



ANTITRUST CLIENT BRIEFING

Market Definition Under the New Notice — What Companies Need to Know

29 February 2024

At a Glance

The European Commission (EC) has revamped the 1997 Commission Notice on the definition of the relevant market for the purposes of Community competition law (the 1997 Notice), and published a new [Notice](#) (Notice) on 8 February 2024.

“With this thorough review of our guidance, we reinforce important principles of competition enforcement and address new market realities, such as digitalisation and increasingly interconnected and globalised commercial activity. Markets are changing fast, and we need to ensure our guidance remains fit-for-purpose and effective in response to technological advances. The revised Notice will enhance transparency and legal certainty to the benefit of all stakeholders.” — Executive Vice-President, Competition Policy, Margrethe Vestager, 8 February 2024

Key Points:

- The Notice retains the main principles of the 1997 Notice, but incorporates 27 years of EC decisional practice and case law of the EU courts, as well as guidance and clarifications on gaps identified in the [Staff Working Document](#) published in July 2021 and further insights gained in its public consultation, such as:
 - The role of market definition and its general principles including whether a market definition analysis is always needed, and the value of EC decisional precedents
 - The methodology in assessing demand substitution, including the use and purpose of the small, significant, non-transitory increase in price (SSNIP) test and its relevance in the context of zero monetary price products and highly innovative industries
 - The relevance and weight of supply-side substitution in defining markets
 - The definition of geographic markets in conditions of globalization and import competition
 - The approach to market definition in certain specific scenarios, including in the context of digitalization, with dedicated sections on the approach; e.g., in the presence of multi-sided platforms, digital ecosystems, or pipeline products
 - The forward-looking application of market definition
 - The calculation and significance of market shares
 - The practical process of defining markets, including the source and type of substantive evidence the EC relies on to make its determination, and their probative value.
- The Notice provides updated guidance on the methodology used for market definition, but does not curb the EC’s substantial flexibility in the application of the rules it sets out. The Notice will therefore be useful for companies to determine the tools they may apply for market definition, but it will hardly help them reach reliable conclusions when defining markets in borderline cases.

Background

The EC officially began evaluating the [1997 Notice](#) in March 2020, collecting evidence from stakeholders as well as EU national competition authorities (NCAs), experts, and representatives from stakeholder groups. It also started reviewing legal economic literature, in particular with respect to four specific aspects of market definition: digitalization, innovation, geographic market definition, and quantitative techniques. On that basis, the EC published its [Staff Working Document](#) in July 2021 summarizing the findings of its evaluation (see Latham [briefing](#)), and prepared the Draft Notice published for [consultation](#) on 8 November 2022 (see Latham [briefing](#)). Fifteen months later, on 8 February 2024, the EC has published the final Notice together with a [press release](#) and a [Q&A](#) document.

The Role and General Principles of Market Definition

Market definition is only concerned with “immediate” competitive constraints

The Notice provides that market definition primarily aims to identify the “immediate” competitive constraints that the undertakings involved face (§6), i.e., the competitive constraints from “within” the

market (§17). By contrast, the competitive constraints from “outside” the market, such as potential competition, are taken into account at the stage of the competitive assessment (§17). Potential competition is singled out as lacking the necessary “immediate and effective” characteristics from a market definition perspective (§23). These statements consolidate the EC’s previous position in the 1997 Notice, despite calls from some stakeholders for the EC to systematically consider potential competition at the market definition stage.

Market definition is not mandatory and the EC may not need to consider all alternatives in depth

The Notice explains that “market definition is not a mandatory step in all assessments under Union competition law” (§8). Furthermore, “where required,” market definition is used “as a tool,” for example to assess market power or to calculate market shares, to “structure and facilitate the competitive assessment” (§8). In any event, the EC “does not need to reach a definitive conclusion on the precise scope of the market where the outcome of the Commission’s assessment would not change under different plausible market definitions” (§20). In that case, the EC will consider, as far as possible, a competitive assessment based on all plausible alternative market definitions, although “the depth of its competitive analysis may vary,” for example to focus on those alternative markets if the overlaps are more substantial and the immediate competitive constraints are fewer (footnote 40). This position is in line with the 1997 Notice and the EC’s decisional practice.

Market definition is a “case-by-case” affair

The Notice grants the EC ample flexibility to determine the scope of the relevant product and geographic market(s):

- Market definition is, first and foremost, “based on the facts of the case” (§14)
- The EC “is not bound to apply the definition of a relevant market from its past decisions,” although it may start its analysis from these decisions and verify whether they can still be applied (§14)
- The outcome of the market definition analysis may differ depending on:
 - the sector concerned (§14);
 - the level of the supply chain (§14);
 - the geographic area in question (§14);
 - the undertaking(s) involved (since the parties’ products serve as the starting point) (§18);
 - the time period considered (e.g., the geographic market may change as the competition dynamics have changed over time, referring to *Metso/Svedala* compared to *Outotec/Metso*; §18); or
 - the competitive concerns under consideration (e.g., whether the concerns under a merger would lead to increases in prices or would reduce investments in prices) (§18).

Product Market Considerations

As explained in this Latham [briefing](#), market definition continues to involve the definition of both product and geographic markets on the basis of demand-side and, to a certain degree, supply-side substitutability. This paradigm has not changed (see §§15 and 23), but the Notice addresses certain adjustments or clarifications regarding the specific methodology to define relevant markets, including the points below.

The use and purpose of the SSNIP test in defining relevant markets

In the 1997 Notice, price appeared as the key parameter of competition for the EC to consider in determining the scope of the relevant market, although it already implied that price was not the only relevant parameter of competition.

On that basis, the 1997 Notice explained that one way of deciding whether products are part of one single relevant product market (or a specific area constitutes a relevant geographic market) is to “determine whether the parties’ customers would switch to readily available substitutes or suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered” (§17). This test is commonly known as the SSNIP test for “small, significant, non-transitory increase in price.”

The Notice extends the list of parameters of competition the EC considers in determining the scope of the relevant product (and geographic) market(s). It refers not only to price but also to a product’s “degree of innovation and its quality in various aspects – such as its sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate the product with other products, 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” (§15).

The Notice adds that “when undertakings compete on parameters other than price, such as quality or the level of innovation, the application of the SSNIP test is difficult, in particular in the context of zero monetary price products and highly innovative industries” (§30). Stakeholders specifically requested this acknowledgement in the context of the evaluation process, along with additional clarifications which, however, remain limited. The Notice indeed mainly clarifies the following:

- The “small but significant non-transitory decrease of quality” (SSNDQ) test is a relevant alternative in the context of zero monetary price services or products (i.e., if the service or product is accessible for free, or if users pay with their own data) but “defining a precise quantitative standard of degradation of quality of the target product cannot constitute a pre-requisite for the application of the SSNDQ test [...]. All that matters is that the quality degradation remains small, albeit significant and non-transitory.” (footnote 54, referring to the *Google and Alphabet* GC judgment).
- There is, however, “no obligation for the Commission to apply the SSNIP test empirically, and other types of evidence are equally valid to inform market definition” (§31, and footnote 56, referring to the *HeidelbergCement and Schwenk Zement* GC judgment) including, in relation to zero monetary price services or products offered on multi-sided platforms, “product functionalities, intended use, evidence of past or hypothetical substitution, barriers or costs of switching, such as interoperability with other products, data portability and licensing features.” (§98)
- The SSNIP test may not apply in an abuse-of-dominance context (§30).

The Notice does not specifically address the difficulties in applying the SSNIP test in bidding markets, or discuss the small but significant non-transitory increase-in-cost test, although stakeholders raised these issues during the evaluation process.

The relevance and weight of supply-side substitution in defining relevant markets

The evaluation had revealed that some stakeholders suggested that supply-side substitutability be excluded from market definition and taken into account at the competitive assessment stage. Others, particularly from the digital sector, suggested that supply-side substitutability be considered for market definition purposes to the same extent as demand-side substitution.

In the Notice, the EC confirms its previous approach that “supply substitution can also be relevant for the definition of the relevant market in some cases, namely when it is as immediate and effective as demand substitution and when it leads to similar competitive conditions across the products concerned” (§23). The Notice emphasizes that in the EC’s experience, supply substitution is only relevant for market definition in specific cases (§23) and provides two examples of such situations:

1. The first situation is when “suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products” (§32). The “necessary” conditions for the market to be broadened on that basis are that “most, if not all, suppliers are able to switch production between products in the range of related products, that suppliers incur only insignificant additional sunk costs or risk when they switch production; that suppliers have the incentive to and would do so when relative prices or demand conditions change, and that they can offer all products in the range effectively in the short term” (§33).
2. The second example is that of bespoke products, which can be included in the same relevant product market “when the same suppliers can and generally do respond with offers that meet the specifications of different customers” (§35).

The EC reiterates that, outside of these situations, supply-side substitution is taken into account only at the competitive assessment stage (§36).

Geographic Market Considerations

The evaluation results had shown that overall, the 1997 Notice adequately described the assessment of geographic markets in the context of globalization, including in markets in which imports pose increased competitive pressure. In that context, the EC kept its changes in the Notice to the bare minimum:

- more explicitly stating that “geographic markets can range from local to global, depending on the facts of the case” (§38);
- incorporating examples from its decisional practice of global markets having been defined, including the controversial *Siemens/Alstom* case, in which the relevant geographic market was considered to be global but excluding China, South Korea, and Japan (footnote 94), which was a pivotal element in the decision to prohibit the transaction; and
- outlining explicitly the concept of competitive pressure from imports (§§42-44), specifying that “the mere existence of imports or the possibility of switching to imports in a given geographic area does not necessarily lead to a widening of the geographic market to include the area from which the goods were or could be exported” (§42); the test remains whether the customers face “sufficiently homogeneous conditions of competition” — if this test is not met, imports will still be taken into account at the stage of the competitive assessment (§43; see also [below](#) and §119).

Market Definition in Specific Circumstances

The Notice dedicates single sections to market definition in specific circumstances, namely in the presence of (i) significant differentiation, (ii) discrimination between customers or customer groups, (iii) significant R&D, (iv) multi-sided platforms; and (v) after-markets, bundles, and (digital) ecosystems. These sections, which are new in the Notice but in line with the EC’s recent decisional practice, are summarized below:

MARKET CHARACTERISTICS	POSSIBLE MARKET DEFINITION OPTIONS & RELATED PROPOSALS
Differentiated products (§§85-87)	<ul style="list-style-type: none"> • Separate markets within a continuum of products, or • Relatively broad relevant market that includes differentiated products — including products at the extreme of chains of substitution
Discrimination between customers or customer groups (§§88-89)	<ul style="list-style-type: none"> • Can lead to a distinct group of customers constituting a distinct product market if three conditions are met: <ul style="list-style-type: none"> – It is clear which group a customer belongs to – Trade between customers or arbitrage is unlikely – The discrimination between customers or customer groups is of a non-transitory nature
Significant R&D (§§90-93)	<ul style="list-style-type: none"> • Pipeline products, depending on intended use and projected substitutability: <ul style="list-style-type: none"> – Part of an existing product market – New market limited to the pipeline products and substitutes • Due to the underlying R&D effort and its geographic scope, the geographic dimension of a market containing pipeline products can be broader than the geographic market of commercialized products • R&D processes related to earlier stages of research: <ul style="list-style-type: none"> – Identify “the boundaries within which undertakings compete in these early stages” (so-called “innovation spaces”) – Decisive factors include: nature and scope of the innovation efforts; the objectives of the different lines of research; the specialization of the different teams involved; and the results of the undertaking’s past innovation efforts – Regard to the R&D’s geographic areas and specificities to define the boundaries
Multi-sided platforms (§§94-98)	<ul style="list-style-type: none"> • Products offered by a platform as a whole, encompassing all or multiple user groups • Separate markets for the products offered on each side of the platform: <ul style="list-style-type: none"> – Decisive factors include: different undertakings offering substitutable products to different user groups; degree of product differentiation on each side (or each user group’s perception thereof); homing decisions; and nature of a platform (i.e., transaction or matching) • Indirect network effects are considered either at the market definition stage or in the competitive assessment • SSNIP test may be challenging such that the EC will need to rely on other elements for the assessment of substitution (see above)
(Digital) Ecosystems (§§99-103)	<ul style="list-style-type: none"> • A market comprising both primary and secondary digital products or a bundle market; an approach which is more appropriate: <ul style="list-style-type: none"> – the more likely it is that customers take the whole-life costs into account when purchasing the primary product; – the higher the expenditure on (or the value of) the secondary product(s) compared to the expenditure on (or the value of) the primary product; – the higher the degree of substitutability between primary products and the lower the switching costs between primary products; and – when there are no or few suppliers specialized only in the secondary product(s) (§101). • Multiple markets (primary digital product versus secondary product further split into separate markets) • Dual markets (primary versus secondary digital product)

The Forward-Looking Application of Market Definition

The Notice includes as a general principle of market definition that the EC “may take into account expected transitions in the structure of a market when the case calls for a forward-looking assessment” (§21). Only such transitions are relevant that relate to the market structure and affect the general dynamics of demand and supply in a market. Changes affecting individual undertakings or customers offering or demanding products do not suffice. For the EC to take the expected transitions into account, there must be “reliable evidence that there is sufficient likelihood that the projected structural changes will take place.” The EC clarifies that “such evidence needs to go beyond mere assumptions that observed trends will continue or that certain undertakings will change their behaviour.” (§21)

The Calculation and Significance of Market Shares

The relevant metrics

The Notice acknowledges that “depending on the specific products or on the specific industry in question, other metrics [than sales and purchases] can provide complementary or more useful information to determine market shares” (§108).

Catering to comments from stakeholders during the evaluation including in the digital space, the Notice specifies in §108 that these metrics may include the following:

MARKET CHARACTERISTICS	POTENTIALLY RELEVANT METRICS
Bidding or innovative markets	<ul style="list-style-type: none"> the number of suppliers the number of contracts awarded
Digital markets (including when services are provided in multi-sided platforms, at a zero monetary price)	<ul style="list-style-type: none"> usage metrics such as (active) users the number of website visits or streams time spent or audience numbers the number of downloads and updates the number of interactions or volume or value of transactions concluded over a platform
Frequent and significant investments in R&D	<ul style="list-style-type: none"> the level of R&D expenditure the number of patents or patent citations

The Notice also specifically addresses potential relevant alternative metrics for transport markets, the mining sector, markets characterized by the strategic importance of capacity, and markets with a high level of product differentiation. “Metrics used internally by market participants in their general course of business generally prove particularly relevant.” (§108)

If markets are defined around customer locations, “all sales to customers in the relevant geographic market are included in the calculation of market shares.” This includes imports and excludes exports. If markets are defined around supplier locations, the opposite holds true: “All sales by suppliers located in the relevant market are included in the calculation of market shares, regardless of customer

location. Sales by suppliers located outside the relevant geographic market are excluded from the calculation of market shares in that case.” (§109)

The relevant period

The evaluation results had shown that the 1997 Notice did not properly discuss the period to be applied when calculating market shares, in particular in the case of bidding markets. The Notice merely confirms that the EC generally relies on shares per year over three years or, for antitrust enforcement, the period corresponds to the duration of the investigated conduct. The reference period over which the market shares are computed may depend on the specific market, including in relation to bidding markets. It does not specifically address the question of rapidly evolving markets from that perspective, but the continuum between R&D processes, for example, can lead to separate markets being defined at the outset. Market shares may be estimated for the future for markets undergoing structural transitions (e.g., regulatory or technological changes) or markets in which a forward-looking assessment may be appropriate (§113; see also [above](#) and §21).

The Evidence Used for Market Definition

Based on the evaluation results, the EC dedicated separate sections in the Notice to (i) the general methodology for defining markets (Sections 2.1 and 2.2), (ii) the evidence to define markets (Sections 3.2 and 3.3), and (iii) the process of gathering and evaluating evidence (Section 3.4).

The key guiding principles in the Notice include the following, yet again providing the EC significant flexibility this time in collecting and using evidence, supported by the General Court’s case law:

1. The EC may rely on various categories and sources of evidence to define markets and the only test in evaluating evidence is whether it is “reliable” (§§21, 77). To this end, internal documents of market participants produced in the ordinary course of business or independent industry reports, including robust projections, may be particularly relevant for conducting a forward-looking assessment (§§77, 80).
2. The EC “does not need to obtain evidence on and assess all factors mentioned” (§46). Certain types of evidence “may be decisive in one case but of limited or no importance in other cases” (§76) and “in view of the need for speed and the very tight deadlines to which the EC is subject, it cannot be required to verify all the information it receives” (footnote 105).
3. The EC “does not apply a rigid hierarchy of different sources of information or types of evidence” (§76).

In addition, the Notice addresses in detail the probative value of certain types of quantitative techniques (footnotes 70, 90), trade flows (§75), internal documents (§§77, 80), etc.

Conclusion

The Notice is welcome as updated information on the EC’s methodology and tools to deal with market definition and substantive assessment, notably in certain specific circumstances, but also more generally as systematic and useful compilation of case practice in the last 27 years. The detailed references and citations to cases are very helpful for users to provide context. Companies should not expect, however, to find guidance that is sufficiently precise and unequivocal to reliably define markets in borderline cases.

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