

The Consumer Voice in Europe

# REVIEW OF THE MARKET DEFINITION NOTICE FOR THE PURPOSES OF EU COMPETITION LAW

BEUC's response to the public consultation on the draft revised  
Market Definition Notice



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## Why it matters to consumers

Market definition is an important part of EU competition law enforcement that contributes to the well-functioning of markets, in the interests of European consumers as the ultimate beneficiaries of this law. This concerns both the effect on consumers of companies' conduct on the market (antitrust cases) 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 includes up to date methodologies for defining markets, and accurately recognises how consumers behave in them. Having a fit for purpose tool is a must in order to tackle effectively competition analysis and enforcement in today's markets, leading ultimately to a better protection of consumers against anticompetitive harms.

## Summary

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The proposed draft revised Commission Notice on the definition of the relevant market for the purposes of Union competition law<sup>1</sup> (Market Definition Notice) is designed to ensure that market definition as a tool is up to date and that the Notice continues to provide valuable guidance on this step in the assessment carried out by competition authorities, in the case of both mergers and antitrust.

BEUC welcomes that developments in best practices in market definition have been reflected in the draft Notice, and that novel market characteristics and new ways of offering goods and services are considered in particular in light of the digital and green transitions.

The draft Notice should nevertheless be further improved to include reference to all evidence-gathering practices required to tackle today's challenges. This implies greater use of behavioural insights in consumer-facing markets given the recent case developments that clearly demonstrate the importance of using not only traditional industrial organisation economics but also behavioural economics in competition law enforcement.

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<sup>1</sup> [https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice_en) revising Commission Notice on the definition of the relevant market for the purposes of Community competition law [1997] OJ C 372/5.

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## 1. Introduction/ general remarks

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BEUC welcomes the opportunity to submit its comments on the Commission’s draft revised Market Definition Notice (“draft Notice”).<sup>2</sup>

Market definition must remain an objective evidence-based tool, rather than a tool that would serve to accommodate political priorities such as industrial policy or vested interests, be they European or other.

BEUC welcomes the draft revised Market Definition Notice which encompasses improvements while ensuring that the core principles of market definition are maintained and conveyed in a clear way. The proposed changes contribute to the Notice remaining effective in providing comprehensive and clear guidance, either through newly introduced or expanded parts, on various key market definition issues and the Commission’s approach to these, including through the examples it provides. This will aid competition law enforcement to serve its purpose of protecting all market participants, including consumers.

While welcoming the Commission’s updates in the draft Notice, we also draw the Commission’s attention to areas that call for further improvements, as set out in this position paper and in line with BEUC’s initial contribution to the Commission’s evaluation of the current Market Definition Notice, launched in April 2020.<sup>3</sup>

## 2. Beneficial changes

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In its response to the Commission’s evaluation of the current Market Definition Notice<sup>4</sup>, BEUC raised the need to revise the existing Market Definition Notice in particular with respect to aspects of the digital economy and geographic markets. BEUC’s initial consultation response also called for revisions in relation to economic analyses and use of evidence (see under section 3).

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<sup>2</sup> To access the published draft revised Market Definition Notice see here: [https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice_en)

<sup>3</sup> BEUC’s response to the public consultation, ‘Market definition in EU competition law enforcement: Need for an update’ (2020), Ref: BEUC-X-2020-092 - 08/10/2020.

<sup>4</sup> BEUC’s response to the public consultation, ‘Market definition in EU competition law enforcement: Need for an update’ (2020), Ref: BEUC-X-2020-092 - 08/10/2020, p. 1-4.

Certain aspects of the Market Definition Notice have been expanded by providing further clarifications (e.g., on the role of market shares and different ways of determining them, homogeneity of the conditions of competition for geographic market definition), whereas in other areas the draft Notice takes a further step in ensuring that the Notice is fit for purpose and reflects today's markets and accompanying changes. By way of example, the new sections that provide guidance on digital markets and innovation driven markets, and the emphasis on non-price elements.

The proposed changes to the Market Definition Notice reflect the technological changes and digitalization, including specific market characteristics and new business models in the digital sector. These are in line with our suggestions to integrate the concepts of ecosystems, zero price markets, multi-sided markets, and non-price parameters into the Market Definition Notice. In addition, the need for a dynamic analysis in digital markets has been taken into consideration by the Commission, as well as the recommendation to include an explicit reference to the Small but Significant Non-transitory Decrease in Quality (SSNDQ) test used in the Google Android case.<sup>5</sup>

BEUC welcomes these changes as set out in more detail below.

### **2.1. Non-price elements and less emphasis on the SSNIP test**

The draft Notice acknowledges that price is not the only or main parameter to be considered in all cases, especially in digital markets. Greater emphasis has been given to non-price elements such as innovation and quality of products and services.

This was necessary in order to have an up-to-date Notice, not only because of the increasing practice of consumers accessing products and services by providing access to their personal data and being exposed to profiling and advertising rather than paying a monetary price, but also because in specific circumstances, parameters such as functionalities, quality (including privacy), data, attention or innovation play a more significant competitive role.<sup>6</sup>

The draft Notice thus stresses that various parameters of competition that customers consider relevant in the area and period assessed will be taken into account by the Commission in defining the relevant market. These parameters include the product's price, but also its level of innovation, its quality in relation to, for example, *"its durability, sustainability, the value and variety of uses offered by the product, the image conveyed or the security and privacy protection afforded–, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs"*.<sup>7</sup>

While the SSNIP (Small but Significant Non-transitory Increase in Price) test serves as a useful conceptual framework, it has its limitations as recognised in the draft Notice. Explicit reference has now also been made to the Small but Significant Non-transitory Decrease in Quality (SSNDQ) test, as suggested by BEUC.<sup>8</sup>

### **2.2. Geographic market definition**

Market definition must be an evidence-based tool. As such, this tool should not be driven by the interests of particular industries or policy considerations, but rather remain a fact-based instrument serving all parts of the economy.

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<sup>5</sup> Commission decision of 18 July 2018, Case AT.40099 - *Google Android*, para. 267.

<sup>6</sup> BEUC's response to the public consultation, 'Market definition in EU competition law enforcement: Need for an update' (2020), Ref: BEUC-X-2020-092 - 08/10/2020, p. 1.

<sup>7</sup> Point 12 of the draft revised Market Definition Notice.

<sup>8</sup> Point 32 of the draft revised Market Definition Notice.

### 2.3. Forward-looking assessments

BEUC welcomes that the draft Notice reflects forward-looking assessments where expected transitions in the structure of a market would lead to effective changes in the general dynamics of demand and supply within the period that is relevant for the Commission's assessment.<sup>9</sup> A greater dynamic analysis is required in particular in digital markets due to the speed of change in the form of innovation cycles and market entry and exit.

### 2.4. New guidance on market definition in specific circumstances

BEUC welcomes the newly added sections in the draft Notice focusing on market definition in the presence of multisided platforms and digital ecosystems. These new additions are essential in the Market Definition Notice given their importance in the digital economy today.

The draft Notice now deals, for example, with specificities of multisided markets and how the Commission can consider these for market definition purposes, including that the Commission may here assess the switching behaviour of customers in response to SSNDQ, as an alternative to the SSNIP framework.<sup>10</sup>

BEUC welcomes the guidance on applicable principles for defining the relevant product market(s) in the case of digital ecosystems. Where the secondary (digital) products are offered as a bundle, the draft Notice clarifies that the Commission may also assess the possibility of that bundle constituting a relevant market on its own. And while not all digital ecosystems will fit an after-market or bundle market approach, the draft Notice clarifies that the Commission may nevertheless consider elements such as network effects, switching costs and single or multi-homing for the purpose of market definition.<sup>11</sup>

## 3. Areas for further improvement

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The draft Notice should be further improved to ensure that all relevant evidence-gathering practices are referenced in the draft Notice. This relates in particular to the use of behavioural insights/behavioural economics in competition law enforcement in consumer-facing markets.

An explicit reference should be added in the Market Definition Notice to consumer behaviour as a source of evidence for market definition, e.g. likelihood of switching.<sup>12</sup> Such evidence could take the form of studies (testing and experimentation), in addition to survey evidence and other traditional economic evidence. Measuring actual behaviour is generally more valuable than surveys of purported behaviour or assumptions on consumer behaviour.<sup>13</sup>

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<sup>9</sup> Point 16 of the draft revised Market Definition Notice. See also point 54 on evidence on hypothetical substitution that may constitute the only available direct evidence of substitutability in certain cases such as this one.

<sup>10</sup> See points 95, 97, 98 of the draft revised Market Definition Notice.

<sup>11</sup> See points 99-103 of the draft revised Market Definition Notice.

<sup>12</sup> See points 27, 28, 50, 57, 98 of the draft revised Market Definition Notice.

<sup>13</sup> Commission decision of 3 October 2014, Case M.7217 – *Facebook/WhatsApp*, para. 186. The case illustrates the risks of not establishing actual consumer behaviour. Unlike what the responses to the Commission's questionnaires by competitors indicated, saying that consumers may switch to different communications apps if Facebook imposed intrusive data policies on WhatsApp users, the Italian Competition Authority found that intrusive data policies did not in practice lead to switching. See <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>

### 3.1. Behavioural economics

Recent case developments demonstrate the importance of using not only traditional industrial organisation economics but also behavioural economics in competition law enforcement.<sup>14</sup> Competition authorities and other regulators have started to integrate consumer behavioural insights from behavioural economics into their competition assessments and the Market Definition Notice should reflect this more explicitly. From the competition law perspective, behaviour of consumers matters because it can affect companies' ability to retain existing customers and steer new ones away from rivals.<sup>15</sup> Consumers do not always follow the theoretical models in the "more economic approach". Behavioural economics must therefore systematically be considered as part of the relevant economic context in consumer-facing markets.<sup>16</sup> The new Market Definition Notice should ensure that this type of evidence can be collected and effectively used in defining consumer-facing markets.

### 3.2. Empirical evidence from consumer organisations

Consumer organisations may be in a position to substantially contribute their expertise and factual evidence to support competition authorities in their market definition analysis.<sup>17</sup> BEUC's interventions in several cases before the European Commission and the European Courts where it provided evidence of consumer behaviour and purchasing patterns could be used in the definition of relevant markets.<sup>18</sup> The provision of such evidence would be assisted by mechanisms to improve and strengthen greater outreach to consumer organisations to use actual real-life evidence on how consumer markets work, as indicated in our Regulation 1/2003 response.<sup>19</sup>

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<sup>14</sup> Commission decision of 16 December 2009, Case COMP/39.530 - *Microsoft (Tying)*; Commission decision of 27 June 2017, Case AT. 39740 - *Google Search (Shopping)*; Commission decision of 18 July 2018, Case AT.40099 - *Google Android*.

<sup>15</sup> BEUC, 'Integrating Consumer Behaviour Insights in Competition Enforcement – OECD Note by BEUC' DAF/COMP/WD(2022)55, p. 2-8.

<sup>16</sup> Competition and Markets Authority, 'Online Choice Architecture – How Digital Design Can Harm Competition and Consumers' (2022) Discussion Paper CMA155, access here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1066524/Online\\_choice\\_architecture\\_discussion\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1066524/Online_choice_architecture_discussion_paper.pdf).

<sup>17</sup> As recognised in point 78 of the draft revised Market Definition Notice. See: Evaluation of the framework for antitrust enforcement of Articles 101 and 102 TFEU, BEUC's response to the public consultation in relation to the evaluation of Regulation 1/2003, ref: BEUC-X-2022-102 – 06/10/2022, p. 12.

<sup>18</sup> BEUC, 'Integrating Consumer Behaviour Insights in Competition Enforcement – OECD Note by BEUC' DAF/COMP/WD(2022)55, p. 6, 8. For example, in the Google Android case, BEUC gathered substantial evidence from its members to support the definition of the relevant markets in the decision. In the Apple and music streaming apps ongoing investigation, BEUC collected evidence from its members relevant to the definition of the relevant markets, Apple's market power, and the effects Apple's practices have on consumers.

<sup>19</sup> Evaluation of the framework for antitrust enforcement of Articles 101 and 102 TFEU, BEUC's response to the public consultation in relation to the evaluation of Regulation 1/2003, ref: BEUC-X-2022-102 – 06/10/2022, p. 12.

