



BOUYGUES EUROPE

COMMENTS  
ON THE REVIEW OF THE  
COMMISSION NOTICE ON  
THE DEFINITION OF  
RELEVANT MARKET  
*JANUARY 2023*

**COMMENTS FROM THE BOUYGUES GROUP  
IN RESPONSE TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION  
ON THE DRAFT REVISED COMMUNICATION ON MARKET DEFINITION**

Bouygues Europe represents the Bouygues Group in Brussels. The company encompasses a wide range of activities including construction (Bouygues Construction, Bouygues Immobilier, Colas), telecommunications (Bouygues Telecom) and media (TF1 Group).

Bouygues Europe welcomes the opportunity to share its thoughts regarding the European Commission's draft revised Communication on market definition.

The draft Communication includes some very significant advances, which should be highlighted.

Indeed, the updating of the Communication is to be welcomed, given the profound market changes that have occurred in recent years, and the stated objective of adapting the current notice to the challenges posed by *"digitalisation and new ways of offering goods and services, as well as the increasingly interconnected and globalised nature of international trade"* (point 2 of the draft).

The draft does, moreover, add a number of analytical elements that will make it easier to understand digital transitions. It also includes an important innovation which will lead the Commission to consider an effects-based and therefore less formalistic approach. Useful methodological clarifications are also provided.

Bouygues Europe welcomes the importance given to transitional effects in the market structure **(I)**. Bouygues Europe wants to highlight the need to consider the superiority of quantitative tests and measures in the delimitation of markets over other more qualitative modes **(II)**. Finally, the new approach chosen by the Commission is a clear progress since it now reflects more accurately the economic reality **(III)**.



## **I. The importance of transitional effects in the market structure**

The consideration of transitional effects in the market structure is very timely if we recall the profound and rapid transformations brought about by the digital revolution (point 16 of the draft).

However, although the inclusion of transitional effects in the market definition is to be welcomed (point 16), the conditions seem to be too demanding for this concept to be applicable in practice. While the Commission states that it is prepared to take into account "expected *short-term or medium-term structural market transitions*", it indicates that this must correspond to transitions that "*would lead to effective changes in the overall dynamics of demand and supply within the period that is relevant for the Commission's assessment*" and that therefore there must be "*strong indications that the projected structural changes will take place with sufficient probability. The evidence must be reliable and needs to go beyond mere assumptions that observed trends will continue or that certain undertakings will change their behavior*". The only one example cited and that appears to meet these conditions is the emergence of generic drugs, of which the effect on the relevant markets is widely known and documented. The Bouygues Group wants to draw the Commission's attention on this point since such a strict notion would probably not have allowed the radical market movements introduced by the digital revolution.

## **II. The need for quantitative tests in the delimitation of markets**

Price is no longer the only parameter taken into account for the delimitation of markets. Quality and the level of innovation are also factored in, which makes it possible to take into account products and services with a zero monetary price as well as the particularities linked to highly innovative industries (point 32 of the draft). The Bouygues Group is in line with these new approaches.

Nevertheless, no account is taken of the superiority of quantitative tests and measures (in particular the SSNIP test) over other more qualitative modes of evidence where reliable data are available to the Commission (paragraph 49, point 76). Application of the SSNIP test is even relegated to the bottom of the list of relevant evidence for assessing demand-side substitutability, after evidence of hypothetical substitutability or 'industry views' (paragraph 59).

These tests make it possible to provide objectivity to and counterbalance the subjective approaches constituted by the feedback from market tests. The responses to market tests contain serious strategic biases: the desire for some to harm the development of a competitor, the desire to avoid a rebalancing of the supplier/buyer balance of power, the revenge of candidates excluded from a sale process, the desire to exert pressure on a partner, etc. Operators with a positive or simply neutral opinion have little incentive to respond, which can create a "magnifying glass effect" that favors any negative and biased opinions.

While the Commission endeavors to qualify the evidential weight of the evidence used for the definition of the relevant markets (see paragraphs 49 et seq.), it is surprising to note that no such precautions are taken with regard to the returns from market tests (see paragraphs 56 and 78).

For the Bouygues Group, it is important that quantitative and objective methods, which are the result of proven economic analyses, are given a prominent place when the appropriate data is available.

Finally, the market definition for the provision of a product at a zero monetary price does not seem to be sufficiently clear (point 98). Indeed, it is hard to see how elements such as "*the intended use (of the product)*", "*evidence on hypothetical substitutability*" or "*competitive constraints based on industry views*", "*barriers or costs of switching*" could constitute a substitutable proposition for a monetary metric. In our view, these elements should be clearly linked to the identification of a tangible added value (e.g., user data that can better value the sale of digital advertising, etc.).

### **III. An appropriate consideration of the economic reality**

The 1997 notice favors a very formal approach in which the definition of the relevant market is an essential starting point for the analysis.

The current draft breaks with this approach in part to include external constraints from outside the market in the analysis. Thus, while *"the market definition allows for a distinction between competitive constraints from within and from outside the market, by including only the immediate competitive constraints in the relevant market"*, the draft states that it takes into account *"all competitive constraints (immediate or not)"* in its competitive analysis (point 14 of the draft).

In so-called "differentiated product markets", where there is no homogeneity, an effects-based analysis is preferred: *"When products are differentiated, market shares may provide a less reliable indicator of market power and the Commission normally analyses whether the undertaking(s) involved and other suppliers compete closely, as part of its competitive assessment. A detailed competitive assessment of how closely suppliers compete with each other may reduce the importance of market shares and hence that of market definition. Therefore, although market definition remains an important step, analyzing how closely suppliers compete suppliers may be more relevant in the competitive assessment of differentiated markets"*.

The draft continues: *"in the case of a significant degree of product or geographic differentiation, market shares tend to be less informative and it may be more relevant to assess the degree of substitutability in the context of a competitive assessment. The Commission may, when appropriate, rely on shares for segments of the relevant market and take those into account when assessing how closely undertakings compete with each other and their competitors"* (point 109 of the draft).

The Bouygues group considers that this change is appropriate because it reflects economic reality more accurately.

Supply-side substitutability is however still considered very peripherally (point 25 of the draft), without sufficient explanation in our view (*"Supply substitution can also be relevant for the definition of the relevant market in some cases, namely when it is as immediate and effective as demand substitution"*, point 25 of the draft). We think that this notion should be more highlighted in the Communication. Similarly, the notion of "purchasing market", referred to in point 6, should be clarified to indicate when a purchase rather than a sale-oriented market should be preferred.

Additionally, the Bouygues Group welcomes the fact that the draft recalls in point 11 that, while the Commission generally initiates its analysis on the basis of its previous decision-making practice, it is in no way obliged to apply it in the cases it has to examine. Thus, we understand that undertakings should be able to propose to the Commission that traditional market definitions be adapted as closely as possible to economic reality, irrespective of previous decision-making practice.

However, the examples cited in footnote 24 to illustrate the sectors in which "the markets defined are often the same across cases and assessments when the same economic activity in terms of products and geography is concerned" seem inappropriate. There is a risk that these illustrations could set the exemplary market definitions in stone, in contradiction with the principle that past decision-making practice never sets the future in stone (point 11). For this reason, we would suggest deleting this footnote.

Therefore, we would advise the Commission to maintain its approach **that takes into consideration the transitional effects in the market structure**. However, we would like to raise the Commission's awareness on the strict interpretation of this notion which seems to set too demanding conditions that would not allow this concept to be fully applicable in practice.

Furthermore, while we welcome the fact that the quality and the level of innovation are taken into account for the delimitation of markets and that price is no longer the only parameter considered, there is a **need to assert the superiority of quantitative tests** (especially the SSNIP test) over qualitative measures. Indeed, a prominent place should be given to these tests when the appropriate data is available since, being the result of proven economic analyses, they provide objectivity and counterbalance the subjective approaches constituted by feedbacks from market tests. Further clarity should also be provided concerning the market definition for the provision of a product at a zero monetary price.

We welcome a more **appropriate consideration of the economic reality** through, first of all, the inclusion of external constraints from outside the market in the analysis. The economic reality is also taken into account in the draft Communication when it recalls that the Commission is not obliged to base its analysis on its previous decision-making practice in the cases it examines. Finally, supply-side substitutability should not be considered peripherally by the Commission and should be more highlighted in the Communication.