

Notice on the definition of the relevant market – EuroCommerce views on the Commission proposed draft

EuroCommerce welcomes the opportunity offered by the European Commission to comment on the draft Notice on the definition of the relevant market for the purposes of Union competition law ('the draft Notice') published on 8 November 2022.

EuroCommerce represents the retail and wholesale sector in Europe. The sector stands for strong competition as the best way to achieve global competitiveness and ensuring that both business customers and consumers continue to have a wide choice of innovative and affordable products.

The 1997 Notice is an important piece of guidance that has worked well, provided the necessary legal certainty and predictability for businesses to operate and has been efficient in ensuring effective competition on both EU and national markets.

EuroCommerce would like to offer a number of comments on the draft Notice.

Key messages

- The draft Notice reflects recent case law and the impact of digitalisation while still preserving a methodology that safeguards legal certainty for business.
- Overall, we would invite the European Commission to make a more prominent use of examples beyond the footnote referrals to case law.
- The draft Notice should place greater emphasis on competitive constraints within the overall competitive assessment.
- The draft Notice should further develop guidance on channel and sector substitution and on the specificities of consumer markets.
- The draft Notice offers useful insight on the value of the evidence which can be further clarified.
- In relation to digital platforms, we welcome the new guidance but would suggest the Notice reiterates that any analysis should be on a case-by-case basis as business models vary.

1. Section 1 – Introduction

General principles of market definition

- 1.1. The draft Notice confirms that the European Commission (henceforth also 'the Commission') is not bound to follow market definitions of previous decisions. We would invite the Commission to explain in the draft Notice under which circumstances the Commission may depart from previous decisional practice.

Resilient and diversified supply chains

- 1.2. We welcome the recognition that competition enforcement can contribute to prevent

dependency and increase resilience by enabling strong and diversified supply chains.¹ EuroCommerce believes that strong competition at home is the best tool to ensure global competitiveness for European businesses and provide consumers with high-quality innovative products at affordable prices.

Parameters of competition

- 1.3. Paragraph 12 introduces notions such as sustainability and durability as elements of quality as a parameter of competition.² Some of these concepts are subjective and have no agreed definition.
- 1.4. For such reasons, we would ask the Commission to ensure that sufficient explanation is incorporated to ensure consistency in application and that examination is of the market as it is, rather than what is the desired market.
- 1.5. Additionally, the Notice should clarify that as part of the market definition there should be a first assessment to establish whether sustainability considerations are relevant to a market. In the retail and wholesale experience, there is evidence that in some markets or for some consumers sustainability may be an important parameter of competition, while in others it may be irrelevant when one considers actual consumer behavior.

Market definition in object cases

- 1.6. The draft Notice explains that the Commission usually does not define the relevant market when assessing by object restrictions.
- 1.7. While this reflects case law, the Notice should explain that in cases involving restrictions by object the Commission will in any event have regard to the economic and legal context of an agreement, which may entail considering the nature of the goods or services affected and the real conditions of the functioning and structure of the market or markets in question.³

Market definitions which are left open

- 1.8. The draft Notice explains⁴ that in certain cases the Commission does not need to reach a definitive conclusion on the precise scope of the market. While this is an established practice, undertakings often still need to provide detailed information to authorities for a large number of possible alternative market definitions. Therefore, in those cases where the market definition can be left open, we would invite the Commission to consider limiting the requests for information it sends to businesses to what is strictly necessary.
- 1.9. Additionally, it would be helpful to businesses if the Commission could in any event reach a definitive conclusion on the market in cases where it is easily able to do so.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Provide guidance of the circumstances under which the Commission would depart from previous

¹ Para 2 of the draft Notice.

² Para 12.

³ Case C-67/13 P *Groupement Cartes Bancaires v Commission* [2014] EU:C:2014:2204, paragraph 53 and the case-law cited, confirmed in C-307/18 *Generics (UK) v CMA* [2020] ECLI:EU:C:2020:52 and C-228/18 *Budapest Bank* [2020] ECLI:EU:C:2020:265.

⁴ Para 18.

market definitions;

- Ensure consistency in applying new concepts on parameters of competition such as sustainability;
- Clarify that the Commission will consider the economic and legal context of an agreement that restricts competition by object even if the Commission is not bound to carry out a market definition;
- In cases where a market definition could be left open, the Commission should define the relevant market if it easily can for the sake of legal certainty.

2. Section 2 – General methodology

2.1. We welcome the further clarity by the Commission on the general methodology to assess demand and supply substitution.

Supply side substitution

2.2. We would invite the Commission to better stress the importance of supply side substitution in the draft Notice. For instance, the draft Notice could indicate at para 35 that the '*Commission **takes into account the substitutability of products from the perspective of suppliers***' (instead of '*may also take into account*') and that supply substitution '*is relevant when defining the relevant market where suppliers use the same assets or processes to produce related products*' (instead of '*can be relevant*').

Geographic markets

2.3. In relation to the definition of geographic markets, we would ask that the Notice recognises that new market circumstances, such as the development of online retail, global marketplaces, price comparators and new delivery models (click & collect, home deliveries) have significantly reduced customers switching costs and the barriers to buy from foreign companies.

2.4. In relation to the distribution sector, this is relevant for non-food retailers with a digital presence (for which markets may be increasing national or even wider – particularly for smaller member states) and for food wholesalers, where the trend towards delivery also leads to an expansion of the geographical reach.

2.5. The draft Notice recognises that the Commission takes into account the process of market integration when defining geographic markets;⁵ this is to be welcomed.

2.6. The definition of geographic markets should also consider artificial commercial market segmentation, such as territorial supply constraints which are at times imposed by some suppliers on retail and wholesale, and which explain why retailers buy locally, even though the geographical scope of sourcing markets is increasingly and might actually be European for certain products.⁶ Looking only at the current geographical pattern of purchases without considering such constraints can be misleading and would only proliferate an artificial segmentation of the Single Market e.g. when performing empirical tests on market delineation.

⁵ Para 72.

⁶ For more information see <https://op.europa.eu/de/publication-detail/-/publication/831c7de4-2a1e-11eb-9d7e-01aa75ed71a1>.

Treatment of imports

2.7. Regarding the treatment of imports, we welcome the Commission's clarification on how these will be assessed when defining a relevant market.⁷

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Clarify that supply side substitution will become part of the standard assessment;
- Recognise new market circumstances (online retail, global marketplaces, price comparators and new delivery models) which facilitate switching and hence affect geographic markets, as well as artificial market segmentation such as territorial supply constraints.

3. Section 3 – Process of defining markets

3.1. We welcome guidance on how to assess competition between different distribution channels (online and offline).⁸

Channel substitution

3.2. A recent joint study by EuroCommerce and McKinsey found that ecommerce is expected to double and drive 90% of sales by 2030.

3.3. For these reasons, we believe that the Notice should clarify that channel substitutability should be part of the standard assessment when looking into consumer markets as part of the market definition exercise or at least as part of the competitive constraint assessment.

3.4. Additionally, such a dramatic increase of the omnichannel reality may entail that some of the criteria listed in footnote 64 (e.g. the need for consumers to experience a product) may be less relevant in the future.

3.5. We would invite the Commission to provide examples on how it intends to carry out an analysis of channel substitutability: in the current draft the Commission cites case M.8394 – Essilor/Luxottica⁹ as an example, but in that case the analysis was left open and the Commission did not reach a conclusion.

Sector substitution and asymmetric competition

3.6. We would suggest reflecting on asymmetric competition and how to assess it as part of a market definition exercise, e.g. the substitutability between sectors for downstream markets.

3.7. For instance, as consumers increasingly eat out of home (at restaurants), buy takeaway ready-made meals from the hospitality sector or explore options such as meal kit subscriptions, retailers are competing with the out of home food market and meal delivery/meal kit platforms. Another example is the trend towards the collaborative economy, e.g. renting /sharing of products, so that bike retailers now compete with bicycle-for-hire platforms. Similarly, food wholesalers may compete directly with manufacturers for professional customers (e.g. the hospitality sector).

⁷ Paras 43 and 75

⁸ Para 51 and footnote.

⁹ Para 64.

- 3.8. Certain undertakings may target the general consumer population as costumers while others may address specific customer groups. In such situations, the latter undertakings may exert more competitive pressure on the former due to their specialisation on the specific customer subgroup, thus creating asymmetric competition. The undertaking addressing the general consumer population can thus be faced with a multitude of different specialised competitors which are not like-for-like competitors.
- 3.9. Competition between sectors and channels can be asymmetric and a market definition exercise may come to very different conclusions depending on the undertakings involved. We would invite the Commission to reflect on these points and provide further guidance.

Evidence to define geographic markets

- 3.10. In relation to subsection 3.3 on evidence to define geographic markets¹⁰, we would again refer to the issue of the artificial commercial fragmentation of the Single Market in the forms of territorial supply constraints (see above at paragraph 2.6).
- 3.11. Territorial supply constraints should be recognised as a barrier for buyers to switch to suppliers in different areas in the Notice.

The quality of the evidence

- 3.12. We welcome the guidance introduced in the draft Notice over the treatment by the Commission of different types of evidence to define relevant markets.
- 3.13. We would stress that **empirical quantitative evidence** such as data on customer purchasing patterns should be regarded as highly relevant; as noted above, the issue of sustainability is an example where consumer surveys often indicate a strong willingness to buy sustainable products which may not necessarily translate into actual purchasing behaviour.
- 3.14. In relation to **information provided by the parties** under investigation or merging, such information should not be viewed as systematically less reliable than information provided by third parties, considering that parties are prohibited by law from providing incorrect or misleading information. The parties will have a comprehensive view of the business and the relevant market(s) and their input should be on equal footing with other sources.
- 3.15. The draft Notice indicates that due to time constraints **the Commission is not required to verify all the information it receives**.¹¹ This may affect markets where data may be difficult to obtain (e.g. wholesale), where the Commission may choose to rely on promptly available data which may be however be less precise. We would ask the draft Notice to explain how the Commission would behave in these situations where there is a trade-off between precision and availability of data given a certain level of reliability.
- 3.16. The draft Notice provides that **evidence predating the investigation** may be more reliable than data collected during the Commission's probe. We would invite a clarification if this would extent to studies conducted by the Commission (whose value may be outweighed by a previous study on the market, even if carried out by one of the parties).
- 3.17. The analysis of **expected structural changes** (e.g. technological developments) may necessarily be based on estimates and assumptions (expert interviews, econometric models). We

¹⁰ Para 64-72.

¹¹ Para 77 and footnote 90.

would invite the Commission to provide more details on the standard of adequacy required from such evidence.

- 3.18. The Notice should specify that in the presence of contradictory evidence the Commission will review the data available in a reasoned and transparent manner.

Consumer markets

- 3.19. We strongly welcome the Commission's further guidance on the issue of consumer markets and the use of catchment areas, which are of high relevance for retailers and wholesalers.
- 3.20. We agree with the current formulation of the draft Notice that the preference should be to draw catchment areas around customers.
- 3.21. The draft Notice explains that where this may not be possible the Commission may consider drawing catchment areas around suppliers using the location of hypothetical customers located at midpoints between the merging parties. We would invite the Notice to clarify and warn against the abuse of artificial midpoints. In practice, analyses often centre on supplier locations and draw empirical catchment areas based on real customer data. This approach could be less precise but more practical in terms of data availability and costs. We would appreciate guidance on the adequacy of this approach as compared to others.
- 3.22. We would also ask that the draft Notice recognise that digitalisation is having a major impact on consumer markets such as retail and this may entail a change of approach in the use of catchment areas as well. This may also be affected by regulation, such as Regulation 2018/302 ('the Geo-blocking Regulation') and any upcoming revision which may impact the delivery aspects of the rules.
- 3.23. In relation to consumer markets, we believe the draft Notice should also provide guidance on market definition in the presence of branded products and the distributors' own brand (private labels).

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Clarify that channel substitutability is part of a standard assessment to define markets;
- Provide further guidance on sector substitutability and asymmetric competition;
- Recognise artificial barriers to geographic markets such as territorial supply constraints;
- Provide further clarity on the use of the evidence by the Commission;
- Provide further guidance on catchment areas in consumer markets (including on the impact of digitalisation).

4. Section 4 – Market definition in specific circumstances

- 4.1. We welcome the further guidance provided on issues such as defining relevant markets in the presence of significant product differentiation, for platforms, ecosystems and aftermarkets.

- 4.2. We would invite the Commission to provide examples of when the Commission would view **products as being significantly differentiated** and provide further clarification on the criteria listed in footnote 98.
- 4.3. We would also ask for guidance on **product markets covering a portfolio of products** (as often occurs in retail and wholesale); national competition authorities such as the Bundeskartellamt have analysed this issue in the past.
- 4.4. The draft Notice (paras. 94, 103) provides that the Commission considers **indirect network effects in multi-sided platforms and digital ecosystems**. We believe the Commission should analyse such issues at competitive assessment stage rather than as part of the definition of the relevant market, as per previous practice by NCAs,¹² to avoid risks to legal certainty, especially in relation to emerging markets.
- 4.5. In relation to **multi-sided markets**, the Commission should complement the factors identified in para. 95 with other elements such as the business model of the platform, as recognised by the Commission's 2021 Support Study on the Market Definition Notice.¹³
- 4.6. On the use of alternatives to the SSNIP test, for the purposes of legal certainty to business the Notice should clarify that in any event the SSNIP test should remain the first economic test to consider and that the Commission will resort to alternatives only if strictly necessary.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Provide further guidance and examples on differentiated products and portfolios of products.
- Consider indirect network effects during the competitive assessment (and not as part of a market definition exercise);
- Recognise the differences in business model when assessing platforms.

5. Section 5 – Market shares

- 5.1. We welcome the further guidance provided on the calculation of market shares.
- 5.2. In relation to **multi-sided platforms** and alternative ways to define market shares, the Commission identifies a number of usage metrics (para. 107).¹⁴ We would invite the Commission to clarify that the usage metrics to be considered depend on the type of platform and its business model.
- 5.3. While certain platforms may base their revenue on advertising, online retail platforms continue to derive their revenues on sales. For such type of platform, sales-based market shares remain more appropriate.

¹² European Commission *Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law* (2021), available here: https://competition-policy.ec.europa.eu/system/files/2021-06/kd0221712enn_market_definition_notice_2021_1.pdf, p. 51.

¹³ See the 2021 Support study, page 44.

¹⁴ Para 107.

Conclusions

EuroCommerce would suggest the following changes to the draft rules:

- Consider business model differences when exploring usage metrics for platforms.

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