

Review of the Market Definition Notice

A draft paper prepared by the European Competition Lawyers Forum¹

Introduction

1. The European Commission is currently conducting a review of its Market Definition Notice (the ‘Notice’)² to determine whether it is still fit for purpose. In this context, the Commission has asked a number of organisations, including the ECLF, to identify issues, which it considers could be improved in a revised Notice.

2. The ECLF considers that the current Notice could be improved by taking the following identified issues into account when reviewing its Notice:
 - a. Supply-side substitution;
 - b. Potential competition;
 - c. Geographic market;
 - d. Online and off-line markets;
 - e. Multi-sided markets;
 - f. Non-price markets;
 - g. Indirect pricing constraints;
 - h. Interaction between trade flows and market definition;
 - i. A coherent and consistent approach to market definition.

¹ The European Competition Lawyers Forum (“ECLF”) is a group of the leading practitioners in competition law from law firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or of their law firms. The views set out in this draft working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1. The paper was submitted to the European Commission on 13 May 2020. Please do not quote from this paper without consent from the chair.

² Commission Notice on the definition of relevant market for the purposes of Community competition law OJ C 372, 9.12.1997 P. 5–13.

Turning to each of these topics separately:

Supply-side substitution

3. The ECLF would welcome clarity on when supply-side substitutability is to be taken into account in the market definition. The current Notice provides that supply-side substitutability is to be taken into account in the market definition when suppliers are able to switch production “in the short term” and “without incurring significant additional costs or risks”. However, there is little guidance on when these conditions would in the Commission’s view be met. A clarification on this issue would help reduce confusion as to whether or not supply-side substitutability would be factored in the market definition in a given case,³ it would allow parties to make more focused submissions and also increase legal certainty for businesses.
4. A clear statement that supply-side substitutability is first and foremost a question directed at market definition would be helpful. It is not directed at the substantive assessment, contrary to what a number of commentators have pointed out. Otherwise the starting point of any assessment would – in many industries – be atomised markets with often high concentrations that do not necessarily reflect market power.
5. The possibilities of supply-side substitution should be accorded more prominence in the case of digital markets, especially given the existence of common standards in digital-based industries to ensure connectivity and the sourcing of inputs suppliers, each of which is eager to provide those inputs in accordance with common standards. The present discussion on supply-side substitution approaches the possibility of supply-side substitution far too narrowly.⁴ The current Notice was formulated in 1997 when the relative ease of supply across product ranges was not well understood. The policy *quid pro*

³ See for example Case C-179/16 *F. Hoffmann-La Roche Ltd and others v Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2018:25, paragraph 61.

⁴ Paragraphs 20-23 of the Notice.

quo to ensure that the concept is not interpreted too widely lies in the revamping of the discussion on barriers to switching.⁵

6. Since the adoption of the Notice, the concept of an “innovation market” has developed in the Commission’s administrative practice both under its merger control powers and its powers under Articles 101-102 TFEU. It is important that the Commission provide guidance on the practical application of that concept, especially given its broader industrial policy significance in key sectors driven by technological development.
7. The ECLF suggests that the discussion of the innovation market concept takes place in conjunction with revisions to the existing discussions on supply-side demand and potential competition,⁶ as elements of both these doctrines have an influence on the practical application of the innovation markets doctrine. In addition, the Commission should inject greater clarity as regards the temporal differences between a supply-side analysis and potential competition.

Potential competition

8. The ECLF would encourage the Commission to clarify what constitutes a potential competitor or competition in the context of market definition. For instance, the Court of Justice held in a recent Preliminary Ruling from the UK: “*real and concrete possibilities for that undertaking to enter that market and compete with the undertakings established in that market*”.⁷ However, the Commission has also accepted in its administrative practice that the mere possibility for certain companies to be able to enter a market may exert a competitive constraint.
9. The Notice should reflect the new world of digital markets by setting forth criteria to take into consideration issues such as digital potential competition.

⁵ Paragraph 42 of the Notice.

⁶ Paragraphs 20-24 of the Notice.

⁷ C-307/18 *Generics (UK) Ltd and others v. the CMA* ECLI:EU:C:2020:52, paragraphs 36 to 38.

Potential competition plays an increasingly important role in providing a material constraint on competitors. Sometimes a digital platform can often easily enter an emerging or nascent market where there are only few constraints (mainly Internet infrastructure, regulatory impediments) compared to a company in a traditional industry that requires significant investment (the establishment of a manufacturing facility or product line). This can also be true for traditional companies. The latter can start selling their products in neighbouring markets with relative ease via the Internet and no longer require a “brick and mortar” shop. On other occasions there might be significant barriers to entry in certain digital markets, which may result from the dynamics derived from neighbouring markets.⁸

10. While potential competition will typically be considered in the substantive analysis of a case, the Commission should clarify when and how potential competition can also be factored in the market definition part of the analysis.

Geographic market

11. With the globalisation of the market and the evolution/harmonisation of the single market, the current rather restrictive approach to defining a geographic market should be reconsidered and likely be extended. For instance, such extension could lead to the inclusion of a wider number of market players that directly compete with e.g. the merging parties or the investigated companies. Notably, the Commission should clarify how to take into account supply-side substitution, shipment patterns or imports. Transport costs, barriers to entry and trade barriers are much lower than comparable barriers in 1997 and are essentially non-existent in relation to services that can be provided online.
12. Somewhat similarly to what the Commission has done in the product market definition (innovation theory), the Commission should consider a more forward-looking and digital-friendly approach when defining geographic

⁸ CMA’s Market study interim report on Online platforms and digital advertising
https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf.

markets. To this end, it should widen its view of the market by taking into account online sales from (neighbouring) countries that can ship products (or provide a service) to the geographic area under investigation. In doing so, it should take into account countries/regions where competing products are already being sold or where competing products that are in their late development phase and/or close to hitting the marketplace.

13. Nowadays, a consumer no longer needs to physically move from one market to another in order to purchase a product. In this context, the revised Notice should clarify, when defining a relevant geographic market how one should take into account: (i) online sales; (ii) online platforms; (iii) products in its final phase of development; (iv) substitutable products sold in neighbouring markets; (v) neighbouring markets, especially when the country is not necessarily physically contiguous. This should enable the Commission to better adapt its market definition to the specificities of a market.

Online and off-line markets

14. Despite the substitutability of online and offline services having become increasingly relevant over the past 20 years in the process of market definition, the Commission has been reluctant – in its case practice – to conclude that online sales and offline sales generate sufficient constraints on one another to fall within the same product market.⁹
15. The Covid-19 pandemic, by generating a surge in demand for online shopping, will arguably generate sufficient data under a ‘natural experiment’ or evidence of a ‘market shock’ (as understood under paragraph 38 of the Notice) so that the Commission is now in a position to establish best practices to determine the extent to which online and offline services exert competitive pressure on one another do as to fall within the same relevant product market.

⁹ Paragraphs 13-14 of the Notice.

16. We will probably now be in a position to be able at least to assess one-way substitutability from offline to online (a market power assessment), while we would probably need a longer timeframe to determine whether that substitution applies both ways (in the traditional sense required under a market definition analysis).

Multi-sided markets

17. Arguably the biggest shift that has occurred over the past 23 years since the adoption of the current Notice is the notion that many markets may be double-sided or multi-sided, depending on the transactions involved. The multi-sided nature of certain markets has grown with time exponentially as the ease of doing business by means of digital transmissions has tended to bring many more markets together that were previously considered to be vertical silos.

18. The review of the Notice should therefore provide some guidance on the identification of such multi-sided markets, especially given that their competitive parameters may be different for each “side” of the market, and to determine the conditions under which each side of the overall market might constitute a market in its own right. To this end, Commission guidance should expand upon how different markets can be identified in a multi-sided environment depending on whether the theory of harm is being developed under the auspices of Article 101 TFEU, Article 102 TFEU or under merger control practice. This would require an elaboration of the existing text in paragraph 12 of the Notice.

Non-price markets

19. The text of the Notice, having been drafted at a time when many digital services offered over digital platforms were largely unexplored, focuses on the relevance of price as the key determinant in the market definition process, to

the virtual exclusion of important non-price factors such as privacy, sustainability, availability and delivery times to mention some.

20. While non-price elements are arguably not easily susceptible to a scientific model comparable to the application of the SSNIP test when measuring substitutability, some accommodation needs to be made of non-price elements in order to capture many of the transactions that are provided “free of charge” over the Internet in exchange for intangible value measured in terms of customer contacts, private data protection, anticipated follow-on advertising revenues, and so forth. As we now also have European Court practice, which provides at least some guidance on this issue, it is appropriate at this time to explore what this might mean in digital markets.

Indirect pricing constraints

21. Indirect pricing constraints are capable of being identified in the context of products or services, which are related or complementary to other services or which are provided in geographic regions, which are contiguous with other regions. The existence of these types of indirect constraints may be particularly relevant in markets that are characterised by existing sector-specific regulation, whereby certain pricing patterns have been influenced or steered by regulatory pressures.
22. These types of constraints should be folded into any analysis of potential competition.¹⁰ Given that this type of analysis is also relevant in the context of any assessment of conglomerate effects, which is likely to become increasingly relevant in the context of digital platforms, the scope of that concept should be explored in this context.

¹⁰ Paragraph 24 of the Notice.

Interaction between trade flows and market definition

23. With global economic markets being put under pressure as a result of the disruption of trade flows because of the Covid-19 epidemic, the increased use of protectionist tools as instruments of trade policy (including the vetting of mergers in strategic sectors by foreign companies), and certain markets being closed to foreign firms in practical terms, the definition of relevant geographic markets arguably assumes much greater significance than ever before.¹¹
24. It is arguably now the time to spend greater effort in understanding the interplay between regulatory barriers to entry and including them into a broader analysis of costs of doing business, determining whether those costs can be offset by other factors such as the need for firms to have market presence in many regions of the world, the commonality of competition which they might face, and the overarching economic conditions faced by competitors in terms of financing, access to distribution outlets and the need to achieve minimum cost efficient scale in production.
25. As such, guidance could be provided as to why otherwise small Member States such as Estonia or Luxembourg might fall within a wider geographic market (especially where parallel trade is unimpeded) and why, by contrast, infrastructure-based access markets are capable of being considered as being sub-national in scope (as is increasingly occurring in relation to broadband wholesale access markets in the electronic communications sector). In this regard also, consideration should be given to expanding the geographic reach of markets beyond the physical territory of the EEA where the EU is pursuing sustainability and environmental goals as part of its international Treaty obligations, which require participation in the fulfilment of those goals by a broad cross-section of firms internationally.
26. Similarly, after decades of liberalisation and harmonisation measures in certain industries such as electronic communications and energy, it is arguably

¹¹ Paragraphs 8-9 and 28-31 of the Notice.

time to revisit the brief discussion in paragraph 32 of the Notice to better understand the impact of the market integration goal on the process of market definition.

A coherent and consistent approach to market definition

27. Whilst the Commission is not legally bound by its own administrative precedents, it would be helpful to be as consistent and coherent as possible including when it comes to market definition to ensure predictability and legal certainty for the parties. This should in particular be the case where the Commission takes decisions in the same industry sector / product area within a relatively short period of time. The ECLF does, however, recognise that this will, for instance, be more challenging for pipeline products for which there are more uncertainty than for on-market products.
28. A movement has been developing in certain economic circles over the past five years, especially in relation to fast-moving and innovative markets whose boundaries might shift quickly, to dispense with the traditional threshold phase of market definition by relying instead on a market power analysis and working backwards to determine the scope of the relevant product and geographic markets by reference to how the theories of harm generated by market power might be supported by the market definition adopted (see, most recently, the Cremer Report).
29. While this type of approach will be attractive to competition authorities because it saves them time in progressing competition law investigations in fast-moving industries, it should not lead to the elimination of the need to establish relevant markets. Consistent European Court practice would not permit such a dramatic shift in enforcement policy. Having said that, it is not inconceivable that a market might be capable of being configured around the particular abusive behaviour that supports a particular theory of harm (for example, the Notice cites the example of a motor vehicle part being used to supply OEMs, on the one hand, and spare parts providers, on the other).

30. Finally, there are a number of alternative economic pricing tests that enable regulators to arrive at robust conclusions more quickly; one such test is the GUPPI.¹² The point is not to dispense with market definition altogether, but this test does present a possible complementary analysis. It is used in the US.¹³ The ECLF recommends that the Commission consider using this test in addition to, or in lieu of, a full market definition and gives some guidance as to how they intend to it.

Annex 1: Members of the ECLF working group on market definition;

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¹² The gross upward pricing pressure index.

¹³ U.S. Horizontal Merger Guidelines (2010).