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EU Competition Policy: Article 82 EC and the Notion of Substantial Part of the Common Market

EU competition policy acts as an important buttress to the Single European Market, with Article 82 EC specifically prohibiting the abuse of a dominant position in the common market or a substantial part of it. Therefore the substantial part notion acts as a boundary or subsidiarity test, determining whether the alleged abuse falls under Article 82 or member state law. This paper contends that two different and potentially competing substantial part tests have been legally sanctioned, namely the territorial test and the economic relativism approach. It further reveals that court rulings have been instrumental in determining not only how the two tests are to be applied in practice but also their respective usage pattern.

The supranational nature of EU competition policy makes it an important agent of EU integration. By safeguarding competition at the EU level, it buttresses the Single European Market, encouraging innovation and greater efficiency, thereby improving the Union's ability to compete, both internally and externally. Key EU instruments to safeguarding competition are Articles 81 and 82 EC, original to the Treaty of Rome, and the later merger control regulation. Articles 81 and 82 EC not only prohibit undertakings from engaging in certain forms of anti-competitive behaviour but also punish those who do. Article 82 EC prohibits, in so far as it may affect trade between member states, abusive behaviour by one or more undertakings holding a dominant position within the common market or a substantial part of it.

The notion of substantial part of the common market therefore acts as a boundary or subsidiarity test. That is, if the abuse occurs in an unsubstantial part of the common market then it comes under the jurisdiction of the relevant member state; but if the abuse arises in a substantial part of the common market then it falls within the remit of EU law, namely Article 82. Yet this role as a boundary test is only significant if it is a mandatory test or condition in determining whether an Article 82 breach has occurred. This paper demonstrates that it is indeed a mandatory requirement. Given this, it is important to appreciate the competing tests that have been legally sanctioned to make the substantial part assessment, including how to apply them, and their respective usage pattern. What makes this more urgent is, first, that the treatment of this subject in the literature tends towards superficiality, and second, the modernisation of Articles 81 and 82 EC means that not only can the European

Commission and national courts make the substantial part determination but member state competition regulators now also have this ability.

The paper contends that two different and potentially competing substantial part tests have been legally sanctioned, namely, the territorial test and the economic relativism approach. It further reveals that court rulings have been instrumental in determining not only how the two tests are to be applied in practice but also their respective usage pattern. To be accurate, the paper makes it clear that advocate general M. Henri Mayras played a pioneering role in developing the economic relativism approach, although ultimately it was the court that shaped the test and made it the law. Moreover, by ruling that every member state territory automatically constitutes a substantial part of the common market, the court appears to have effectively consigned the economic relativism approach to assessing markets other than those that cover the entire territory of a member state. In other words, so long as the dominant position, be it single or collective, covers the entire territory of a member state, the substantial part condition is met. In turn this avoids the diplomatic concern that otherwise might arise if a member state was classified an unsubstantial part of the common market.

The paper asserts that the economic relativism approach intentionally has the necessary elasticity to assess if a market other than that covering an entire member state is a substantial part of the common market. The court in so employing it confirms this. Indeed, by employing it to determine that the port of Genoa constitutes a substantial part of the common market,¹ the court signalled that it was legally correct to use this

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¹ CaseC-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-05889, paragraph 15.

approach on such economic centres of activity and that such centres are likely to fall within the ambit of EU competition law. The paper explains, however, that the law is less clear as to when a sub-national territory meets the rival territorial substantial part test - although what is legally beyond doubt is that a collective dominant position covering only part of the territory of a member state can constitute a substantial part of the common market.

Legal Interpretation

The legal interpretation of the notion of substantial part of the common market effectively starts with two court cases dating from the early to mid-1970s, specifically, the 1974 *Belgische Radio en Televisie v SABAM* (*Societe Belge des Auteurs, Compositeurs et Editeurs*)² and the subsequent *European Sugar Cartel: Coöperatieve Vereniging 'suiker unie' UA and others v EC Commission*,³ herein referred to as *SABAM* and *Suiker Unie* respectively. The cases decided not only whether the substantial part assessment was a separate Article 82 condition but also how the assessment was to be made in practice. In this legal decision making, M. Henri Mayras would be an influential voice.

That Mayras was able to have an influential voice on the legal interpretation of the notion of substantial part of the common market is down to the fact that he acted as the advocate general in both the *SABAM* and *Suiker Unie* cases. The *SABAM* case arose from a music copyright dispute before the *Tribunal de Premiere Instance* in Brussels. The dispute raised questions of Community law and the *Tribunal* asked for a preliminary ruling on these from the *European Court of Justice (ECJ)*. In line with procedure, the court sought the *Opinion of the advocate general, Mayras*. The nature of two of the *Tribunal's* questions, concerning possible infringement of Article 82 EC, led Mayras to expound upon the notion of substantial part of the common market. Eighteen months later, in June 1975, he found himself again commenting on the notion, but this time it was in his *Suiker Unie Opinion*. This came about because the appellant in the case, *Raffinerie Tirlemontoise*, contested the *Commission's* view that the *Belgo-Luxembourg sugar market* was a substantial part of the common market.⁴ Mayras used these two *Opinions* to assert that the substantial part assessment was a discrete Article

82 condition, pioneer an economic relativism approach to making the assessment, and apply it in the two cases.

Mayras was unequivocal that the substantial part condition was a discrete Article 82 EC condition, discrete but nonetheless linked to the other conditions, particularly the dominance requirement. This was made clear in his *SABAM Opinion*, for in a section headed "Conditions for the application of Article 86 of the Treaty"⁵ he declared that

"The abuse prohibited by Article 86[82]⁶ must, firstly, be committed by

- one or more undertakings,
- occupying a dominant position,
- within the Common Market or in a substantial part of it."⁷

In his *Suiker Unie Opinion*, concerning these conditions, he asserted that it must be shown first that the dominant position relates to a substantial part of the common market. The court did not demur, for both the *SABAM* and *Suiker Unie* rulings treated the substantial part notion as a distinct condition. This was later affirmed by the *ECJ* in *United Brands (1978)*, with the court ruling that

"The conditions for the application of Article 86[82] to an undertaking in a dominant position presuppose the clear delimitation of the substantial part of the Common Market in which it may be able to engage in abuses which hinder effective competition"⁸

That it is a condition, therefore, means that the notion can fulfil its role as a subsidiarity test. For in having to assess all such cases as to whether or not they are a substantial part, the issue whether a case comes under EU or national law is decided. Specifically, an alleged infringement that satisfies the substantial part condition comes under Article 82 EC while one that fails the condition is the concern of member state law. Yet for this to happen in practice, a method or approach to determining the substantial part question had to be advanced and sanctioned by the court. Mayras in his *SABAM Opinion* pioneered such an approach, the economic relativism approach, but the subsequent court ruling in the case is viewed as sanctioning a rival approach, the territorial. This did not deter Mayras, however, for in his *Suiker Unie Opinion* he continued to advance the

² Case 127/73 *Belgische Radio En Televisie v. Societe Belge Des Auteurs, Compositeurs Et Editeurs (S.A.B.A.M) And N.V. Fonior* [1974] 2 C.M.L.R., p. 238.

³ Joined cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73 *RE The European Sugar Cartel: Coöperatieve vereniging 'Suiker Unie' UA and Others v. E.C.Commission, Unione Nazionale Consumator* [1976] 1 C.M.L.R., p. 295.

⁴ *Ibid.*, Paragraphs 368-370.

⁵ Case 127/23, *op. cit.*, p. 274.

⁶ What is now Article 82 was originally Article 86 of the Treaty of Rome.

⁷ Case 127/23, *op. cit.*, p. 274.

⁸ Case 27/76 *United Brands Co. v. E.C.Commission* [1978] 1 C.M.L.R., paragraph 44.

economic relativism approach. In fact, the *Suiker Unie* ruling made it law. Thus, within the space of two years, two competing approaches to determining the substantial part question were sanctioned. They remain in force and no further approach has been made law.

The territorial approach to determining the substantial part question was legalised by the *SABAM* ruling. In fact, the court neither expressly rejected the economic relativism approach nor expressly sanctioned the territorial approach. Concerning the former, it was silent; concerning the latter, it simply observed that the *Tribunal de Premiere Instance* in Brussels found that *SABAM* held “a quasi-monopoly within Belgian territory and consequently occupied a dominant position in a substantial part of the Common Market.”⁹ In not questioning this, the court was accepting that the territory of Belgium constituted a substantial part of the common market. Moreover, if this was true of Belgium, it must also apply to similarly sized member states and larger ones. The Commission thought so too, asserting in its Article 82 London European-Sabena decision (1988) that it and the ECJ “have expressly recognised that ‘the territories of both large and medium-sized countries’ constitute a substantial part of the common market.”¹⁰ This suggests that smaller national territories did not automatically constitute a substantial part of the common market. If so, this would be a recipe for tension between such member states and those automatically deemed a substantial part. Subsequently, however, the court came to view the territory of every member state as a substantial part of the common market. This simply left the question of how this approach would make the substantial part assessment in a territory other than that of an entire member state.

That the rival economic relativism approach eventually became law owes a great deal to the continued efforts of one man, advocate general M. Henri Mayras, for not only did he pioneer the approach but persisted with it even though the *SABAM* ruling failed to make it law. He used his *SABAM* and *Suiker Unie* Opinions to pioneer the approach, for he was unequivocal that relative economic importance, not territory, was key to deciding the substantial part question. Thus in *Suiker Unie* he asserted that the substantial part question “is concerned less with the geographical size of the actual territory in which the undertaking concerned exerts its influence as with the economic importance

of the market which it controls.”¹¹ In *SABAM*, he went so far as to declare that the geographical extent of the market is not a determining factor when assessing the substantial part condition.¹² What was crucial, however, was an assessment of the market “in relation to the whole of the Common Market, i.e. its relative economic importance.”¹³

Therefore, for Mayras, relative economic importance determined whether a market constituted a substantial part of the common market. Yet to be able to determine relative economic importance, that is, to assess the market in question relative to the common market as a whole, it must be clear what the market in question refers to. It could be interpreted as either the product market where the dominant position occurs or the territory within which the product market lies. In *SABAM*, Mayras was unequivocal that it was the latter, assessing the territory of Belgium in relation to the Community as a whole, to determine the territory’s relative economic importance.¹⁴ (This led him to conclude that the territory of Belgium was a substantial part of the common market.) However, Mayras was soon to modify his stance, for in *Suiker Unie* he decided that the market in question refers not just to territory but also to the product market where the dominant position occurs.¹⁵ In other words, both these two elements required assessment in order to determine the relative economic importance of a market.

Furthermore, Mayras in his *Suiker Unie* Opinion not only pioneered a method for assessing the relative economic importance of the product market element but also applied it to the Belgo-Luxembourg sugar market. In fact, the method for assessing relative economic importance was the one he had already used in *SABAM*; he simply extended its use to include the new product component. Specifically, when assessing the relative economic importance of the Belgo-Luxembourg sugar market, he gauged the production and consumption of sugar in this market relative to that of the Community as a whole.¹⁶ However, he thought the territory component more decisive than the product component when determining relative economic importance,¹⁷ hence deciding the substantial part question. He gave no reasoning for

⁹ Case 127/23, op. cit., paragraph 5.

¹⁰ Commission Decision of 4 November 1988 relating to a proceeding under Article 86 of the EEC Treaty (IV/32.318, London European – Sabena), OJ L 317, 24/11/1988, paragraph 16.

¹¹ Joined cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73, op. cit., p. 353.

¹² Case 127/23, op. cit., p. 277.

¹³ *Ibid.*, p. 277.

¹⁴ *Ibid.*, p. 277.

¹⁵ Joined cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73, op. cit., p. 353.

¹⁶ *Ibid.*, p. 353.

¹⁷ *Ibid.*, p. 353.

this. Yet, as far as determining the law on these matters, it was not the views of Mayras, however influential, but those of the court that counted.

The Suiker Unie Ruling

The Suiker Unie ruling was the outcome of an appeal against the Commission's 1973 European Sugar Decision. The ECJ noted that the Commission Decision concluded that the appellant, Raffinerie Tirlemontoise, occupied a dominant position on the Belgo-Luxembourg market, which constituted a substantial part of the common market. On appeal, Raffinerie Tirlemontoise, among other things, claimed that the market in question was not a substantial part of the common market. This not only brought the issue of substantial part before the court but also an approach that was different to the SABAM territorial approach. This was because the Commission had declared the Belgo-Luxembourg *sugar*¹⁸ market, not the territory of Belgium and Luxembourg, to be a substantial part of the common market. A further layer of complexity was added by the advocate general, M. Henri Mayras, advocating a new two-component economic relativism test (see above). Of course, the court could simply have relied on the existing SABAM territorial approach, ruling that the territory in question was a substantial part because it covered two member states in their entirety. Radically, however, it decided to do otherwise, sanctioning a second approach to determining the substantial part question. Specifically, the court ruled that

“For the purpose of determining whether a specific territory is large enough to amount to ‘a substantial part of the Common Market’... the pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers must be considered.”¹⁹

This rather obscure wording, combined with how the court applied it in Suiker Unie, established both that the economic relativism substantial part approach was lawful and that the approach itself was specific to the product market where the alleged abuse of a dominant position had occurred. In other words, the court had taken on board the product market element of Mayras's Suiker Unie test but rejected the territory component. Indeed, it had more than taken it on board, for the court articulated a two-component product market economic relativism test. That is, for a territory to be a substantial part, it must satisfy the production and consumption component as well as the habits and economic opportunities of sellers and buyers requirement. Thus,

¹⁸ My italic.

¹⁹ Joined cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73, op. cit., paragraph 371.

concerning the substantial part issue in Raffinerie Tirlemontoise's appeal, the court assessed the pattern and volume of the production and consumption of sugar in the combined territories of Belgium and Luxembourg, as well as considering the habits and economic opportunities of the vendors and purchasers of the said product. Within the same ruling, the court went on to apply this assessment in respect of another sugar market, that of Southern Germany.

The court's production and consumption element of the economic relativism test, as well as its application to the Belgo-Luxembourg sugar market, was pure Mayras. Copying Mayras, the court assessed the production and consumption of sugar in Belgium and Luxembourg in relation to Community output and consumption of the same. On this matter, Mayras had deemed it “a very significant fact”²⁰ that Belgo-Luxembourg sugar production “is relatively speaking very large ... that is to say nearly 10% of all the sugar produced in the Community.”²¹ He noted that local consumption, “which far from being small,”²² only averaged 350,000 tons per annum during the reference period. The court effectively concurred with this assessment, after going through the same numerical exercise. It deemed the Community market shares as sufficiently large, when taken into account with the meeting of the other component of the test, “for the area covered by Belgium and Luxembourg to be considered, so far as sugar is concerned, a substantial part of the Common Market in this product.”²³

The other component of the court's economic relativism test requires that the habits and economic opportunities of vendors and purchasers of the product in question must be considered. Yet the court presented no reasoning as to why this second component was required, and why it had to have a product specific focus. Thus, in Suiker Unie, the court considered the habits and economic opportunities of vendors and purchasers of sugar, but it did so only fleetingly, thereby failing to provide a detailed exemplar of how to undertake this assessment. However, even if it had done so, the factors important in making the assessment concerning sugar may have little relevance in respect of other products. There is no one set of factors that will uniformly apply to each and every assessment of this requirement. Presumably the task of selection will fall to the competition regulator handling the case, subject to judicial review.

Nor is the production and consumption element of the economic relativism test concern free. One concern

²⁰ Ibid., p. 353.

²¹ Ibid., p. 353.

²² Ibid., p. 353.

²³ Ibid., paragraph 375.

derives from the numerical relativism method used to assess this element of the test. More precisely, it derives from the fact that the determination of this requirement principally rests on the percentage size of the Community market share held by the territory in respect of the product in question. The concern therefore is, when does the percentage share support an unsubstantial part decision and vice versa. In *Suiker Unie* an 8 to 9 per cent share of Community sugar production and 6 per cent share of consumption, in conjunction with the other element of the test being satisfied, led the court to rule that the Belgo-Luxembourg sugar market was a substantial part. If this were universally true for all products and services, and it may not be, then an unsubstantial part decision is likely to require a lower percentage share of the common market. What this percentage would be, and whether it would vary according to the relative importance of the other element in a particular case, remains unsettled, although advocate general Warner in his 1978 *British Petroleum Opinion* declared that the view is tenable that anything under 0.5 per cent of a market is not a substantial part of it.²⁴

These concerns are real but they should not mask the fundamental strength of the economic relativism test. This strength was demonstrated by the court in *Suiker Unie* when, on the basis of relative economic importance, it deemed a sub-national sugar market (Southern Germany)²⁵ and a sugar market covering the territory of two member states (Belgium and Luxembourg) substantial parts of the common market. In other words, the test has the capacity to assess the relative economic importance of any market irrespective of its territorial size. Hence, it has the elasticity to determine whether a particular centre of economic activity, such as an airport or financial centre, or even a seaport, is of sufficient relative economic importance to constitute a substantial part of the common market. Indeed, a later preliminary ruling would, using a version of the economic relativism approach, determine that the port of Genoa constituted a substantial part of the common market.

Usage Pattern

The Commission, post *Suiker Unie* ruling, appeared therefore to have a choice of two competing legally sanctioned substantial part approaches, the territorial and the economic relativism. In fact, court rulings during this period played a critical role in determining the Commission's usage pattern of these two approaches. For by determining that a member state territory is a substantial part of the common market, the court has argu-

ably rendered the economic relativism test irrelevant to such cases. Indeed, the Court of First Instance (CFI) in its 1999 *Irish Sugar* ruling appears to confirm this.²⁶ Furthermore, the *Crespelle* preliminary ruling of 1994 saw the ECJ for the first time apply the territorial approach to a situation of collective dominance that covered the entire territory of a Member State.²⁷

Yet the legal position is more complex. For in its 2002 *Schneider Electric* merger case ruling, the CFI did not follow its earlier *Irish Sugar* ruling and apply the territorial approach but instead employed the economic relativism approach to conclude that certain electrical markets corresponding to the territory of France indisputably constitute a substantial part.²⁸ However, because a member state territory is automatically a substantial part of the common market, the choice of employing either the territorial approach or the economic relativism test to make this determination has proven to be more imaginary than real in such cases. De facto, the use of the economic relativism approach appears restricted to markets that are other than an entire member state. That it is suitable for determining the substantial part question in such markets is demonstrated by its use in the *Suiker Unie* (Southern Germany) and *Porto di Genoa* rulings. This suitability is made all the more important given the current difficulties in applying the territorial approach at the sub-national level.

Community law viewing a member state territory as a substantial part of the common market begins with the *SABAM* preliminary ruling. This was accepted by subsequent rulings and was put into practice by the Commission. Furthermore, the 1994 *Crespelle* preliminary ruling saw the reach of the territorial approach extend beyond situations of single dominance to encompass collective dominance that covered the entire territory of a member state. The ruling concerned state authorised bovine insemination centres, with each having a local monopoly with respect to the area of France it served. The ECJ pointed out that a member state granting such exclusive rights to an undertaking must ensure that the rights are not contrary to EU competition law, including Article 82.²⁹ With regard to this Article, or at least to two of its conditions, the court ruled that, because the insemination centres constituted a contiguous series of monopolies territorially limited but together covering the

²⁴ Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v E.C. Commission* [1978] 3 C.M.L.R 174, pp. 183-184.

²⁵ Joined cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73, op. cit., paragraphs 441-448.

²⁶ Case T-228/97 *Irish Sugar plc v Commission of the European Communities* [1999] ECR II-02969, paragraph 99.

²⁷ Case C-323/93 *Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECR I-05077, paragraph 17.

²⁸ Case T-310/01 *Schneider Electric v Commission of the European Communities* [2002] ECR II-4071, paragraphs 415-419.

²⁹ Case C-323/9, op. cit., paragraph 16.

entire territory of a member state, the dominance and substantial part conditions were met.³⁰ Thus, so long as the collective or single dominant position covers the entire territory of a member state, the substantial part requirement is fulfilled.

Nevertheless, the *Suiker Unie* ruling is clear that the economic relativism approach can also be used to determine if a member state market is a substantial part of the common market. Indeed, the Commission in its 1997 *Irish Sugar* decision applied both approaches.³¹ That it was familiar with the *Suiker Unie* sugar ruling was evident in its *Irish sugar* decision, and this may explain why it applied the economic relativism test to the *Irish sugar* market. In line with established case law, the Commission also applied the territorial approach. The use of elements from the two approaches in the same decision is uncommon, but not unknown.³² Avoiding embarrassment, the Commission decided that both approaches had been satisfied. On appeal, *Irish Sugar*, which held a dominant position in the stated market, saw it differently. The company, using the economic relativism approach, repeatedly insisted that the *Irish sugar* market was of minor importance relative to other member states' markets, and also because it held only 1.4 per cent of the Community market.³³ The CFI's response was unequivocal: the geographical market in question constituted a substantial part of the common market because "it corresponds to the territory of a Member state".³⁴ Hence, in such situations, the territorial approach appears to determine the substantial part question.

Yet the legal situation is now more complex. This is because in 2002 in its *Schneider Electric* merger ruling, the CFI did not comply with its earlier *Irish Sugar* ruling and judge that the markets in question, French electrical sector markets, constitute a substantial part because they correspond to the entire territory of France. Instead, the court just relied upon the *Suiker Unie* economic relativism approach to conclude that the stated markets indisputably constitute a substantial part of the common market. Thus, technically, it is possible to use either the economic relativism approach or the territorial to determine the substantial part question when the market corresponds to an entire member state territory. However, this choice is more imaginary than real, for the

legal fact that a member state automatically constitutes a substantial part renders it unnecessary to apply the economic relativism in these cases.

Each and every member state of the European Union is therefore a substantial part of the common market, even Luxembourg and Malta. Some members of the Commission's competition directorate see a positive resulting from this legal fact, namely, the prevention of the diplomacy concern. The concern refers to the likely negative political and diplomatic fallout of labelling a specific member state an unsubstantial part of the common market, for the member state in question may find it unacceptable to be the unsubstantial part in a sea of substantial parts of the common market. This is because the substantial/unsubstantial part of the common market decision can act as a ranking mechanism, with unsubstantial carrying the stigma of inferior rank or status. The very words themselves are suggestive of this, seeming to affirm that some member states are 'less equal' than other member states, indeed, that an unsubstantial member state is somehow less than a sub-national territory that has been labelled a substantial part. This diplomatic concern is no longer an issue.

The remaining outstanding issue in respect of the usage pattern of the two substantial part approaches relates to a territory other than that of an entire member state. Here again the court would play a key role. The ECJ's decision to use the economic relativism approach was an act of pragmatism on its part, recognition that this approach intentionally has the necessary elasticity to determine the substantial part question in such markets. This cannot be said of the territorial approach. It was in *Suiker Unie* that the ECJ first applied the economic relativism approach to a sub-national market, determining that the sugar market of Southern Germany was a substantial part of the common market. Then silence, a silence that lasted for seventeen years, for it was not until December 1991 that the court again applied a version of the economic relativism test in a ruling, namely, the case of the *Porto di Genova*.

The *Porto di Genova* and *Crespelle* preliminary rulings are similar in that they concern the applicability of Community competition rules to a state authorised monopoly enjoying exclusive rights; in *Porto di Genova*, the monopoly related to the organisation and performance of dock work regarding ordinary freight.³⁵ In considering the applicability of Article 82 EC to the case, the court for the first time assessed whether a port like Genoa constituted a substantial part of the common market. The result was a landmark ruling. For in declaring the

³⁰ *Ibid.*, paragraph 17.

³¹ Commission Decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621, 35.059/F-3 – *Irish Sugar plc*) OJ L 258, 22.9.1997, paragraphs 97-98.

³² See, for example: Commission Decision of 26 July 2000 relating to a procedure pursuant to Article 86(3) of the EC Treaty, C(2000) 2267, OJ L208, 18/08/2000, pp. 0036-0046, paragraphs 42-44.

³³ Case T-228/97, *op. cit.*, paragraph 99.

³⁴ *Ibid.*, paragraph 99.

³⁵ Case C-179/90, *op. cit.*, paragraph 15.

port a substantial part of the common market,³⁶ the court signalled that this must be true of similar centres of economic activity and that they therefore fell within the remit of Article 82, not member state law. Moreover, in using the economic relativism approach, the court not only demonstrated that the test was capable of making the determination, but also revealed that it was legally correct to apply it in such cases. This was not lost on the Commission, who duly put it into practice.³⁷

How the territorial approach would make the substantial part determination in the case of a major port or similar centre of economic activity remains unclear, although that is not to discount its possible use in the future. Therefore, the economic relativism approach currently ensures that Article 82 EC catches such an important centre of economic activity. Yet there have been legal developments that make the territorial approach of relevance in collective dominance cases at the sub-national level. We have already seen that the court in *Crespelle* declared that the substantial part test was satisfied when a collective dominant position covered the entire territory of France. However, this was not the first time the court had dealt with the issue of collective dominance in a case involving French territory. The issue had arisen in its 1988 *Bodson* preliminary ruling because a number of local communes had awarded their individual monopoly on providing external funeral services to a single group of private undertakings whose market strategy was controlled by their parent company.³⁸

As not all communes handed over their external funeral services monopoly to the private group, the collective dominant position did not cover the entire territory of France, and this raised the question as to whether the territorial test had been satisfied. Yet the *Bodson* ruling was unequivocal that Article 82 EC applied to a situation of collective dominance covering a certain part of a national territory.³⁹ This supports a conclusion that, in such a case, a certain part of a member state territory is a substantial part of the common market, although the ruling does not explicitly say this. The required legal clarification had to wait until the 1994 *Almelo* preliminary ruling. The judgment, which concerns the structure and relationships pertaining to electricity distribution in Holland, particularly clauses restricting its importation, saw

the ECJ rule that a collective dominant position "covering only part of the territory of a Member State"⁴⁰ is held in a substantial part of the common market.

However, the ruling did not determine whether the Dutch territory in question is a substantial part of the common market. In fact, in respect of the territorial approach, in such situations of collective dominance, there is no agreed legal position as to when a sub-national territory is or is not a substantial part. A legal vacuum exists. This uncertainty in determining the substantial question must directly translate into uncertainty as to whether the case comes under Article 82 EC or member state law. It must also make life very difficult, if not impossible, for a regulator trying to make the substantial part decision in such a case. Clearly, the court must address this matter and provide clarity where currently uncertainty prevails.

The court also needs to address a related matter. We have seen the ECJ judge that, in situations of collective dominance within a sub-national territory, it is legally correct to employ the territorial approach to determine if the said territory is a substantial part of the common market. To date, however, the court has not expressly ruled that the same holds true when the dominance is not collective but single. On the ground of consistency alone, the court, at its next opportunity, should so rule. If it does, then, irrespective of whether the dominant position is either collective or single, a sub-national territory covering a certain part of a member state is a substantial part of the common market under the territorial approach. We have already demonstrated that this is the law in respect of a member state territory.

Conclusion

The *United Brands* ruling is unequivocal that, for a breach of Article 82 EC, the alleged infringement must occur within the common market or a substantial part of it. It is a mandatory requirement. Thus, failure to meet the condition means that the market or territory in question constitutes an unsubstantial part of the common market, and the competition matter becomes the concern of the relevant member state. The substantial part requirement therefore acts as a boundary or subsidiarity test, determining whether the matter comes under EU or member state law. For this to happen in practice, however, agreement was required on both the nature of the substantial part test and how it should be applied in a case. Here advocate general M. Henri Mayras made several pioneering contributions, and the Commission also had a voice, but, ultimately, the court decided the law on these matters. Indeed, legal rulings not only

⁴⁰ Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf IJsselmij* [1994] ECR I-01477, paragraph 41.

³⁶ *Ibid.*, paragraph 15.

³⁷ See, for example: Commission Decision of 14 January 1988 relating to a proceeding under Article 86 of the EC Treaty (IV/34.801 FAG- Flughafen Frankfurt/ Main AG) 072, 11/03/1988, PP.0030-0050, paragraphs 57-58.

³⁸ Case 30/87 *Corinne Bodson v SA Pompes funéres des régions libérées* [1988] ECR P.02479.

³⁹ *Ibid.*

sanctioned two substantial part approaches, the territorial and the economic relativism, but further determined both how to put them into practice and their respective usage pattern. The court, however, has yet to explain why two approaches, instead of just one, have been made law.

It was the SABAM and Suiker Unie rulings that respectively made the territorial and economic relativism approaches EU law. Indeed, the SABAM ruling started the classification that ultimately led the law to view each member state, irrespective of territorial size or any other factor, as constituting a substantial part of the common market. That is, concerning an alleged Article 82 EC infringement, when a single or collective dominant position covers an entire member state territory, the territory constitutes a substantial part of common market. Yet the 2002 Schneider Electric ruling demonstrates that the economic relativism approach can still be used to determine the substantial part question in a market that covers an entire member state. However, the choice of employing either the territorial approach or the economic relativism test is more imaginary than real, for as a member state is automatically a substantial part of the common market, there is absolutely no point in applying the economic relativism approach in such cases. This effectively limits the relativism approach to assessing the substantial part question in markets other than those covering an entire member state.

That a member state automatically constitutes a substantial part provides the Commission, national courts and member state competition regulators with considerable legal certainty, for they now know that in such an Article 82 EC infringement, where the market covers a member state, the substantial part condition is legally met. Because this is the established law, moreover, the regulator is unlikely to see its substantial part determination challenged before a court. Furthermore, because a member state is automatically a substantial part of the common market, the regulator does not have to expend time and resources on making the substantial part determination. The very opposite is true concerning the application of the economic relativism test. It is not automatic, requiring the regulator to make an assessment and then reach a decision, which of course is open to legal challenge, as occurred in Suiker Unie and Irish Sugar.

At the sub-national level, the use of the territorial approach and the economic relativism approach are problematic, albeit for different reasons. The difficulty with the territorial approach is that the law is opaque on a key matter and not fully articulated on another. It requires further articulation on the linked issue of dominance and a substantial part. The court has already ruled that a

collective dominant position covering only a part of the territory of a member state is held in a substantial part. However, it has yet to rule that the same holds when the dominance is not collective but single. The key matter where the law is opaque is that it is not clear as to when a sub-national territory is (or is not) a substantial part of the common market, which makes it difficult to determine if the case comes under EU or member state jurisdiction. Again, the law requires further articulation and clarification to resolve this matter.

The difficulty with the economic relativism test stems not from the absence of law but from the fact that the test used in the Porto di Genova ruling does not fully reflect that of the earlier Suiker Unie judgment. Two important differences are apparent. First, the Suiker Unie requirement to assess the habits and economic opportunities of vendors and purchasers of the product in question is absent from the Porto di Genova test,⁴¹ making the latter less demanding to apply. The second difference relates to what the economic relativism is gauged in relation to. In Suiker Unie, the Belgo-Luxembourg sugar market was gauged in terms of the Community output and consumption of the same, whereas Porto di Genova's importance was not assessed in relation to the Community but the member state it served, Italy.⁴² Currently, it appears that a regulator has discretion as to which version of the relativism test to employ in a case. Indeed, the Commission has not only used its own variant of the Porto di Genova test in a port case⁴³ but has also used a test that incorporates elements from both the Suiker Unie and Porto di Genova versions.⁴⁴

The likely outcome of legally assessing economic relativism in relation to a member state (or some other sub-community level), instead of in terms of the common market as a whole, is an extension of the reach of Article 82 EC, and hence EU jurisdiction. For example, a local port may be of little economic importance when viewed in relation to the common market, yet it may be of considerable significance to the member state it serves. If so, then, under the law as it currently stands, the port could constitute a substantial part of the common market. What was once undoubtedly national, if not local, has become europeanised, at least in relation to competition policy.

⁴¹ CaseC-179/90 *Merci convenzionali porto di Genova SpA v Sidergica Gabrielli SpA* [1991] ECR I-05889, paragraph 15.

⁴² *Ibid.*, paragraph 15.

⁴³ Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby (Denmark) OJ L 055, 26/02/1994, pp. 0052-0057, paragraph 8.

⁴⁴ Commission Decision of 11 June 1988 relating to a proceeding under Article 86 of the EC Treaty (IV/35.613-Alpha Flight Services/ Aéroports de Paris), C(1998) 1417, OJ L 230, 18/08/1998, pp. 0010-0027, paragraphs 77-82.