

The Consumer Voice in Europe

MARKET DEFINITION IN EU COMPETITION LAW ENFORCEMENT: NEED FOR AN UPDATE

BEUC's response to the public consultation



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Why it matters to consumers

Market definition is an important part of competition law enforcement by competition authorities in the EU to ensure that markets work in the interests of European consumers. This concerns both the effect on consumers of companies' conduct on the market or the effect of one company buying up another (mergers). It is therefore important that the approach set out in the Market Definition Notice reflects the current nature of markets and up to date methodologies for analysing markets.

Summary

The Market Definition Notice remains valid in its core. It does however require updating to ensure that it continues adding value and provides guidance for both merger and antitrust analysis. It is particularly important to update the way we define markets in relation to the digital economy, internal market integration, the production and use of evidence and its analysis to ensure the Notice reflects the reality of consumers.

1. General remarks

BEUC welcomes the opportunity to submit its views on the Commission's consultation on the Market Definition Notice ("Notice").¹ Market definition is an important tool of competition law analysis and enforcement, whether in mergers or antitrust, particularly in relation to thresholds for the application of Block Exemptions or other safe-harbour guidance and presumptions or rules of thumb for example. However, technological change means that traditional market definition may not be as relevant in some circumstances and a revised Notice should reflect this. This is because defining digital markets in the traditional sense might overlook important elements in competition law assessment such as leveraging techniques e.g. a company that is dominant in one market might acquire a company in another market and use the acquisition to enter and leverage its market power in new markets.

Ensuring that market definition is appropriate and done as accurately as possible using up-to-date methodologies and reflecting current developments in markets is therefore essential to internalise in the competition analysis the situation of consumers in each market. Whilst the core of this 1997 Notice remains valid, it is essential that it is updated.

Review and revision of the Notice should reflect in particular:

- The digital economy
- Greater internal market integration
- Current economic analyses
- Use of evidence

¹ Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

Further details on these points are set out below.

2. Areas in which the Market Definition Notice requires review

2.1. The Digital Economy

The Notice needs to be updated to reflect technological changes, in particular the digital economy, and its specific market characteristics and new business models, including the importance of ecosystems, so-called “zero price” markets, multi-sided markets, the importance of data and potential interaction between on and off-line markets².

In digital markets in particular, narrow product market definitions or adherence only to the traditional concept of market definition in competition analysis will not be appropriate for an accurate assessment of market power. The concept of digital platform ecosystems (including the Internet of Things) means that in certain cases the concept of relevant market may be less significant or indeed “relevant” for the appropriate analysis of potential competition concerns in both merger and antitrust analysis. In such circumstances, market definition may not have “a decisive influence on the assessment of a competition case”.³ This should be adequately reflected in paragraphs 4, 10-12 of the Notice. This does not mean that market definition is not relevant, just that it must be seen in a broader context. As the Competition Policy for the Digital Era Report neatly summarises it:

“In the digital world, market boundaries might not be as clear as in the “old economy”. They may change very quickly. Furthermore, in the case of multisided platforms, the interdependence of the “sides” becomes a crucial part of the analysis whereas the traditional role of market definition has been to isolate problems. Therefore, we argue that, in digital markets, we should put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies. At the same time, even if in some consumer-facing markets – according to their own account – firms compete to draw consumers into more or less comprehensive ecosystems, markets for specific products or services will persist from a consumer’s perspective, and should continue to be analysed separately, alongside competition on (possible) markets for digital ecosystems. Where the firms’ lock-in strategies are successful, and consumers find it difficult to leave a digital ecosystem, ecosystem-specific aftermarkets may need to be defined.”⁴

Furthermore, market definition in digital markets should allow for greater dynamic analysis given the speed of change in the form of innovation cycles and market entry and exit. This can work both ways, meaning that high market shares may not always be indicative of market power⁵ but market power may be present despite lower market shares where ecosystem scenarios are prevalent and market power may be linked to adjacent/portfolio markets, or where the boundaries between markets are blurred and in flux⁶.

² See the reflections of the Autorité de la Concurrence: Concurrence et commerce en ligne, May 2020, available at : https://www.autoritedelaconcurrence.fr/sites/default/files/2020-06/concurrence_commerce_en_ligne_v2.pdf?utm_source=POLITICO.EU&utm_campaign=906dbc41f5-EMAIL_CAMPAIGN_2020_06_05_01_07&utm_medium=email&utm_term=0_10959edeb5-906dbc41f5-190331965.

³ Notice, para 4.

⁴ Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, ‘Competition policy for the digital era’, 2019 (“Special Advisors Report”), p. 3. See also p. 42-48.

⁵ Case T-79/12 *Cisco Systems Inc. and Messagenet SpA v. Commission*, ECLI:EU:T:2013:635, para. 69; Commission decision of 7 October 2011 in Case M.6281 *Microsoft/Skype* para. 78.

⁶ Commission decision of 3 October 2014 in Case M.7217 – *Facebook/WhatsApp*, para. 52.

Substitutability relationships may be fluid and consumers' perceptions of viable substitutes may change over a short time span.⁷

In the digital economy it has become clear that price should not be considered the only or main parameter for market definition in all cases. Non-price parameters are considered in the merger guidelines and should be expanded upon in the Notice from the demand-side perspective.⁸ This is because consumers increasingly access products and services not in exchange for a monetary price but by providing access to their personal data and being exposed to profiling and advertising. Aside from "zero price" markets, there are other circumstances where functionalities, quality (including privacy), data, attention⁹ or innovation are more significant competitive parameters. This should be clarified in paragraphs 13 and 15-19. Whilst the Notice recognises that the Small but Significant and Non-transitory Increase in Price (SSNIP) test is not the only way to define markets on the demand side, explicit reference could also be made to the Small but Significant Non-transitory Decrease in Quality (SSNDQ) test as used in *Google Android*.¹⁰

The significance of data on the supply side should also be referenced as recognized in more recent merger cases.¹¹

Multi-sided markets are not mentioned in the Notice despite their importance in the digital economy in the last decades. Specificities of such markets and how the Commission considers these for market definition purposes should be added, for example, the interrelationship between the two (or more) sides, the implications for the relevant platform, potential dual roles, lock-in effects and the appropriate use of the SSNIP test. The above points should be reflected throughout as regards relevant product markets, and in particular in paragraphs 25-27 and 36-43 of the Notice.

The emerging practice of personalised pricing should be considered in paragraph 43 to reflect the fact that the technology and the availability of large amounts of relevant personal data for online personalisation and price discrimination are developing rapidly, as recognized in the Commission's Report to the OECD on Personalised Pricing in the Digital Era.¹² One product may not correspond to one relevant market as customers may be divided into smaller groups linked to their willingness to pay. Additionally, the Notice should recognise that personalised pricing can co-exist with other forms of pricing, including price collusion in relation to the same product or market. This is because technology could allow personalised pricing to be applied to low-end consumers to extract more value from them and price collusion to high-end consumers. Furthermore, price discrimination also includes the practice of combining both dynamic pricing and price personalisation. As shown in surveys and mystery shopping exercises carried out by our members Altroconsumo and Arbeiterkammer in Italy and Austria respectively, it is not always easy to distinguish one from the other¹³.

⁷ Special Advisors Report, p. 47.

⁸ See also BEUC - The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era, p.17 available at: https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf.

⁹ Special Advisors Report, p. 44.

¹⁰ Commission decision of 18 July 2018 in Case AT.40099 - *Google Android*, para. 267.

¹¹ Commission decision of 6 December 2016 in Case M.8124 - *Microsoft/LinkedIn*, para. 179; Commission decision of 21 December 2016 in Case M.8180 - *Verizon/Yahoo*, para. 81-83; Commission decision of 6 September 2018 in Case M.8788 - *Apple/Shazam*, para. 317-328.

¹² Personalised Pricing in the Digital Era - Note by the European Union to the OECD, 28 November 2018, available at [https://one.oecd.org/document/DAF/COMP/WD\(2018\)128/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)128/en/pdf).

¹³ Personalised Pricing in the Digital Era - Note by BEUC to the OECD, 28 November 2018, available at [https://one.oecd.org/document/DAF/COMP/WD\(2018\)129/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)129/en/pdf)

2.2. Greater internal market integration

For geographic markets/market integration (paragraphs 28-32 and 44-50), the Notice should be updated to reflect greater internal market integration and globalization since 1997, including also the role of the Internet in geographic market dimensions. In this regard, the Internet and the exponential use of e-commerce in the EU in the last decades show that geographic markets are becoming blurred in the eyes of consumers who might not know that they are ordering products from another Member State when the website is provided in her or his language and country currency.

2.3. Economic analysis, including behavioural economics

The revision of the Notice should reflect the developments in economic analysis and the Commission's current policies on and use of evidence.

The Commission uses economic tests and methodologies beyond the SSNIP¹⁴ (and SSNDQ) tests). It also makes direct assessments of market power without going through the market definition step. Further information on these practices and methodologies could be included here on potential economic analysis in different types of cases.

The evidence gathering sections of the Notice should also reflect the new analytical challenges of the digital economy as set out above.

The current Notice gives inadequate consideration on the demand-side to behavioral economics or recognised consumer biases and the importance of actual consumer behaviour in defining relevant markets. This should be added to the demand side paragraphs (40-43 and 46-47), first as a key factor in market definition for consumer-facing markets and second, in terms of the most useful evidence to identify this. Measuring actual behaviour is much more valuable than surveys of purported behaviour or assumptions on consumer behaviour. The Commission's *Facebook/WhatsApp* decision illustrates the risks of not establishing actual consumer behaviour. Whereas the Commission apparently relied on responses to its questionnaires by competitors that consumers may switch to different communications apps if Facebook imposed intrusive data policies on WhatsApp users¹⁵, the Italian Competition Authority found that intrusive data policies did not in practice lead to switching.¹⁶ Paragraph 41 on consumer preferences and surveys should be updated and expanded to reflect these points.

The impact of ecosystems and lock-in needs to be factored into the ability of customers and consumers to switch or multi-home on the demand side. Competitors may be competing for "access points" to consumers rather than for a specific product or service.¹⁷ Paragraph 42 on switching should be updated to recognize this.

2.4. Evidence

Evidence gathering techniques referenced in the Notice (paragraphs 44-52) should be expanded to cover the key types of evidence and analysis relied on by the Commission today, in particular internal documents, economic evidence and data practices. For consumer-facing markets, consumer organisations should be added as a potential source of evidence such as independent consumer behavioural studies (also in paragraph 41).

¹⁴ Case T-699/14 *Topps Europe Ltd v Commission*, ECLI:EU:T:2017:2, para. 82.

¹⁵ *Facebook/WhatsApp*, para. 186.

¹⁶ <https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes>.

¹⁷ Special Advisors Report, p. 48.



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