

EBU'S COMMENTS ON THE EUROPEAN COMMISSION'S DRAFT REVISED MARKET DEFINITION NOTICE (13/01/23)

ABOUT THE EBU

The European Broadcasting Union is the world's leading alliance of public service media (PSM). The EBU has 115 member organizations in 56 countries who operate nearly 2,000 television, radio and online channels and services and reach an audience of more than one billion people in 160 languages. PSM organizations are entrusted with the performance of a service of general economic interest, which consists, inter alia, of the provision of high-quality content that fulfils the cultural and democratic needs of the society they serve.

The EBU and its Members welcome the opportunity to provide comments on the revised draft European Commission Market Definition Notice (the Draft Notice). The following paper brings to the Commission's attention certain issues that are *common* to EBU Members.

We welcome the fact that the Market Definition Notice has been renewed and updated with a framework to define and assess markets which have emerged over the past 20 years (e.g. markets with non-monetary transactions and bundled services in digital ecosystems which may constitute a relevant market of their own). The Draft Notice also provides comprehensive guidance on the relevant evidence for the purpose of defining markets and rightly stresses the importance of the Notice in the state aid field. We identified certain areas where the revised draft could yet be further improved. This implies in particular to:

- emphasize the **prime importance of end-users usage patterns and attitudes to define relevant markets** to adequately reflect what the consumer regards as interchangeable or substitutable; and
- address the **challenges linked to the practical enforcement of this Notice**, notably the need to factor in technological developments in a systematic manner;

1. Methodology of the Market Definition Notice: evidence relating to demand-side substitutability should be the main parameter

- ***Demand substitutability shall always prevail to ensure that competition assessments adequately reflect what the consumer regards as interchangeable or substitutable***

The European Commission (the Commission) carries out its competition assessments taking into account all competitive constraints. That said, the purpose of EU competition rules is in first instance to protect competition to the benefit of customers and ultimately of EU consumers.¹ Market definition, a tool that structures and facilitates competitive assessment is therefore closely tied to such objective. To this end, the Commission staff working document evaluating the Notice² acknowledges that "*market definition is primarily customer-centric by assessing which alternative products or services are available to the customer to satisfy the same need*" (emphasis added). Supply side substitution only ought to be taken into account where "*its effects are equivalent to demand substitution in terms of immediacy and*

¹ C-27/76, *United Brands v Commission* (1978), EU:C:1978:22. See also Case 413/06 P, *Tetra Laval International SA v Commission* (2007), Opinion Advocate General Kokott.

² Commission staff working document evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD(2021) 199 final, 12.7.2021, p.7.

effectiveness".³ The Draft Notice itself reckons that "[d]emand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product".⁴

Unfortunately, the Commission often relies on the replies of the undertakings under scrutiny (or those of their competitors) to determine demand-side substitutability or makes assumptions about how the user may behave as a result of price increases or quality degradation. Recent cases demonstrated that such replies and/or assumptions are not always accurate.⁵ For instance, in *Facebook/WhatsApp*, the Commission dismissed the concern that the concentration would strengthen Facebook's position in the provision of online advertising services as a result of the increased amount of data which would come under Facebook's control relying on the ability of users to switch to less intrusive apps.⁶ Yet, a decision adopted by the Italian Competition authority (AGCM) concerning the changes introduced by WhatsApp in its privacy policy following acquisition by Facebook demonstrated on the contrary that users do not necessarily react to practices that would lower the level of data protection afforded to them.⁷ More recently, the German Competition Authority (Bundeskartellamt) concerning the practice of Meta to combine user data from different sources or services, heavily relied on independent customer surveys to define a market for private social network limited to Germany.⁸

The current Draft Notice continues to refer to past substitution data collected by undertakings (see e.g. at para. 52) and fails to acknowledge that other methods such as consumer surveys and market experiments⁹, constitute the most reliable source to assess how the consumer behaves in the affected markets.¹⁰ We invite the Commission to emphasize in the revised Notice that such methods should constitute a primary source of evidence when conducting competition assessments, at least when it comes to digital markets.

- ***End-users perspective shall not be confined to forward looking assessments and/or structural market transitions***

Market definition essentially looks at 'all those products and/or services which are regarded as interchangeable or 'substitutable by the consumer'.¹¹ This commands the reference to reliable data, facts and evidence. The Notice provides a clear framework in this respect, laying

³ Commission staff working document evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD(2021) 199 final, 12.7.2021, fn 17. This is also settled case law (see eg. *United Brands*, para. 42).

⁴ Draft Notice, para 25.

⁵ See the *Newscorp/BSkyB* and *Facebook/WhatsApp* examples referred to in our previous submission.

⁶ Commission decision *Facebook/WhatsApp Case No COMP/M.7217* [2014] OJ C 417/2, para. 184.

⁷ More particularly, AGCM found that WhatsApp forced users to accept in full the new Terms of Use, and specifically the provision to share their personal data with Facebook, by inducing them to believe that without ranting their consent to data sharing they could no longer use the service. See AGCM (2017). Testo Provvedimento PS10601. Retrieved from: <https://www.agcm.it/media/comunicati-stampa/2017/5/alias-8754>

⁸ Bundeskartellamt, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing 2019, B6-22/16 - Retrieved from: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=8.

⁹ This involves conducting controlled experiments in real-world markets in order to better understand how consumers behave. This can be a useful way to assess the impact of a particular business practice on consumer behavior.

¹⁰ Customer surveys on usage patterns and attitudes, data on customer purchasing patterns, the views expressed by suppliers and market research studies are only mentioned as a secondary category of evidence (see para. 79).

¹¹ See Commission notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/3, para. 7.

out different categories of evidence depending on the type of assessment conducted (see section 3.2).

That said, the Draft Notice considers that in case of hypothetical substitution (i.e., how customers are likely to react to hypothetical changes in relative supply conditions), such evidence are “*less reliable than evidence on actual substitution, because hypothetical demand substitution has no actual consequences for customers*”. While it is true that hypothetical substitution has no actual consequences for customers, it can still provide useful information about how customers and firms perceive the substitutability of different products and services, and how they are likely to behave in different market scenarios. This can be particularly useful in cases where actual substitution data is limited or unavailable, or where the market is changing rapidly and past substitution data may not be representative of current or future market conditions.

Additionally, it is worth noting that hypothetical substitution evidence can be corroborated with other types of evidence, such as market data and expert opinions, in order to increase its reliability. This can help to mitigate concerns about the reliability of such evidence.

For instance, in its Google Shopping decision, the Commission did rely primarily on surveys from consumers regarding their usage habits to find that a lack of multi-homing contributed to Google’s dominant position in general search result.¹² We therefore invite the Commission to take note of the relevance of this type of evidence beyond forward looking assessments.

2. Practical enforcement of the Market Definition Notice

The revised draft should also address issues linked to its practical enforcement.

- **The Notice should ensure that the Commission (and NCAs relying on this Notice) are encouraged to adopt revised market definitions to factor in technological developments (i.e., be flexible and not use past decisions as a rigid benchmark)**

Market definition assessment are primarily based on past decisions (assuming they are relevant for the specific market under scrutiny). Although the Commission is not bound to apply the definition of a relevant market from its past decisions in future cases, it only rarely departs from them.

The Draft Notice acknowledges the need in fast paced markets to take into account the “*expected changes in substitution possibilities resulting from the change in competitive dynamics*”¹³ and in turn amend the market definition. This consideration is however limited to case where a “structural market transition” occurs, which is a relatively high threshold (e.g., the introduction of a new product or disruptive technology which fundamentally changes consumer behaviors or new regulatory environment).

While this framework offers a certain legal certainty, it may lead to a lack of flexibility of the Commission’s decision-making practice, making it difficult to take account of all market developments. For example, if a new technology enables a firm to produce a product at a significantly lower cost, this could affect the market definition by changing the range of products that are considered to be substitutes for the product in question. Similarly, if a new technology allows a firm to deliver a service in a significantly more convenient or efficient

¹² European Commission Decision in Google Shopping (AT.39740), 27 June 2017, para. 306.

¹³ Draft Notice, para 55.

manner, this could affect the market definition by changing the range of services that are considered to be substitutes for the service in question.

Interestingly, the Notice does not compel authorities to always reach a definitive conclusion on the scope of the relevant market. The Commission now explicitly reserves the possibility to leave the relevant market undefined if the competition concerns arise or fail to arise regardless of market definition. We invite the Commission to go a step further and ensure that an analysis of the competitive dynamics is systematically carried out in fast paced markets.

- **Encourage the setting up of an open access database to enhance transparency and enhance compliance with antitrust and merger control rules**

One the aims of the Draft Notice is to “*increase the transparency of [the Commission’s] policy and decision-making when applying Union competition law*” (para. 3.). Given the fundamental importance of market definition precedents to define relevant markets¹⁴, we invite the Commission to set up an open database to facilitate the review of market definitions in antitrust and merger cases. Such a data base would not only lower compliance costs and burden on businesses but also ensure that market definitions are applied consistently and in a transparent manner.

¹⁴ The Draft Notice reckons that “[i]n practice, the Commission is usually in a position to preliminarily identify the most plausible relevant product and geographic markets within which a particular concentration or conduct should be assessed, based on readily available information, the relevant markets found in past Commission decisions in the same or similar industries” (para. 46).