

Booking.com submission to the consultation on the *Notice on the definition of the relevant market for purposes of Union competition law*

13 January 2023

Booking.com appreciates the opportunity to comment again on the Commission's draft *Notice on the definition of the relevant market for purposes of Union competition law* ("Draft Notice"). We refer to our submission of 9 October 2020 for a comprehensive analysis of the limitations of the current Notice with regard to certain issues arising in digital markets.

We are encouraged to see that the Commission's Draft Notice now incorporates guidance on various issues included in our previous submission including on market definition for multi-sided platforms, digital ecosystems, and non-price competition as well as clarifications on the role of the hypothetical monopolist test and the probative value of different forms of evidence.

In this submission, we elaborate on two issues that we believe could benefit from further clarification in the Draft Notice: i) the role of indirect network effects in defining separate markets in the context of multi-sided platforms, ii) the importance of the hypothetical monopolist test in defining markets involving multi-sided platforms.

The role of indirect network effects when defining separate markets in the context of multi-sided platforms

The Draft Notice states that the Commission takes into account the indirect network effects between user groups on different sides of the platform when defining the relevant markets.¹ The Draft Notice further sets out that for multi-sided platforms it may be appropriate to define one continuous market encompassing all user groups or separate product markets on each side of the platform.²

We agree with this assessment. However, in practice the two-sided nature of platforms is often not incorporated in actual market definition. The table below, drawn from Caccinelli and

¹ Draft Notice, para 94.

² Draft Notice, para 95.

Toledano (2018), illustrates this in the context of price parity investigations in several EU Member States. The risk of omitting to incorporate indirect network effects is particularly high when defining separate markets on each side of the market. As Franck and Peitz illustrate, using the example of the French competition authority's parity investigation into Booking.com, not incorporating the feedback loops between different sides of a platform risks defining markets too narrowly.³

	France (Adlc)	Italy (AGCM)	Sweden (Konkurrenverket)	Germany (BKartA)
Recognised the two-sided nature	Yes	Not explicitly (but recognises the features)	Not explicitly (but recognises the features)	No
Considered the SSNIP test	For one side only	Not specified	Not specified	Not specified

Source: Caccinelli and Toledano (2018), Table A.1⁴

We therefore believe two clarifications in the Draft Notice might be helpful. In paragraph 95, it should be clarified that the markets on different sides of a platform might be “separate but interrelated.” This ensures that the interdependency between different sides of a platform is appropriately recognised and taken into account in the Commission’s market definition exercise. Furthermore, the Draft Notice could clarify that where separate but interrelated markets have been defined, network effects and constraints from the other side of the market *should* be taken into account in the competitive assessment.⁵ Given the nature and fundamental importance of (indirect) network effects for assessing the competitive dynamics of markets where multi-sided platforms are present, such an assessment should not be discretionary,⁶ as it reduces the risk of type II errors.

³ Franck, Jens-Uwe and Peitz, Martin, Market Definition in the Platform Economy (March 1, 2021). CRC TR 224 Discussion Paper Series 2021, final version, available at SSRN: <https://ssrn.com/abstract=3773774> or <http://dx.doi.org/10.2139/ssrn.3773774>.

⁴ Chiara Caccinelli & Joëlle Toledano, 2018. "Assessing Anticompetitive Practices In Two-Sided Markets: The Booking.Com Cases," Journal of Competition Law and Economics, Oxford University Press, vol. 14(2), pages 193-234.

⁵ For example in the last sentence of para 95.

⁶ Mandrescu, Daniel, Applying (EU) competition law to online platforms: Reflections on the definition of the relevant market(s) (May 23, 2018). World Competition: Law and Economics Review, Vol. 41, No. 3, 2018, Available at SSRN: <https://ssrn.com/abstract=3271624>.

The importance of the hypothetical monopolist test

We welcome the Commission's recognition of the central conceptual role of the hypothetical monopolist test in market definition and the recognition that the SSNIP test remains a valuable tool for market definition.⁷ This is also true for markets with multi-sided platforms.

The analytical rigour of the SSNIP test can help to ensure that indirect network effects are properly accounted for in assessing demand substitutability and defining markets.⁸ In particular in markets with digital platforms, substitution patterns can be surprising and asymmetrical as it is often not a functionally identical product that is exhibiting competitive constraints on one or both sides of the market. Identifying and incorporating such substitution patterns and resulting feedback loops is essential in establishing whether a hypothetical price increase would be profitable. For example, as Haucap and Wey show in the German HRS rate parity clause case, the Bundeskartellamt did not properly take into account asymmetrical substitution opportunities and therefore likely defined the market too narrow.⁹

We therefore believe that, while recognizing that an empirical application of the SSNIP test is not binding on the Commission or always feasible, the Commission's ambition should be to carry out empirical assessments. Where this is not feasible or would be inappropriate, the Commission should set out the reasons in its decision and at a minimum show how it applied the conceptual framework of the SSNIP to qualitative evidence. We would welcome a corresponding amendment to paragraph 33 of the Draft Notice.

⁷ As the Draft Notice points out, this might require adaptation in certain instances.

⁸ See Franck/Peitz in footnote 3 above.

⁹ Hamelmann, Lisa; Haucap, Justus; Wey, Christian (2015) : Die wettbewerbsrechtliche Zulässigkeit von Meistbegünstigungsklauseln auf Buchungsplattformen am Beispiel von HRS, DICE Ordnungspolitische Perspektiven, No. 72, ISBN 978-3-86304-672-9, Düsseldorf Institute for Competition Economics (DICE)