

Evaluation of the Market Definition Notice
Meeting with J.-U. Franck and M. Peitz on 21.03.2021
- Minutes-

The authors presented their latest paper¹ to the DG COMP team dealing with the evaluation of the Market Definition Notice. The presentation followed the slides attached to these notes.

Introduction

In Cremer et al. (2019) “In the case of platforms, the interdependence of the markets becomes a crucial part of the analysis whereas the role of market definition traditionally has been to isolate problems. Therefore, [...] less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies.”

The premise is entirely correct, but the conclusion has to be put into perspective. Market definition when it comes to two-sided platforms is more complex, more error-prone, and less formative. In particular, when you define the market, you can derive market shares, which are less informative in terms of market power. That being said, market definition is useful as a filter to suspect competition problems. They indicated that it is because market definition is more complex and error-prone in the case of digital platforms, that the Commission should pay more attention to it. It is still a mandatory element in a considerable amount of competition cases.

The Commission should also take into consideration the fact that the Notice does not only give more clear guidance for market participants, but it is helpful for the NCAs and national courts when applying both EU competition law and national competition laws. The practice of the Commission is generally followed by the NCAs. Therefore, the more explicit the Commission is about the key challenges and how to cope with them, the more helpful would be to the remaining stakeholders and agencies.

Purpose of market definition

One of the key findings in the Franck and Peitz (2019) is that in the case of a two-sided platform, separate markets for each side of the platform should be defined. The single market approach is meaningless in many cases. In those cases where it is meaningful, it is prone to lead to wrong conclusions. When a product or service is not well defined, because it is driven by the joint demand on both sides and how the demand looks like depends very much on the substitutability on the two sides and the network effects. The multi markets approach separates these things and considers both substitutability on each market and the degree of connectedness.

¹ Franck, Jens-Uwe and Peitz, Martin, Market Definition in the Platform Economy (March 01, 2021). CRC TR 224 Discussion Paper Series 2021, Available at SSRN: <https://ssrn.com/abstract=3773774> or <http://dx.doi.org/10.2139/ssrn.3773774>

Zero-price markets

From a competition perspective, zero-price markets are not an issue. In the *Google Shopping* case, the Commission defined a market for general search, for example.

This kind of market should be straightforwardly recognised. As long as a product is offered as part of a strategy to generate revenue, that should be sufficient to define a market. Consumers' data can be exploitative because it can be valuable for the firm in another context. Providing data is an economic activity and there is clearly a market that is involved. Purely philanthropic activities such as Wikipedia cannot be defined as markets in the sense of competition law. Nevertheless, Google Scholar although also being a philanthropic activity, it is owned by an enterprise, which has other goals involved and may use that data for other means. Therefore, even purely philanthropic services could be part of a broader strategy to create revenue.

The authors suggested that it would have been helpful if the Commission had clarified explicitly that zero-price markets can also be subject to competition scrutiny in the 1990s. Clarification is needed also because Member States tend to follow the Commission's approach not only when applying EU competition law but often also when applying domestic law.

Homing decisions

The authors indicated that we can differentiate between single homing (users make discrete choices between platforms' offerings) and multi-homing (users consume multiple offerings). Franck and Peitz (2021) discusses how the distinction should be implemented. Each platform of several competing platforms may provide monopoly or exclusive access to a particular set of consumers. This implies the definition of multiple relevant markets, one for each platform. The Commission did this in the *Google Android* case.

According to the authors, the level of switching costs in the single-homing side would matter in order to assess market power of a given platform but it is not a key to the market definition of a platform as a separate market. Even as a monopolist, a certain firm has to face some constraints that may be very severe. In addition, one should be cautious to assume that switching costs are low. If consumers did not switch or could not switch easily and cheaply, one should think twice if there is something to hinder them to switch.

Amazon Prime is one of the examples of becoming a preferred access point for consumers. Amazon Prime has monopoly power over the number of users on the seller side who see this technique as their preferred way of making transactions. For this reason, the only way for those sellers to get access to the users is by being listed on Amazon.

Granularity of markets

One should not easily assume there is only one market on each side of the platform. There can be product differentiation that might justify, for instance, different local markets.

The issue of bundling is essential in this discussion. There is a risk of not taking substitutes sufficiently into account. There is a possibility to have unbundled services, which provide competitive constraints. It is important to understand what are the possible offers, and if there is a feasible way of providing them in unbundled form.

Depending on the users' behaviour, associate markets may be closely interrelated. Markets that look geographically unrelated, might be interrelated. To give an example, if people go to a holiday in the Mediterranean area and use the same platform to hire a car, that means the geographic markets for hiring cars in Cyprus or Spain are interrelated precisely because of the users' behaviour.

SSNIP test

Competition authorities have referred to the SSNIP test and it has been helpful. However, according to the author, considering feedback effects at the market definition level might lead to a wrong market definition.

Other comments

The authors are clear advocates of the multi-markets approach. Therefore, it was inquired how the question of out-of-market efficiencies should be approached. According to the authors, the market definition should not decide about what kind of efficiency effects or what group of consumers should be considered. Effects-analysis should not be limited to the market definition.

In its Guidelines on Article 101(3) TFEU, the Commission explains that an “assessment [...] of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates”. However, the Commission also acknowledges, “where two markets are related, efficiencies on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same”. Therefore, applying Article 101(3) TFEU to two-sided platforms should be considered the exception. Moreover, the authors maintain that the Guidelines on the assessment of horizontal mergers, according to which “efficiencies ... should *in principle*, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur”² should also be understood as leaving the door open to consider cross-market efficiency gains in exceptional cases as, in particular, in the case of two-sided platforms. Hence, the authors suggested considering efficiency effects beyond a defined market in the context of two-sided platforms.

² OJ 2004 C 31/5, para. 79 (emphasis added).



MARKET DEFINITION IN THE PLATFORM ECONOMY

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INTRODUCTION

INTRODUCTION

- Platforms and, in particular, digital platforms subjects of a number of high-profile investigations by the European Commission and national competition authorities
- Are we (authorities, practitioners,...) well-equipped to deal with such cases?
- Proper market definition in such cases?

PLATFORMS AS AN ANALYTIC AND LEGAL CONCEPT

- Intermediary operates a platform if it manages interaction among its users (involving network effects)
- Intermediary operates a two-sided platforms if it has more than one user group and these groups are linked through cross-group network effects

IMPORTANCE OF MARKET DEFINITION

- “In the case of platforms, the interdependence of the markets becomes a crucial part of the analysis whereas the role of market definition traditionally has been to isolate problems. Therefore, [...] **less emphasis should be put on the market definition** part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies.” (Crémer, de Montjoye and Schweitzer, 2019, p. 46)
- Agree with the premise
- But: Conclusion has to be put into perspective

PURPOSE OF MARKET DEFINITION

- Legally required, in particular, for
 - merger control
 - abuse cases
- “identify and define the boundaries of competition between firms” (OJ 1997 C 372/5, para. 2)
- “identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure” (OJ 1997 C 372/5, para. 2)

MARKET DEFINITION WHEN DEALING WITH PLATFORMS

MULTI-MARKETS APPROACH

- A two-sided platforms makes service proposals to each side on which it operates
- Single-market approach: one market for an intermediation service
 - single market of what?
 - “derived demand“ for a fictional intermediation service
 - appropriate only under specific circumstances
- Multi-markets approach: A market to be defined for each side
- Compared to single-market approach
 - more flexible
 - less error prone
 - captures different substitution possibilities on the two sides
- Cross-group network effects and homing decisions to be accounted for
- Market Definition Notice should be amended accordingly

“ZERO PRICE” MARKETS

- “Markets” for products offered free of charge, i.e. without monetary consideration by those who receive the product
- Free side of the platform may not even pay indirectly (opportunity cost of attention or provision of data)
 - legal concept of “remuneration” not useful
- Sufficient to demonstrate that the platform’s activity is part of a broad or long-term strategy to generate revenue
- Market Definition Notice should be amended accordingly

HOMING DECISIONS

- Single-homing (users make discrete choices between platforms’ offerings) vs. multi-homing (users consume multiple offerings)
- Multi-homing/single-homing framework (competitive bottleneck): (each) platform provides monopoly access to its set of users on the single-homing side
- Consequently, one market for each platform in regard to the service provided to the multi-homing side can be defined
- Alternatively, definition of one market including various platforms, but considering the framework when discussing theories of harm

GRANULARITY OF MARKETS

- Different categories of services
 - Virtually bundled and unbundled services may co-exist
 - Example: search and booking
- Different regional markets; different service categories
- Different subpopulations of users that are separately targeted or priced
- Depending on user behaviour, the associated markets may be closely interrelated

SSNIP TEST

- Useful instrument for competition practice if applied as a thought experiment
- Instead of varying price, other variables may have to be varied (SSNDQ)
- Quantification often challenging
- Conceptual clarity regarding demand-side substitutability maintained

CONCLUSION

CONCLUSIONS

- Market definition in the platform economy complex – authorities need to invest substantial resources into the investigation
 - an individual market typically cannot be considered in isolation
- No new paradigm for market delineation: consider economic transaction between the platform and its users
 - Multi-markets approach (interdependent multiple markets)
 - Zero-price markets
 - Homing Decisions
 - Granularity
 - SSNIP test