

RELEVANT MARKET DEFINITION: WHEN NON-SUBSTITUTE PRODUCTS CONSTITUTE A SINGLE AND BROADER MARKET

Natalia Acevedo Alvear

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Natalia Acevedo Alvear

Abogada, Universidad de Chile. Diplomada en Regulación y Competencia (Facultad de Economía y Negocios), y en Derecho y Política de la Competencia (Facultad de Derecho), Universidad de Chile. Máster en Derecho, Universidad de Columbia, EE.UU. (W. Bayard Cutting Jr. Fellow y Public Interest Honoree). Becaria Fulbright. Relatora del Tribunal de Defensa de la Libre Competencia. Docente del Diplomado de Libre Competencia de la Universidad Adolfo Ibáñez.

Abstract: Last December, the Federal Trade Commission and the Department of Justice released the New Merger Guidelines, underscoring the reliance on demand-side substitution arguments to define relevant markets.

Despite this, the Guidelines also incorporate potential supply responses into the market share calculations stage, albeit posing practical challenges. In addition, the Guidelines outline three market settings - cluster, bundle, and one-stop shopping markets - where relevant market definitions shall include non-substitutable products and differentiate each from the overarching concept of “cluster markets” often cited by courts.

This research aims to evaluate the feasibility of incorporating non-substitutable products into a broader relevant market, and endeavors to ascertain convergence between judicial interpretations, to foster alignment with the stance advocated by the Agencies.

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I. INTRODUCTION

The primary aim of this research is to assess the plausibility of incorporating two or more products, which do not exhibit substitutability from a demand-side perspective, into a single and broader relevant market. Traditionally, the determination of relevant market boundaries, a pivotal tool in assessing anti-competitive and pro-competitive conducts, has relied on a demand-side substitution analysis of the implicated products or services. Nevertheless, courts and commentators have occasionally extended the scope of the relevant market to encompass products or services that are not substitutes. Regrettably, there is not a definitive and consistent criterion in legal precedents regarding the application of these arguments. Sometimes, courts have invoked actual or potential supply responses to amplify the delineation of the relevant market, while others, courts have embraced the broader notion of “cluster markets” to comprehend diverse rationales supporting the inclusion of non-substitute products within a unique relevant market.

The Merger Guidelines (“Guidelines”)¹, released in December 2023 by the Federal Trade Commission and the Department of Justice (the “Agencies”), delineate conspicuous criteria aimed at circumventing the utilization of supply responses within the relevant market definition process. Furthermore, the Guidelines specify three specific settings in wherein multiple non-substitutable products may be allocated within a broader relevant market using only demand-side reasoning: (i) cluster markets; (ii) bundle markets; and (iii) one-stop shopping markets. Through these three settings, the Guidelines seek to separate what the courts have most of the times just called “cluster markets” by distinguishing the features that make each category different from the other.

This paper endeavors to ascertain convergence between the federal judicial interpretations and New York state case law in multiple antitrust cases where courts have addressed relevant market definitions —not necessarily involving a merger control—, to foster alignment with the stance advocated by the Agencies in the Guidelines. The ultimate objective is to streamline the analysis process for each relevant market (cluster, bundle and one-stop shopping markets). It is expected that after these new and more straightforward conditions the Guidelines propose, courts may reach uniformity in their analysis of non-substitute products as part of one single and broader relevant market definition, leveraging legal precedents.

II. RELEVANT MARKET DEFINITION IN TERMS OF DEMAND-SIDE SUBSTITUTION

Typically, the delineation of a relevant market is predicated upon considerations of demand-side substitution. Since *Brown Shoe*² was decided, in 1962, it has been accepted that the definition of a relevant product market relies on the “reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it”.³ Notably, the Agencies explicitly cite this precedent in the Guidelines (Section 4.3.).

Courts have employed these two methodologies (reasonable interchangeability and cross-elasticities of demand) to elucidate their application. In particular, in *Sysco*, the District Court for the District of Columbia furnished an exhaustive explanation of each approach: The first, (i) termed a “reasonable interchangeability” test, scrutinizes the extent to which consumers could viably substitute one product for another.⁴ Moreover, in

1 U.S. Department of Justice and the Federal Trade Commission, 2023 Merger Guidelines. Available at: <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>

2 *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)

3 *Id.* at 325.

4 *Fed. Trade Comm’n v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015), at 25.

New York state law, the Appellate Division of the Supreme Court held that for two products to be functionally interchangeable they must share similarities in terms of character and use.⁵

Regarding (ii) the cross-elasticity of demand, the *Sysco* court mentioned this methodology relates to substitution driven by pricing considerations, judicially recognizing the use of the “Small but Substantial and Non-Transitory Increase in Price” test. According to the court “[i]f an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market. (...) [but, the Court also states that] substitution based on a reduction in price will not correlate to a high cross-elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience.”⁶

The Guidelines recognize that relevant markets “need not have precise metes and bounds” but as an analytic instrument, it requires drawing the line including and excluding certain products according to their degree of substitutability. For such purposes, the Guidelines establish the need to review characteristics “such as size, quality, distances, customer segment, or prices.” (Section 4.3.). To accomplish this task, the Agencies identify four tools:

1. Direct evidence of substantial competition between the merging parties
2. Direct evidence of the exercise of market power by a market participant
3. Hypothetical monopolist test
4. Practical indicia, citing *Brown Shoe*, such as industry or public recognition, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Now, some courts have considered these factors as evidentiary proxies for direct proof of substitutability.⁷

Notwithstanding this, the Guidelines, consistent with judicial precedents, acknowledge the existence of certain circumstances that may lead to broadening relevant market definitions for non-substitute products.

III. RELEVANT MARKET DEFINITION FOR NON-DEMAND-SUBSTITUTE PRODUCTS

Courts have embraced a more expansive definition of relevant markets comprising non-substitute products on two types of occasions: (i) first, in instances of supply-side substitution; and (ii) secondly, when distinct products are encompassed within a unified cluster market. Nevertheless, the methodological framework to arrive at such determinations has not been consistently applied. The Guidelines offer an exhaustive description of these scenarios, eschew the utilization of supply-side substitution to define relevant markers, and as already mentioned, disaggregate the overarching concept of “cluster market” into three different settings. The delineation of each scenario serves to structure relevant market definitions, participants, and the competitive conditions within such markets.

⁵ *Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.*, 92 A.D.3d 570, 939 N.Y.S.2d 30 (2012), at 572–73.

⁶ *Sysco*, *supra* Note 4, at 25.

⁷ *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C.Cir.1986)

3.1. Supply-side substitution

The Guidelines explicitly confine the market definition process to demand substitution considerations and explicitly exclude suppliers' responses from consideration during this particular stage of the competition analysis (Section 4.3.D.3). Notwithstanding, the Guidelines demarcate three junctures of the competition evaluation where supplier responses merit consideration: (i) during the evaluation of how firms compete within the market; (ii) in the assessment of entry and repositioning dynamics; and (iii) when calculating market shares and concentration levels (Section 4.3.D.3).

Therefore, it can be concluded that the Guidelines exclude the use of supply substitutability from the relevant market definition stage and reduce its impact to two stages: (i) market functioning and concentration and (ii) barriers of entry and expansion.

The Guidelines include as market participants those that currently supply or consume products. In addition, they include as market participants firms that are "rapid entrants": those firms that are currently inactive within a relevant market, yet "very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions, without incurring significant sunk costs" (Section 4.4.A.). Such scenarios commonly arise within markets featuring relatively homogeneous goods where suppliers possess surplus capacity. In such instances, these firms shall be included in the market share calculations, based on capacities or reserves (Section 4.4.B.). However, this stance—the calculation of market share based on firms capacities— may be criticized on the grounds of its impracticality: first, (i) in numerous industries, the reliable determination of each firm's idle capacity remains challenging or unfeasible; and secondly, (ii) on other occasions, firms may opt to convert a higher proportion or their entire capacity into producing another good, as a response to a small yet significant increase in price from their potential competitors.

Subsequently, the Guidelines mandate a more pragmatic and viable assessment of supply conditions to determine whether entry and repositioning from potential competitors would be timely, likely, and sufficient. Given that supply-side substitution may facilitate entry and expansion, this aspect ought to constitute an integral component of such analysis.

Notwithstanding the above, some courts have included supply-side substitution to widen the relevant market definition. For instance, in 1999, the Court of Appeals for the Second Circuit decided that cross-elasticity of supply is a key factor to the delineation of a relevant product market because "a would-be monopolist's attempt to charge supracompetitive prices will be thwarted by the existence of firms willing to shift resources to producing the product, thereby increasing supply and driving prices back to competitive levels."⁸ Before this case, in 1958, a court discarded a proposed relevant market definition in terms of supply substitutability because "producers have not been quick to shift from product to product in response to demand".⁹

Jonathan B. Baker explains this phenomenon of using supply-side substitution to widen a relevant market definition, occurs as a means to avoid incurring in a further case analysis. Given that a more expansive relevant market definition may reveal a lack of market power among the entities under scrutiny, the court may find it unnecessary to delve deeper into the subsequent steps of the competition analysis.¹⁰ Consequently, this author

⁸ *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216 (1999), at 227.

⁹ *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958)

¹⁰ "[a]djusting the definition of the market allows courts to account for supply substitution without opening the door to a wide-ranging competitive inquiry. For example, in analyzing an agreement among rivals, expanding the market to show lack of market power may be a tempting analytical approach". Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 *Antitrust L.J.* 129, 138 (2007).

advocates for following the same analytical framework the Guidelines adopt, including supply substitution in the further steps of the competition analysis (participants, concentration, entry conditions, and effects).

3.2. A general and extensive concept of cluster markets

From a comprehensive perspective, clusters markets are those “that consist of noncompeting goods”.¹¹ This extensive concept has prompted courts to cluster markets for several reasons: analytic convenience, economies of scope, and consumer preference for being provided with an ample selection of distinct products. These rationales mat at times appear incongruent with the overarching principle of defining markets based on demand-side substitutability, yet in other instances, clustering is fully coherent with this principle. Krisha A. Cerilli explains this phenomenon has occurred because “the cluster market concept has developed over decades”.¹²

It is noteworthy that the initial case acknowledged by authors as a “cluster market” example is also the case advocating for a market delineation predicated upon demand-side substitutability, without any reference to the term “cluster”: *Brown Shoe*.

When the Supreme Court decided *Brown Shoe* in 1962, as previously noted, it identified three different markets: men’s shoes, women’s shoes, and children’s shoes. The court emphasized that each category is not interchangeable from the consumer’s perspective. Nevertheless, it acknowledged that Brown manufactured significant and comparable quantities of each type of nonrubber men’s, women’s, and children’s shoes, and Kinney sold such quantities of virtually every type of men’s, women’s, and children’s shoes. Consequently, the court opted to be pragmatic and to employ what in the years to come was called “analytical convenience”: “[W]hether considered separately or together, the picture of this merger is the same.”¹³ As Cerilli highlights, the “Court then endorsed evaluating the markets for men’s, women’s and children’s shoes together (even though distinct shoe sizes and types were not substitutes) because the competitive conditions for each market were similar.”¹⁴

The following year, 1963, the Supreme Court decided *Philadelphia Nat. Bank*,¹⁵ where it included the “cluster market” concept for commercial banking activity, aggregating different banking services, such as loans, deposit accounts, checking accounts, and trust administration, because there were distinctive products, cost advantages, and settled consumer preference. The court held that the cluster market of commercial banking is “sufficiently inclusive to be meaningful in terms of trade realities.”¹⁶ Each of these three criteria went beyond the prong of “analytical convenience” used in *Brown Shoe*, and enlarged the notion of cluster markets, in the following sense:

1. **Distinctiveness:** The *Philadelphia Nat. Bank* court identified that “[s]ome commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category.”¹⁷ This aspect refers to demand-side substitution and recognizes that some specific products, such as checking accounts, differ from products that can be offered by other types of non-banking firms, but does not provide an argument to cluster checking accounts with other banking services.

11 Herbert Hovenkamp, *Digital Cluster Markets*, 2022 Colum. Bus. L. Rev. 246, 253, 2022. In the same sense, Maureen K. Ohlhausen, *Reflections upon six years of FTC Litigation*, 2018, proposed that for cluster markets “several individual products or services should be considered together”.

12 Krisha A. Cerilli, *Staples/Office Depot: Clarifying Cluster Markets*, Competition Policy International, 2016

13 *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962), at 327-328.

14 Krisha A. Cerilli, *supra* Note 12

15 *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 83 S. Ct. 1715, 1737-38, 10 L. Ed. 2d 915 (1963), at 356

16 *Id.*, at 357

17 *Id.*, at 356

2. Cost advantages: The Supreme Court recognized that certain banking products “enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies’ rates are invariably much higher than the banks”.¹⁸ With this assessment, the court implicitly introduced the concept of economies of scope,¹⁹ for markets where entities can provide each product at a reduced cost because they offer other non-substitute products as well.
3. Settled consumer preference: The court stated that “there are banking facilities which, although in terms of cost and price (...) are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits.”²⁰ This argument extends the concept of cluster markets to those where consumers value the fact of having non-substitute products offered by the same firm, which has been furtherly known as a “one-stop shopping”, in *Phillipsburg*²¹ or as a “package-deal” option in *Promedica*.²²

Hereinafter, in 1966, the Supreme Court decided *Grinnell*²³ and recognized a cluster market composed of accredited central station services, which included fire and burglar alarms. The reason to define it as a cluster was that “there is here a single use, i.e., the protection of property, through a central station that receives signals. (...) We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities (...) [because] [c]entral station companies recognize that to compete effectively, they must offer all or nearly all types of service.”²⁴ Consequently, the court combined the market because of the existence of economies of joint provision, or economies of scope, as it did in *Philadelphia Nat. Bank*.

Moreover, “[l]ower courts have extended the cluster concept to a small number of other industry settings, to define markets that include traditional grocery supermarkets, department stores, and acute inpatient care hospital services.”²⁵

For decades, scholars have endeavored to formulate a conceptual framework integrating the particular set of circumstances courts have used to cluster a market²⁶⁻²⁷ and discussed whether clusters should be accepted solely based on analytic convenience,²⁸ or whether additional factors such as “consumer preference or economies of joint provision”²⁹ should also be considered acceptable.

On the one hand, Phillip E. Areeda and Herbert Hovenkamps advocate for the application of the concept of “cluster markets” across three cases:

1. When “many customers prefer the convenience of receiving the defendant’s grouping of products”.³⁰ In other words, “[c]onsumers want the cluster because it is more valuable to have all the non-

18 *Id.*, 357

19 Phillip E. Areeda (late) & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1565. (Fourth and Fifth Editions 2018-2023)

20 *Id.*

21 *United States v. Phillipsburg Nat. Bank & Tr. Co.*, 399 U.S. 350, 361, 90 S. Ct. 2035, 2042, 26 L. Ed. 2d 658 (1970)

22 *ProMedica Health System, Inc. v. F.T.C.*, 749 F.3d 559 (2014)

23 *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966)

24 *Id.*

25 *Jonathan B. Baker*, *supra* Note 10

26 *Areeda & Hovenkamp*, *supra* Note 19

27 Geoffrey A. Manne, International Center for Law and Economics (ICLE), *Gerrymandered Market Definitions in FTC v Amazon*, 2024

28 *Id.*

29 *Hovenkamp*, *supra* Note 11

30 *Areeda & Hovenkamp*, *supra* Note 19

substitute products on a commonplace.”³¹ Courts have conceptualized this as “settled consumer preference”, “package deal” or “one-stop shopping”, with the latter being the term employed by the Guidelines to denote this phenomenon.

2. When “economies of joint provision (economies of scope) make distribution of the cluster cheaper per good than distribution of each separately.”³² In such cases, while the customer may only desire to purchase one product, clustering “reduces the cost of the individual services or permits individual services to take advantage of common technologies that reduce costs or improve quality.”³³ These economies of scope are, as already mentioned, what the court in *Philadelphia Nat. Bank* included as a “cost savings” argument and what the Guidelines have recently called a “bundle market” (see *infra*).
3. Cases where “the firms supplying one of the products in the cluster could not easily add the others as well.”³⁴ This prong was explained by Hovenkamp in the following years, as firms that must offer the complete cluster of products because without it “entering into competition with [another entity offering the] cluster is difficult.”³⁵ The same author has also explained this prong in terms of supply-side substitutability, in which it should be assessed “whether a firm currently providing a smaller range of products could readily expand to offering a larger range of products.”³⁶

However, arguments against this perspective could be advanced in the following sense:

- a. Supply-side considerations ought to be omitted from the definition of the relevant market and confined solely to the analysis of barriers of entry and expansion, as detailed *supra*.
- b. The focus of this prong just reflects the content of the first and second cases and does not add something new.

In other words, according to the first prong, an entity must offer multiple non-substitute products because consumers value the one-stop shopping experience itself. An example of this is supermarkets: consumers value having access to multiple non-substitute products at the same time.

Then, according to the second prong, the entity must offer a bundle of products to be able to offer each individual and non-substitute product at a reduced price, taking advantage of economies of scope. Consumers will only -or at least, at a higher rate- perceive as substitutes the individual products offered by firms that provide multiple products because those firms can offer lower prices for each good. An example of this case is the banking services. A consumer may hold a checking account in one bank and a credit in other bank, but each banking institution may solely offer lower rates for credits or checking accounts when offering multiple banking services.

These two perspectives facilitate the understanding of demand-side substitutability for non-substitute products, and are consistent with the Guidelines’ proposal to eliminate supply-side substitutability from the relevant market definition stage, as mentioned below.

On the other hand, in 1986 Ian Ayres proposed to narrow the concept of cluster markets only to ‘transactional complements’, meaning goods that when bought from a single firm significantly reduce consumers’ transaction

31 *Hovenkamp, supra* Note 11

32 *Areeda & Hovenkamp, supra* Note 19

33 *Hovenkamp, supra* Note 11

34 *Areeda & Hovenkamp, supra* Note 19

35 *Hovenkamp, supra* Note 11

36 *Id.*

costs, for instance, by having one trip to a grocery store to buy many different products (“one-stop shopping”).³⁷ According to the same author, the “transactional complementarity” solution is “a demand-side analog to economies of scope, in which the economies accrue to the consumer instead of the producer (...) [so] while transactional complementarity necessitates joint purchase, economies of scope do not necessitate joint sale.”³⁸

Subsequently, in the following years, other scholars have proposed a distinction between cluster and bundle markets. According to their perspectives, a cluster market comprises individual relevant markets that are grouped together solely due to their similar competitive conditions -this is, only for analytical or administrative convenience- under the authority of *Brown Shoe* (and *Promedica*). On the contrary, bundle markets would encompass a collection of products that suppliers value for their offering as a unified package, thereby enabling consumers to benefit from a one-stop shopping experience, despite each product potentially presenting distinct competitive conditions. For the latter, examples cited include supermarkets, discount stores, food distribution, casino services, and managed care provider organization services, under the authority of *Grinnell* (and *Staples II*)^{39,40-41}

A challenge arises due to the lack of precision in the definition of a “bundle market” by both courts and scholars. Kevin Hahm and Loren K. Smith suggest the employment of the term “bundle” to group all the categories different from the “analytical convenience” test,⁴² while others keep using the judicial term “cluster market” for all markets composed of non-competing goods.⁴³ Courts have predominantly held the latter approach and considered the customers’ need for a bundled package as a practical indicial of the existence of a cluster market, as in *Philadelphia National Bank*,⁴⁴ *Phillipsburg*,⁴⁵ *Grinnell*,⁴⁶ *Sysco*,⁴⁷ *Promedica*,⁴⁸ *Wilhelmsen*,⁴⁹ and *Staples II*⁵⁰. Cerilli points out that the notion of “bundle market” as a different concept of a cluster market was indirectly addressed in *Staples II* but it “sent mixed messages related to this argument, and Judge Sullivan did not explicitly address it in his opinion.”⁵¹

Conversely, in Europe, the European Commission has explicitly introduced the concept of “bundle markets” in cases where customers prefer to acquire multiple products together, in its recent release of a new Commission Notice on the Definition of the Relevant Market for the purposes of Union Competition Law, in February 2024. According to the European Commission, “customers may still prefer to consume several products together as a bundle. In those circumstances, the [European] Commission may examine whether the bundle constitutes a relevant product market distinct from the individual products, by assessing substitutability between the bundle and the individual products”.⁵²

Fortunately, the ambiguity present in the aforementioned judicial and academic state of the art was addressed by the Guidelines. The Agencies distinguished three distinct market settings and provided a clear

37 Ian Ayres, *Rationalizing Antitrust Cluster Markets*, 95 *Yale L.J.* 109, 1985

38 *Id.*

39 *Federal Trade Commission v. Staples, Inc.*, 190 F.Supp.3d 100 (2016)

40 Kevin Hahm and Loren K. Smith, *Clarifying Bundle Markets and Distinguishing Them from Cluster Markets*, 2021

41 Krishna A. Cerilli, *supra* Note 12

42 Hahm & Smith, *supra* Note 40

43 *Areeda & Hovenkamp*, *supra* Note 19. *Hovenkamp*, *supra* Note 11

44 *Philadelphia*, *supra* Note 15

45 *Phillipsburg*, *supra* Note 21

46 *Grinnell*, *supra* Note 23

47 *Sysco*, *supra* Note 4

48 *Promedica*, *supra* Note 22

49 *Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 46 (D.D.C. 2018)

50 *Staples*, *supra* Note 39

51 Krishna A. Cerilli, *supra* Note 12

52 European Commission, C/2024/1645, Commission Notice on the definition of the relevant market for the purposes of Union competition law, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645. Interestingly, the European Commission mentions its own analysis of the Staples/Office Depot merger as an example of a bundle market.

framework outlining the circumstances under which non-substitute products should be consolidated into one single and broader market: (i) cluster markets; (ii) bundle markets; (iii) one-stop shopping markets.

IV. THE THREE-SPECIFIC SETTINGS PROPOSAL IN THE GUIDELINES

4.1. Cluster Markets

According to the Guidelines, “when the competitive conditions for multiple relevant markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a ‘cluster market’ for analytic convenience, even though not all products in the cluster are substitutes for each other.” (Section 4.4.D.4.).

Three aspects are worth noting from this definition: first, the Agencies underline the use of demand-side substitution considerations when they identify multiple relevant markets. Second, the Agencies limit the concept of “cluster market” to the interpretation adopted in *Brown Shoe* and *Philadelphia Nat. Bank*: analytic convenience. Third, the clustering of a market is contingent upon reasonably similar conditions presented by the multiple relevant markets.⁵³

The utilization of cluster markets as an analytic instrument does not imply that every non-substitute product is eligible for clustering. In *Emigra*, the District Court for the Southern District of New York held that “[c]ertainly it is possible to describe any number of related and even unrelated products or services as a single line of business provided only that one adopts a sufficiently high level of generality. The term “transportation vehicles” for example, reasonably might include such diverse products as planes, automobiles, golf carts, locomotives, horse-drawn carts, submarines, and other conveyances. But the fact that our language permits such generalization does not justify the uncritical aggregation of distinct products and services into relevant markets for antitrust purposes. (...) So any definition of a cluster market must be responsive to the purpose of the market definition process—identification of an area of competition in which variations in price will affect the demand for alternative products.”⁵⁴

In the same sense, Maureen K. Ohlhausen has mentioned that we do not “find a cluster market under every rock. Rather, consistent with the *Brown Shoe* requirement (...) we undertake a ‘pragmatic, factual approach to the definition of the relevant market,’ [and] we must grapple with the facts each and every time. Sometimes the facts lead us to cluster markets, sometimes they do not”.⁵⁵ Notwithstanding this, Hahn and Smith consider the exercise of clustering markets to be a permissive one, based on that “there is no danger in doing so, because the proper approach absent clustering is to separately analyze each individual service.”⁵⁶

Courts have consistently acknowledged the utility of cluster markets as an analytical tool. In *Philadelphia Nat. Bank*, “the Court clustered noncompeting banking services such as checking accounts and business loans into a single market because the evidence indicated that the defendant had roughly equivalent positions in all.”⁵⁷ In *Promedica*, the Court of Appeals for the Sixth Circuit endorsed the government’s contention that cluster markets are defined for “administrative convenience” and stated that “there is no need to perform separate antitrust analyses for separate product markets when competitive conditions are similar for each”.⁵⁸

53 The agencies follow the same view as an author who defines cluster markets as “an aggregation of distinct relevant markets for analytical convenience”, *Krishna A. Cerilli*, *supra* Note 12

54 *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330 (S.D.N.Y. 2009), at 353

55 *Ohlhausen*, *supra* Note 11

56 *Hahn & Smith*, *supra* Note 40

57 *Areeda & Hovenkamp*, *supra* Note 19

58 *Promedica*, *supra* Note 22, at 565. In this sense, also *Manne*, *supra* Note 27

Following the same rationale as in *Brown Shoe*, the court scrutinized whether obstetric services warranted separate consideration from other general acute care services. The court found that the obstetric services were not uniformly offered by all the actors in the market, but provided exclusively by three out of four incumbents, in contrast to the general acute services that were offered by all of them.⁵⁹ In this case, the court proposed renaming the “administrative convenience” theory to a “similar-conditions” theory.⁶⁰

In 2016, the District Court for the District of Columbia was even more explicit when decided *Staples II* and stated that cluster markets “allow items that are not substitutes for each other to be clustered together in one antitrust market for analytical convenience”.⁶¹ In this case, the court evaluated whether the product ink/toner products should be excluded from a broader cluster market encompassing consumable office supplies that were sold to large business customers. The court determined that in the market for ink/toner, multiple suppliers did not offer other consumable office supplies, so the parties faced more competition in this narrower relevant market.⁶² This rendered the inclusion of ink/toner products in a broader cluster market analytically inconvenient.

In *Kodak*⁶³, “the Ninth Circuit found a cluster market of “all parts” for Kodak photocopiers notwithstanding that there was no common facility in which the parts were produced and apparently no economies of scope in joint production. (...) The only rationale that the court gave for grouping noninterchangeable goods into a single market is administrative convenience, which can certainly justify clustering if its limitations are carefully kept in mind.”⁶⁴

From these cases, it can be concluded that courts may employ the concept of cluster markets utilizing the same criteria outlined in the Guidelines, for analytical convenience, when market conditions exhibit reasonable similarities. However, the specific conditions defining such similarity are typically not explicitly articulated by the judiciary. Under the authority of *Brown Shoe*, *Philadelphia Nat. Bank*, *Promedica*, and *Staples II*, clustering is analytically convenient when the parties involved in the case commercialize comparable quantities across two or more relevant markets, and the number and significance of actors in each market are equivalent. In addition, *Promedica* explicitly references market shares as an element of similarity.

Ultimately, the *Promedica* court incorporated within its analysis an additional element of similarity: the barriers of entry in each clustered market. This consideration is pivotal in the decision of which markets to include in the broader definition. Indeed, should the intensity of potential competitors’ ability to enter the market or existing competitors’ capacity to expand their production sufficiently counterbalance the market power of the firm under scrutiny, it may render the analysis of anticompetitive effects and efficiencies superfluous. Therefore, if multiple markets exhibit disparate entry barriers, they should not be clustered together.⁶⁵

Consequently, it can be concluded that if market shares, concentration rates, and entry conditions are similar across each relevant market involved in a specific case, clustering becomes a practical and analytically convenient approach. Nevertheless, given the involvement of multiple markets, agencies or courts may opt to still assess each market individually despite the potential for clustering.

59 See also *Hahn & Smith*, *supra* Note 40

60 *Promedica*, *supra* Note 22

61 *Staples*, *supra* Note 39, at 117

62 See also *Hahn & Smith*, *supra* Note 40

63 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992)

64 *Areeda & Hovenkamp*, *supra* Note 19

65 *Promedica*, *supra* Note 22: “competitive conditions for hospital services include the barriers to entry for a particular service—e.g., how difficult it might be for a new competitor to buy the equipment and sign up the professionals necessary to offer the service.”. See also: *Hahn & Smith*, *supra* Note 39, who extend the similar competitive conditions analysis to barriers to entry.

4.2. Bundle Markets

According to the Guidelines, “[f]irms may sell a combination of products as a bundle or a ‘package deal,’ rather than offering products ‘a la carte,’ that is, separately as standalone products. (...) If the components of a bundled product are also available separately, the bundle may be offered at a price that represents a discount relative to the sum of the a la carte product prices.” (Section 4.4.D.5.).

The Guidelines introduce the terms “bundle” and “package deal” in a setting different from the earlier proposals by the authors and divergent from the usage by the European Commission. The Agencies decided to confine the concept of a “bundle market” to markets where firms can leverage their economies of scope to provide goods at a lower price.

As previously noted, the Supreme Court invoked the rationale of cost advantages in providing multiple non-substitute products in *Philadelphia Nat. Bank*, and accepted that firms had earlier acknowledged that to compete effectively is imperative to offer multiple non-substitute products, as indicia of a broader relevant market, in *Grinnell*.

In 2015, the District Court for the District of Columbia decided *Sysco*, where it assessed whether the defendant’s broadline distribution was distinct from other modes of distribution, in attention to its distinct attributes, including a vast array of product offerings, private label offerings, next-day delivery, and value-added services. The court held that Sysco’s broadline distribution encompassed a “full panoply of products and services” that is not functionally interchangeable with other modes of food service distribution because, among other arguments, “[b]roadliners generally compete only against other broadliners on pricing.”⁶⁶

Another pertinent, yet highly criticized case, is *Hughes Tool*, where the District Court for the Central District of California held that the “defendants’ product market [consists] of a cluster of specialized surface rotary drilling tools [because] [t]here exists a high degree of functional complementarity and integration linking the products. There is a high degree of commonality in the technology and manufacturing processes involving the components of the market.”⁶⁷ According to an author, the court appears “to have clustered products on the basis of supply substitutability” a factor that, as stated earlier, should not be considered in the definition of a relevant market. The same author critiques the use of functional complementarity as a rationale to “clustering” a market⁶⁸ -or “bundling” as per the terminology employed in the Guidelines-.

However, an alternative argument could be made that, in this case, the court invoked an “economies of scope” rationale, referring to the common technology and manufacturing processes utilized to produce each non-substitutable product. Therefore, when the court bundled complementary products into a single market, it did not contradict demand-side substitutability arguments but instead adhered to an approach consistent with the economies of joint provision, which optimize the production of goods that use a common technology or manufacturing process, which may or may not be complementary.

In this sense, it is pertinent to highlight that economies of scope are traditionally regarded as integral to supply-side analysis. This arises from the premise that firms capable of diversifying their product offerings without incurring significant sunk costs are better positioned to enter the market in a more timely, likely, and sufficient manner. However, when economies of scope are applied within the framework of a “bundle

66 *Sysco*, *supra* Note 4, at 29

67 *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 641 (C.D. Cal. 1976)

68 *Ayres*, *supra* Note 37

market” concept, as delineated in the Guidelines, they align seamlessly with defining relevant markets only focusing on demand-side substitutability arguments. As previously indicated, customers will perceive as substitutes only -or at a higher and decisive degree- those individual products offered by firms leveraging economies of scope to offer bundled products, thus enabling them to provide these goods at reduced prices.

Hence, in ascertaining the presence of a bundle market, paramount considerations include (i) the cost advantages derived from taking advantage of economies of scope in the production of non-substitutable products; (ii) the impact of these efficiencies on the incumbents’ pricing strategies; and (iii) the industry’s recognition that effective competition necessitates the provision of multiple non-substitutable products.

4.3. One-Stop Shopping Markets

The third specific setting the Guidelines define is for those “one-stop shops” “where customers can select a combination of products to purchase from a single firm, either in a single purchase instance or in a sequence of purchases. Products are commonly sold at a one-stop shop when customers value the convenience, which might arise because of transaction costs or search costs, savings of time, transportation costs, or familiarity with the store or web site.” (Section 4.4.D.6.).

As mentioned above, the *Philadelphia Nat. Bank* court considered the settled consumer preference to define banking services as a broader relevant market definition encompassing non-substitute products. Then, in 1970, the Supreme Court decided *Phillipsburg* and held that “[a] customer who uses one service usually looks to his bank for others as well, and is encouraged by the bank to do so.”⁶⁹

Subsequently, when the Court of Appeals of the District of Columbia decided *WholeFoods* in 2008, it alluded to markets where “core customers require the whole package, [so] they respond differently to price increases from marginal customers who may obtain portions of the package elsewhere” because these core customers have “settled consumer preference” since “their particular circumstances dictate that a product ‘is the only realistic choice,’ (...) or because they find a particular product ‘uniquely attractive’”.⁷⁰

In *Promedica*, the Court of Appeals of the Sixth Circuit decided that “each individual medical procedure could give rise to a separate market”⁷¹ but clustered the market for analytical convenience, as mentioned *supra*. Later, the court addressed the defendant’s proposition to encompass obstetrical services within a broader market of general acute care services, relying on the “transactional-complements” theory, which the court opted to rename as the “package-deal” theory. The court held that according to this framework “if most customers would be willing to pay monopoly prices for the convenience of receiving certain products as a package, then the relevant market for those products is the market for the package as a whole,” citing *Areeda & Hovenkamp*, and *Grinnell*. The *Promedica* court held that the record showed this was not a market where managed care organizations needed to “obtain all of those services from a single provider,”⁷² thus obstetrical services were not included in the broader market.

In *Sysco*, the court emphasized that not every competitor in the overall marketplace should be included in the relevant product market unless consumers perceive their products as viable substitutes. The court illustrated this principle with the following example: “fruit can be bought from both a grocery store and a fruit stand, but no one would reasonably assert that buying all of one’s groceries from a fruit stand is a reasonable substitute

69 *Phillipsburg*, *supra* Note 21

70 *E.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028 (2008)

71 *Promedica*, *supra* Note 22

72 *Id.*

for buying from a grocery store.”⁷³ The Sysco court identifies two key factors to consider in delineating a single “one-stop shopping market”: (i) the breadth and diversity of product offerings, including the SKUs broadliners stock in their premises that permit them to comprehensive shopping destination, and (ii) the broadliners’ ability to provide frequent deliveries and their flexible delivery schedules.⁷⁴

In the subsequent year, 2016, the Court of Appeals for the Seventh Circuit decided *Advocate Health* where explicitly held that “products can also be “clustered” together if the “cluster” is itself an object of consumer demand.”⁷⁵

To conclude, the Agencies advocate for rebranding the concept courts traditionally have termed as a “cluster market”, to be identified as a “one-stop shopping market”. Courts have acknowledged these types of markets where the consumers value the convenience of a single purchase, thereby circumventing transaction costs, as evidenced by a settled consumer preference. The evidentiary requirements to substantiate this setting pertain to customers’ willingness to pay more (even a monopoly price) for a specific product because it is offered along with a diversity of non-substitute products.

V. CONCLUSIONS

In summary, the Guidelines recently confirmed the delineation of relevant markets must rely on demand-side substitution arguments, echoing the precedent set forth in the seminal *Brown Shoe* decision. Courts typically employ two methodologies: reasonable interchangeability and cross-elasticity of demand, to ascertain the substitutability of goods.

Although it has been commonly accepted by the courts, except for specific cases, that supply-side factors should be included in the subsequent analysis of barriers of entry and expansion and omitted during the relevant market definition phase, courts and Agencies have accepted the inclusion of potential entrants in calculating market shares. However, this stance in practice could be difficult or unfeasible.

On the other hand, courts have also defined broader relevant markets encompassing non-substitute products, often named “cluster markets”. The criteria guiding the definition of cluster markets have spurred debate in academia and the judiciary, encompassing a variety of notions such as “analytic convenience”, “economies of scope”, or “settled consumer preference”. However, the Guidelines finally provide a clear categorization of three specific market settings using only demand-side reasoning: cluster markets, bundle markets, and one-stop shopping markets.

With regard to cluster markets, the Guidelines elucidate a concept where non-competing products from multiple relevant markets may be grouped together for analytic convenience, predicated on reasonably similar competitive conditions. Under the authority *Brown Shoe*, *Philadelphia Nat. Bank*, *Promedica*, and *Staples II* such conditions relate to comparable market shares, concentration rates, and barriers of entry in each market when considered separately.

Secondly, the Guidelines introduce the concept of a “bundle market” wherein firms take advantage of economies of scope to offer multiple noncompeting products, which results in their ability to provide each individual set of products at a discounted price compared to offering them individually. Courts have conducted an analysis in this sense in *Sysco*, *Philadelphia Nat. Bank*, and *Grinnell*, where key considerations

⁷³ *Sysco*, *supra* Note 4

⁷⁴ *Id.*

⁷⁵ *Fed. Trade Comm’n v. Advoc. Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016)

include, cost efficiencies, pricing strategies, and industry recognition of the importance of offering multiple non-substitute products for effective competition.

Thirdly, the Guidelines delineate a specific market setting termed “one-stop shopping”, where customers value the convenience of purchasing products from a single source, either in one transaction or sequentially, driven by factors such as avoiding transaction costs, evidenced by the customers’ willingness to pay a surplus for acquiring multiple products from the single provider. Courts have assessed these markets when deciding *Philadelphia Nat. Bank*, *Phillipsburg*, *WholeFoods*, *Promedica*, and *Advocate Health*.

In conclusion, the Guidelines furnish a structured framework of settings for navigating markets comprising multiple non-substitute goods, while they distinguish and rebrand the excessively broad concept of “cluster markets”.

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