on the prices and quality of products, as well as costs related to conducting negotiations, concluding transactions, monitoring their performance, and the legal protection of the parties' rights;

conditions of competition – the conditions under which products are traded on a market, including price, volume, discounts, mark-ups or other charges, terms of supply, as well as the factors affecting them (market structure, legislative, administrative and regulatory restrictions on economic activity, the granting of State aid, production technologies and costs, characteristics of the use or consumption of products, methods of transportation, etc.);

actual competitor – a supplier (customer) that is actually engaged in a relationship of economic competition with another supplier (customer);

digital platform (platform) – an information and communication system (software and hardware complex) that functions as an intermediary and, through the use of digital technologies, enables two or more groups of users (including business users and end consumers) to interact with one another for the purpose of exchanging information, providing services, selling (acquiring) products, or carrying out other transactions;

target product – the product that is the subject of the study or investigation;

timeframe of the market – the period during which economic activity takes place and for which the relevant product market is defined.

The terms "economic competition (competition)", "information", "control", "monopolisation", "state authorities", "administrative and economic management and control bodies", "product market", and "undertaking" used in this Methodology shall have the meanings assigned to them in the Law of Ukraine "On the Protection of Economic Competition" (hereinafter – the Law).

II. Defining the relevant product market and the monopoly (dominant) position of an undertaking in the market

1. Defining the relevant product market involves the following steps (actions):

1) identifying the target product;

2) compiling a list of the main suppliers and customers of the target product;

3) defining the product boundaries of the market;

4) defining the territorial (geographical) boundaries of the market;

5) defining the timeframe of the market.

2. Defining the monopoly (dominant) position of an undertaking, together with the steps (actions) set out in clause 1 of this Section, includes:

1) identifying the undertaking whose monopoly (dominant) position is to be determined;

2) determining the volume of the product (product group) traded on the relevant product market (the volume of the product market);

3) calculating and analysing the market shares of undertakings on the relevant product market;

4) identifying the main actual and potential competitors of the undertaking;

5) analysing and assessing potential competition, including market entry and market exit barriers for undertakings that sell (produce), purchase (consume or use), or may sell (produce) or purchase (consume or use) the same and/or similar product (product group) on the market;

6) assessing the impact of countervailing buyer (supplier) power;

7) analysing the strategic advantages of the undertaking;

8) assessing the undertaking's market power and determining its monopoly (dominant) position on the product market.

3. The stages of defining the relevant product market and the monopoly (dominant) position of undertakings, provided for in clauses 1 and 2 of this Section, as well as their number and sequence, shall be determined in each individual case of a violation, taking into account the circumstances of the case or market study, and in other cases provided for by law, in the course of the Committee (its regional offices) exercising state control over compliance with the legislation on the protection of economic competition, including the characteristics of the product, the market structure, the volume of available market information, etc.

When defining the product market, it is mandatory to carry out the steps (actions) provided for in subclauses 1 and 3-5 of clause 1 of this Section.

When defining the monopoly (dominant) position of an undertaking on the market, it is mandatory to carry out the steps (actions) provided for in subclauses 1 and 8 of clause 2 of this Section.

When defining the monopoly (dominant) position of undertakings included in the register of natural monopolies pursuant to part two of Article 5 of the Law of Ukraine "On Natural Monopolies", on the relevant natural monopoly market, the Committee bodies shall not apply the provisions of subclause 2 of clause 1 and subclauses 2-7 of clause 2 of this Section.

4. If it is possible to define the relevant product market within both narrower and broader parameters (product, geographic, and/or timeframe), and if the Committee has found that competition is restricted within the broader market, defining the market within the narrower parameters is not mandatory, even if such a definition is possible.

III. Defining the subject of analysis for determining the relevant product market and a monopoly (dominant) position in the market

1. The objects of analysis are:

the undertaking;

the group of undertakings;

the target product(s) produced, sold, purchased (used or consumed) by such undertaking(s);

the products forming the product group to which the target product belongs;

the relationships between undertakings and other participants in the product market concerning the production, sale, purchase (use or consumption) of the target product;

state authorities, local self-government bodies, and administrative and economic management and control bodies, in relation to their activities involving the production, sale, purchase of products, or other economic activities.

2. Determining the composition of an undertaking that produces, supplies, sells, or purchases (consumes or uses) a particular product shall be determined by identifying the list of undertakings engaged in the production, sale or purchase of products, or in other economic activities, including those exercising control over another legal or individual person, and which are linked by control relationships within the meaning of Article 1 of the Law.

3. The composition of a group of undertakings shall be determined by identifying the independent undertakings to which the undertaking(s) that produces, supplies, sells, purchases, consumes, uses the target product belongs.

IV. Definition of the list of products for which the market is identified, the undertaking’s position in the market, and the main customers and suppliers of these products

1. The list of products for which the market and the undertaking's position on it are determined consists of products that are traded in Ukraine or in the relevant part of its territory and that are considered substitutable or interchangeable by suppliers (customers).

2. The characteristics of a single product (product group) are determined based on similarities, in particular:

1) consumer characteristics:

functional purpose;

physical characteristics;

technical and operational characteristics;

degree of novelty of the product;

2) conditions of use:

the need for energy supply, water supply, etc.;

specific requirements for placement, installation, etc.;

level of technical maintenance and transportation support;

3) conditions of sale:

through a wholesale distribution system or under individual contracts;

through a retail distribution system, including a brand-owned retail chain;

the scope of additional services and benefits for buyers.

4) prices.

3. Intermediate products of undertakings that are not sold on the market but are consumed in their own technology production process are not considered products.

4. The list of main suppliers and customers is compiled by identifying undertakings that have significant volumes of sales (supply, production) or purchases (consumption, use) of products traded in Ukraine or in a relevant part of its territory.

Significant volumes of sales or purchases of products are defined as volumes that, as a rule, exceed 5 percent of the known volumes of products (product groups circulating in Ukraine or in the relevant part of its territory), except in the cases specified in the third and fourth indents of this clause.

If, in Ukraine or in the relevant part of its territory, the specified product (or a product group) is sold (produced, supplied) or purchased (consumed, used) in volumes that are similar in size (i.e., differing by no more than 5 percent in volume) by 20 or more undertakings, volumes of less than 5 percent may be recognized as significant.

If, in Ukraine or in a relevant part of its territory, the specified product is sold (produced, supplied) or purchased (consumed, used) in volumes that are similar in size by fewer than 6 undertakings, volumes exceeding 5 percent may not be recognized as significant.

In the case of identical market shares – whether greater or less than those specified in the second indent of this clause – undertakings are treated the same, whether they have or do not have significant volumes of sales or purchases of goods.

If the volume of the relevant product (product group) circulating in Ukraine or in the relevant part of its territory cannot be established and/or confirmed by evidence, it shall be deemed equal to the sum of the established sales volumes of the relevant product (product group) in Ukraine or in the relevant part of its territory by all actual competitors known to the Committee (and its regional offices) operating in the relevant market.

V. Definition of the product boundaries of the market

1. The product boundaries of the market are defined by assessing the substitutability (interchangeability) of the product from the demand side and, if necessary, also from the supply side.

2. When assessing substitutability (interchangeability) from the demand side, the process involves identifying products that customers perceive as interchangeable or substitutable for the target product, and the customers' ability and willingness to substitute the target product with a substitute or interchangeable product(s) in the event of changes in supply conditions (prices, quality, service life (shelf life, consumption)), or the emergence of additional purchase conditions.

3. When assessing the substitutability or interchangeability of a product from the supply side, the process involves identifying undertakings that are capable, within no more than two years, of commencing the production and/or sale of the target product and/or a product that is substitutable or interchangeable with the target product from the demand side.

4. The criteria for determining the substitutability (interchangeability) of products from the demand side are:

the product's functional purpose (its ability to satisfy specific consumer needs);

the product's characteristics;

the product's price;

the product's stage in the supply chain;

product differentiation (if any);

the product's level of novelty;

the presence of barriers to the substitutability (interchangeability) of products.

If it is necessary to determine the substitutability (interchangeability) of a product from the demand side, the following are analyzed: the ability of customers to purchase the product from suppliers located in different regions, and data on the actual substitutability (interchangeability) of certain products with the target product in the past.

5. When determining the substitutability (interchangeability) of products from the demand side, it is established which of the criteria listed in clause 4 of this Section are decisive for substituting one product for another from the perspective of demanders, and a group of substitutable (interchangeable) products is formed based on their combination.

6. If the target product has no substitutes, the product boundaries of the market are defined by the target product.

7. The various stages of a product's distribution (functional levels with specific supply and demand), such as the sale of a product by producers or importers, each stage of subsequent distribution for resale, or the sale of a product to the end consumer, generally cannot be combined into a single group of substitutes (interchangeable) products.

8. The product boundaries of the market may be expanded to account for the presence of complementary products that are used together with the main product, are necessary for its functioning, or significantly increase the efficiency of its use.

9. Taking complementary products into account, the product market may be defined by the Committee's bodies as:

a systemic market – a single market comprising all primary and complementary products;

a multiple market – a single market for the primary product and separate markets for complementary products, each of which is compatible only with a specific part of the primary product;

a dual market – the market for the primary product and a separate market for all complementary products that are compatible with all types of the primary product are identified.

10. When defining the product scope of a market, products that are not substitutes may be included within the same product scope if products that are indirect substitutes are linked by chains of substitutability in such a way that that a price fluctuation of one product in the substitution chain affects the price fluctuation of another product, which in turn affects the price fluctuation of yet another product, and one of these products is the target product.

11. Separate product markets are formed from differentiated products and their substitutes. If, within a given set of differentiated products, these products prove to be substitutable (interchangeable) for a specific group of customers, such a set of products constitutes a market within a single product scope.

12. In cases where suppliers discriminate against specific groups of customers, a separate market within a narrower product scope is formed by a specific discriminated or non-discriminated group of customers for the target product.

Such a distinction occurs when the following conditions are met:

it is possible to identify the discriminated or non-discriminated group to which a specific customer belongs as of the date of sale of the relevant product to that customer;

trade between customers or through third-party intermediaries does not take place, cannot take place, or is unlikely to take place;

the discrimination against individual customers or groups of customers is not of a one-time or episodic nature.

13. All other things being equal, a distinct product market may be formed by products characterized by a significant degree of novelty.

The existence of intensive research and development regarding certain products is also taken into account when assessing the homogeneity of competitive conditions for a particular group of products or a particular territory, if it significantly affects such homogeneity.

14. Barriers to the substitutability of products on the demand side, including the costs for customers to switch from one product to another, may arise due to:

contractual obligations;

the costs of searching for alternative products;

a lack of sufficient information regarding alternative products;

the costs of training in the use of other products;

costs of adapting their own production processes;

costs of ensuring brand recognition;

regulatory barriers to market entry or other forms of government intervention;

the presence of network effects;

data migration costs (in digital markets);

the degree of interaction with other products;

the inability of customers to substitute one supplier for another;

other circumstances related to access to information, the integration of the product into the product market, or additional characteristics of its use.

15. Supply-side substitutability of a product arises when a change in prices prompts other undertakings that do not currently produce or sell the relevant product to begin producing and/or selling a substitute for the target product within a short period of time (typically up to two years) without incurring additional costs or risks.

16. Supply-side substitutability for such undertakings occurs when all of the following conditions are met:

the availability of necessary capacity and technical capabilities (fixed assets, technology, infrastructure);

the ability to establish a system for promoting, supplying, and distributing the substitute product;

the ramp-up period for the production and/or sale of the substitute product – during which undertakings are able to begin production or sales of such a product without investment – does not exceed two years;

no additional costs and no sunk costs;

the potential to generate profit from the production and/or sale of the substitute product for the target product;

the absence of contractual obligations that would create obstacles to the production and/or supply of the substitute product or to its purchase by a significant number of potential customers.

17. Supply-side substitutability is taken into account when defining market boundaries if it creates competition for actual market participants, even if only some suppliers have the ability and/or incentive to switch to selling products that are substitutable (interchangeable) with the target product.

18. Product boundaries of the market for the same target product may be defined differently depending on the supplier whose product is selected as the target product, particularly in cases where a certain undertaking can restrict the capabilities of

another undertaking by unilaterally setting the terms of trade, while the other undertaking lacks such ability.

VI. Defining the territorial (geographical) boundaries of the market

1. The territorial (geographical) boundaries of a market are the geographical area within which undertakings represent the supply or demand for the target product and its substitutes (interchangeable products), and where the conditions of competition are homogeneous and can be distinguished from other geographic territories, since the conditions of competition in those territories differ significantly.

2. When determining the territorial (geographic) boundaries of the market, the Committee's bodies assess (analyze) the following indicators (circumstances) that affect or may affect the homogeneity of competitive conditions:

the physical and technical characteristics of the product, which affect, in particular, its transportability (fragility, perishability, shelf life (consumption period), weight, compactness; and, with respect to works and services, the technical feasibility of their performance (provision) in a specific territory);

the composition of suppliers in different geographic areas (the presence of identical and different suppliers in these areas);

the market shares of identical suppliers in different geographic areas;

similarities or differences in prices, sales, advertising and promotional strategies, and the provision and distribution of products across territories;

similarities or differences in customer preferences and purchasing behavior;

barriers to market entry, including administrative barriers, for a supplier or customer to conduct business in another territory (in particular, for the import or export of products);

the size of transportation, transaction, and other costs associated with shifting supply and demand between territories, including the costs of expanding or replacing production facilities to supply products to customers in other territories;

the feasibility and economic viability of supplying products that are interchangeable with the target product from different territories;

the existence of technological relationships between suppliers and customers;

the location of specific customer groups;

the availability of retail and warehouse facilities, loading and unloading facilities, and pre-sale preparation capabilities;

factors related to the distance between suppliers and customers that affect costs, available volumes, or the reliability of supply;

trade flows and supply chains between regions;

other circumstances affecting the uniformity of competitive conditions.

3. When determining the territorial (geographical) boundaries of the market, the actual shift of customers/suppliers toward purchasing/selling products in other territories in the past is taken into account.

4. The application of the indicators (circumstances) specified in clauses 2, 3 of this Section, which characterize the homogeneity of competitive conditions, either

collectively or individually, to determine the territorial (geographical) boundaries of the market, shall be carried out by the Committee in each individual case (during the investigation of cases, market research, or the implementation of other state control measures to ensure compliance with legislation on the protection of economic competition).

5. Where suppliers do not have established economic relationships (ties) with individual customers or cannot discriminate against customers based on location, the relevant geographic market is determined, taking into account the suppliers' locations, by identifying in which neighboring territories other suppliers of the relevant product are present and/or whether the product is interchangeable.

6. Where suppliers have established ties with individual customers or can discriminate against customers based on location, the relevant geographic market is determined by taking into account the customer's location.

7. The fact that a particular product is imported does not mean that the territories of the foreign countries from which the imports originate must be included within the territorial (geographical) boundaries of the market. The Committee (and its regional offices) includes importers in the list of undertakings supplying products to the market within Ukraine, and the actual sales volumes of imported products are taken into account when calculating the market size and market shares of undertakings. Potential imports are not taken into account when determining the territorial (geographic) boundaries of the market.

8. The territorial (geographic) boundaries of the market determined by the Committee may change over a certain period of time if competitive conditions change significantly. This may occur, in particular, when competitive conditions in different geographic regions converge over time and become sufficiently homogeneous, and territories that were part of separate geographic markets are incorporated into a single geographic market.

9. If necessary, the Committee's bodies apply an assessment (analysis) of customers' hypothetical reaction to a significant but small and sustained increase in prices (the SSNIP test – the hypothetical monopolist test).

The hypothetical monopolist test is not applied if competition in the market is predominantly non-price-based, or if the price level in the market is known to be higher than it would be under conditions of significant competition, or if there is insufficient information to apply it.

VII. The timeframe of the market

1. The timeframe of the market is defined as the period during which the relevant set of product-money relations between buyers and suppliers forms a product market with homogeneous conditions of competition.

2. The duration of the period used to determine the timeframe of the market is, as a rule, one year. The duration of the timeframe of the market may be extended or shortened by the Committee in the event of:

differences in the conditions of production, supply, or purchase (consumption) of products at various times, including those of a regulatory nature;

periodic (in particular, seasonal and/or peak) fluctuations in supply and demand.

VIII. Calculation of the volume of the relevant product market and the market shares of undertakings in the market

1. The market volume on which a monopoly (dominant position) is determined is defined as the total volume of products traded in that market, according to the formula:

$$Q_{PT} = \sum_{j=1}^{n} Q_j ,$$

where n – the number of undertakings that sell or purchase products (categories of products) falling within the product boundaries of the market;

Q_j – the volume of products (product groups) sold or purchased by the j-th undertaking during the period that constitutes the timeframe of the market;

Q_{PT} – volume of the market.

The quantitative indicators Q_{PT} and Q_j are expressed in value and/or physical terms. Natural indicators are used when it is possible to apply a single natural indicator to all products that constitute the product boundaries of the market, and at the same time, prices for the same product from different suppliers or for different customers differ significantly (by more than 5 percent), or the products are sold at zero price. In other cases, value indicators are used.

If the use of value-based and physical indicators leads to conflicting definitions of the market structure, the Committee analyzes which indicators more accurately reflect the position of undertakings in the market.

2. The volume of products (product groups) sold or purchased by the j-th undertaking is defined as the total volume of products (product groups) sold or purchased that fall within the product boundaries of the market during the timeframe that constitutes the timeframe of the market, according to the formula:

$$Q_j = \sum_{i=1}^{m} Q_{ji} ,$$

where *m* – the quantity of products (product groups) that fall within the product boundaries of the market and are sold or purchased by the j-th undertaking;

Q_{ji} – the volume of the i-th product (product group) sold or purchased by the j-th undertaking.

3. The volume of products (product group) sold or purchased by the j-th undertaking is determined using the following formula:

$$Q_{ji} = Qв_{ji} – \Delta\, Qз_{ji} – Qвн_{ji} – Qe_{ji} + Qi_{ji} ,$$

where Q_{ji} – the volume of the i-th product (product group) sold by the j-th undertaking;

$Qв_{ji}$ – the volume of the i-th product (product group) produced by the j-th undertaking;

$\Delta Qз_{ji}$ – changes in the inventory levels of the i-th product (product group) at the j-th undertaking over a period of time corresponding to the timeframe of the market;

$Qвн_{ji}$ – the quantities of the i-th product (product group) used by the j-th undertaking in the production process of its own production;

Qe_{ji} – the volume of exports of the i-th product (product group) outside the relevant market by the j-th undertaking;

Qi_{ji} – the volume of imports of the i-th product (product group) into the relevant market by the j-th undertaking.

The volume of the i-th product (product group) purchased is defined as the volume of the product (product group) purchased by the j-th undertaking during the period that constitutes the timeframe of the market.

4. An undertaking's market share is calculated using the following formula:

$$P_j = \frac{Q_j}{Q_{PT}} x100 \ [\%] \ ,$$

where P_j – market share of the j-th undertaking (j = $1,2,...,n$);

Q_j – the volume of products (or a group of products) sold or purchased by the j-th undertaking;

Q_{PT} – volume of the market.

5. The overall market share of several undertakings – specifically, the five, four, three, and two largest undertakings—is calculated using the following formula:

$$SPn = \sum_{j=1}^{m} Pn_j \quad [\%],$$

where m = 2, 3, 4, 5 – the number of undertakings whose market shares are taken into account when calculating the overall market share, specifically those undertakings that hold one of the five, four, three, or two largest market shares;

Pn_j – market share of the j-th undertaking;

SPn – overall market share, specifically the overall market share held by the five, four, three, and two undertakings with the largest market shares, respectively.

6. Depending on the specifics of the product or industry, the determination of market shares may have certain particularities. An undertaking’s market share is defined as the percentage ratio of the value of the undertaking’s individual indicator to the total value of the corresponding indicator in the relevant product market. Depending on the characteristics of the market, the following indicators, among others, are used:

sales (purchases) volumes of the target product in physical terms (particularly in markets for products with price differentiation);

production capacity or production volumes (in particular, for markets characterized by the strategic importance of production capacity, regardless of the actual level of its utilization, due to the fact that this capacity can be quickly and at no significant cost deployed to produce additional volumes of products);

the number of suppliers (particularly in markets where products are sold through competitive procurement procedures or where innovative products are in the development stage);

the number of commercial transactions concluded;

in the mining industry – available reserves;

the amount spent on research and development and/or design and development work (R&D and/or D&D work), or the number of patents or patent citations – in markets where there is frequent investment in R&D and/or D&D work;

in information services markets:

the number of active users over a specific period (daily, monthly);

the frequency and duration of service use;

the volume or value of transactions concluded through the platform;

the number of transactions concluded using the platform or information resource, in connection with visits to such platform or information resource;

in transportation services markets:

the number of vessels (ships);

the number of seats in vehicles;

the number of trips (journeys) or access rights, such as slots at specific airports.

7. The market shares of undertakings are calculated for the period corresponding to the timeframe of the relevant product market.

8. The level of concentration in a product market, based on data regarding the market shares of its participants, is assessed using specific indicators, including:

market concentration rate (CRs) – calculated by summing the market shares of the largest undertakings (typically 2, 3, 5, or 10 undertakings);

the Herfindahl-Hirschman Index (HHI) – defined as the sum of the squares of the market shares of all undertakings operating in the relevant market.

Criteria for assessing market concentration using the HHI:

HHI > 2 000 — the market is considered highly concentrated, which is a sign of potential restrictions on competition;

1 000 ≤ HHI ≤ 2 000 — the market is considered moderately concentrated;

HHI < 1 000 — the market is considered to be non-concentrated, which indicates that the conditions for effective competition are in place.

The dynamics of the HHI index over time also serve as an indicator of changes in market structure:

an increase in the HHI indicates a decrease in competition.

IX. Analysis and assessment of potential competition and countervailing market power

1. The following undertakings are considered potential competitors:

those that have the material and technical resources, personnel, technologies, etc., but for various reasons do not capitalize on these opportunities;

that manufacture products (product groups) constituting the product boundaries of the market but do not sell them in the relevant market, and there are no objective legal, technical, or economic barriers that would make entry into the relevant market impossible or economically unfeasible in the near future (within one year);

new undertakings that may enter the market, including those whose products are in the development stage and are highly likely to enter the market in the near future (within one year).

2. The impact of potential competition on the level of market power is determined by the Committee's bodies based on an analysis of barriers to market entry and exit, as well as the likelihood, timeliness, and effectiveness of potential competition.

The intent and/or ability of potential competitors may be limited by the existence of barriers to market entry.

The absence of new undertakings entering the relevant market over a prolonged period (two years or more, or another period exceeding the investment cycle of the relevant product) may be an indication of the existence of barriers to entry into that market.

The Committee's body determines the ability of potential competitors to enter the market by analyzing the practical feasibility of the undertaking overcoming market entry barriers and assessing the existence of economic incentives for a potential competitor to enter the market.

3. Barriers to entry for potential competitors into the relevant market include:

demand-side constraints related to high market saturation with products (product groups) and low purchasing power among buyers;

administrative factors;

environmental constraints;

economic and organizational constraints;

underdeveloped market infrastructure;

other constraints that entail costs necessary for entry into a specific market for a product (product group).

4. The existence of at least one barrier to market entry that an undertaking cannot overcome within the two years required to enter the product market is considered an indication that this undertaking is not a potential competitor.

5. The economic incentive for a potential competitor to enter the market is the existence of a positive difference between the expected revenues from conducting business in this market and/or other markets and the costs associated with entry, which include the costs incurred by the undertaking to overcome existing barriers to entry, as well as any other excess of the expected benefits from entering the market over the costs associated with such entry.

6. The countervailing market power of a supplier's (buyer's) customers (suppliers) – which stems from the bargaining power of those customers (suppliers) – is taken into account as a factor capable of limiting the supplier's (buyer's) market power.

The bargaining power of a buyer or supplier is determined, in particular, by:

the absolute or relative (with respect to the supplier/buyer) volume of products purchased by the buyer or sold by the supplier;

the commercial importance of the buyer (supplier) to the other party in the relationship;

the buyer’s (supplier’s) ability to switch to an alternative supplier (buyer).

However, establishing the existence of countervailing market power on the part of buyers (suppliers) affects the determination of an undertaking’s monopolistic (dominant) position only if it is proven that such countervailing market power substantially restricts or eliminates the undertaking’s ability to independently determine the terms of trade for products on the market.

X. Establishment of a monopoly (dominant) position

1. Establishing a monopoly (dominant) position of an undertaking (undertakings) involves the following actions:

1) determining the market share of an undertaking, or the combined market share of several undertakings that hold the largest market shares (five, four, three, or two, respectively);

2) establishing that the market share of an undertaking, or the combined market share of several undertakings holding the largest market shares, exceeds the quantitative thresholds set forth in Article 12 of the Law, namely:

for a single undertaking – 35 percent;

two or three undertakings – 50 percent;

four or five undertakings – 70 percent;

3) an assessment of the impact of the countervailing market power of the customer (supplier) on the market power of the undertaking whose monopoly (dominant) position is established based on the presence of such market power;

4) refuting (if necessary) the arguments of the undertaking(s) regarding the absence of a monopolistic (dominant) position in the market;

5) recognition of a monopoly (dominant) position of an undertaking whose market share exceeds 35 percent, or of each of several (two, three, four, or five) undertakings holding the largest market shares, which collectively exceed 70 or 50 percent, respectively;

6) in cases where a monopoly (dominant) position is determined for an undertaking whose market share is less than 35 percent:

establishing evidence that the undertaking does not face significant competition in the market;

refuting the undertaking’s arguments that it faces significant competition and recognizing the undertaking’s market position as monopolistic (dominant);

7) in cases where a monopoly (dominant) position is determined for several undertakings (except as provided in subparagraph 5 of this clause):

establishing evidence that:

there is no competition or only insignificant competition among the specified undertakings;

the specified undertakings, taken together, do not face significant competition or have no competitors at all;

refuting (if any) the arguments of the specified undertakings that:

there is significant competition among these undertakings;

taken together, these undertakings have competitors and face significant competition;

recognition of a monopoly (dominant) position held by each of several undertakings.

2. An undertaking is deemed to hold a monopoly (dominant) position in the relevant market for the target product when:

1) the market share of a single undertaking in the relevant market exceeds 35 percent, unless it has demonstrated that:

it has a competitor (or competitors) in that market;

it faces significant competition in the relevant market due to the absence of restrictions on other undertakings' ability to procure raw materials and supplies and to sell products, barriers to market entry for other undertakings, preferential treatment, or other circumstances;

or its market power is limited by the countervailing market power of the customer (supplier);

2) overall market share:

the combined market share of the two or three undertakings with the largest market shares exceeds 50 percent;

the combined market share of the four or five undertakings with the largest market shares exceeds 70 percent, unless they have demonstrated that:

there is significant competition among them;

taken together, they have a competitor(s) in the market and face significant competition due to the absence of restrictions on other undertakings' ability to procure raw materials and supplies and sell products, barriers to market entry for other undertakings, preferential treatment, or other circumstances;

or their market power is limited by the countervailing market power of customers (suppliers);

3) a single undertaking's market share is less than 35 percent, unless it has refuted the Committee's arguments that it does not face significant competition, in particular due to the relatively small market shares held by its competitors;

4) the indicators of an undertaking's market power in the relevant market, as specified in subclauses 1–3 of this clause, have existed for at least one year, except in cases where the timeframe of the market is shorter.

When analyzing the duration of market power, the Committee's bodies assess not only the size of the market share but also its stability over time. An increase in such a market share indicates a strengthening of the undertaking's market power;

5) if two or more undertakings (except as provided for in subclause 2 of this clause) have not refuted the Committee's arguments that:

there is no competition or only insignificant competition between them;

taken together, they have no competitors in the market or do not face significant competition due to the absence or limitation of other undertakings' ability to access raw materials and supplies and to market products, barriers to market entry for other undertakings, preferential treatment, or other circumstances.

3. An undertaking (undertakings) does not face significant competition if, due to its market power, it has the ability to prevent, eliminate, or restrict competition, including by limiting the competitiveness of other undertakings or infringing upon the interests of other undertakings or consumers.

Indicators of market power include:

the ability of an undertaking (undertakings) that is not the sole producer (or supplier) of the relevant product (or group of products) to dictate its terms when selling the product (or group of products) or entering into a supply agreement, and to impose unfavorable terms on consumers;

the ability of an undertaking (undertakings), by establishing control over production resources, to restrict competition, drive other undertakings that produce the relevant products (groups of products) using these production resources out of the market, or create barriers to market entry;

the ability of an undertaking (undertakings) to reduce or limit the production of products (product groups) and their supply to the market in order to gain unilateral advantage when buying or selling products (product groups), concluding contracts and agreements for the supply of products (product groups), as well as the inability of other undertakings that are its competitors to compensate for the resulting shortage of products (product groups);

the ability of an undertaking (undertakings) to raise prices for products (product groups) and maintain them at a level exceeding that determined by market competition.

It is considered that an undertaking does not face (do face) significant competition, in particular when:

it (they) has (have) no competitors in the market;

the market shares held by competitors are relatively small;

other undertakings' ability to procure raw materials and supplies and to market products (product groups) is significantly limited;

barriers to market entry for other undertakings, existing preferential treatment, or other circumstances significantly restrict the entry of new undertakings into the market.

4. The following are also considered additional indicators of market power:

a high level of market concentration;

high barriers to entry for potential competitors;

a prolonged period during which the market is closed to new undertakings;

a quantitative advantage of the market share of an undertaking (undertakings) over the market shares of other competitors, provided that the market structure remains stable;

significant market shares held by an undertaking (undertakings) in vertically related markets (resources, transportation services, retail services, advertising services, etc.) and geographically related markets;

the entity under analysis's possession of special rights, powers, or privileges, including those granted by government authorities, local self-government bodies, administrative and economic management and control bodies, or other undertakings holding a monopoly (dominant) position;

control over infrastructure (transportation, energy, communications, etc.) that is necessary and essential for conducting economic activities.

5. When establishing the monopoly (dominant) position of an undertaking (undertakings) or refuting the arguments of an undertaking (undertakings) regarding the absence of a monopoly (dominant) position, and when deciding whether to recognize the position of an undertaking (undertakings) as a monopoly (dominant), the Committee's bodies may clarify the product, territorial (geographical), or timeframe boundaries of the product market.

XI. Sources of information

1. To determine the relevant product market and the monopolistic (dominant) position of undertakings in the market, the following sources of information, among others, are used:

statistical information (data) – official government information that characterizes widespread phenomena and processes occurring in the economic, social, and other spheres of life in Ukraine and its regions;

administrative data – data obtained on the basis of observations conducted by state authorities (excluding state statistical agencies), local government bodies, and other legal entities in accordance with the law and for the purpose of performing administrative duties and tasks within their jurisdiction;

other information regarding the activities of undertakings obtained by the Committee and its regional offices, in connection with the review of complaints and cases regarding violations of legislation on the protection of economic competition / during market research / in other cases specified by law, while the Committee (or its regional offices) carries out state oversight measures to ensure compliance with legislation on the protection of economic competition;

data from selective surveys and questionnaires of the general public or other customers regarding the market situation – the response of respondents to a specific set of questions, in particular regarding customers' opinions on the range and quality of products, assessments of customers' intentions and motives for their behavior, their preferences, wishes, and requirements regarding the consumer qualities of products and their interchangeability, as well as characteristics of product use;

data from consumer panel surveys – information regarding consumer opinions and behavior obtained from permanent groups (panels) of consumers that serve as a representative sample of the general consumer population;

information from suppliers and customers operating in the relevant market, provided to the Committee in connection with the exercise of state oversight over compliance with legislation on the protection of economic competition;

data reflecting the production plans of undertakings participating in the market, including data published by such entities in the media;

data from government agencies and independent research and information centers on the state, structure, and volume of product markets, as well as the participation of individual customers and suppliers in product turnover;

surveys of experts and/or specialists in the relevant industry regarding the assessment of market balance (supply and demand) and buyers' priorities regarding the consumer qualities of products based on selected criteria of product substitutability when forming product groups;

information on the activities of undertakings obtained by the Committee's bodies and other government agencies for the current and previous years.

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