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## **Comments on the Draft Revised Market Definition Notice**

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The Draft Revised Notice on Market Definition is an impressive piece of work, which makes clear strides in updating the Market Definition Notice for the future.

In this document, I wish to make some comments on the draft notice, as a follow up on [my submission in May 2020](#) (in the consultation on the Roadmap). My comments are based on my doctoral work, published articles, and work on my forthcoming book on market definition with Hart (Bloomsbury) Publishing.

### **The role of market definition**

The first area in which the Draft Revised Notice makes clear strides compared to the 1997 Notice is in the articulation of the role of market definition. In my submission to the roadmap consultation, I urged the European Commission to more explicitly articulate the purpose of market definition as an analytical tool to structure and understand the facts in light of the question it is trying to resolve. This role means market definition's utility goes beyond the calculation of market shares, allowing for the identification of competitive constraints which are relevant to assessing the feasibility of the conduct and anti-competitive effects in light of the theory of harm.<sup>1</sup> This view of the utility of market definition can not only be supported by the jurisprudence, but also by the practice and guidance of the European Commission. Nonetheless, some scholarship criticises (the results of) market definition in light only of the market power rationale, without having due regard for the functional nature of the market. The European Commission bears some responsibility for this, as its guidance and indeed decisional practice has insufficiently emphasised the broader utility of the concept. Thus, in my 2020 roadmap submission, I urged the European Commission to be more explicit and more expansive in a revised notice.

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<sup>1</sup> See M. Eben, 'The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process' (2021) 17(3) Journal of Competition Law & Economics 586-619, available at <https://eprints.gla.ac.uk/232899/>.

It is therefore encouraging to see that the Draft Revised Notice is indeed more explicit about the multi-faceted role of market definition. Both the content and the structure of the Notice indicates that the role of market definition goes beyond the identification of market power. The inclusion of a section entitled ‘Role of market definition’ (paras 5-9) is a welcome step forward, as are the multiple references to the purposive nature of market definition (see, *inter alia*, paras 11, 24, 46, 48, 93).

Across multiple paragraphs, the Notice recognises that market definition is a tool for structuring and facilitating the competitive assessment. Although the frontloading of market power (understandably) remains and although the Draft Revised Notice has dropped the ‘*inter alia*’ wording which was present in the 1997 Notice<sup>2</sup>, the Notice refers in multiple places to the use of market definition as a tool to draw the boundaries of competition and an analytical tool for the competitive assessment more broadly. It also recognises that market definition is linked to the objectives of the specific legal instrument (see para 8).

However, opportunities exist to revise the section in aspects that would ensure there is clarity on the purpose of market definition. Certain paragraphs in the draft Notice may be read as contradictory or unrelated when they actually form part of a whole. In particular, the link between the objectives of competition law (instruments) and market definition can be clarified further. If market definition is indeed ‘closely related to the objectives’ of the different competition law instruments (para 8), there is likely to be some variation in the market definition exercises depending on the legal basis and conduct.

In its present form, paragraph 8 sets out why market definition is used under Article 102 TFEU, the EUMR, and Article 101 TFEU. It also notes when, under Article 101 TFEU, the relevant market is usually not defined. However, the paragraph does not explicitly state whether this different use may be the cause of variations in market definition processes or outcomes. Paragraph 11 notes, that ‘the outcome of market definition in a given case is usually unaffected by whether it takes place in the context of merger control or antitrust enforcement’. Nonetheless, the supplementary comment in footnote 20 notes that ‘in some cases, market definition may lead to different results depending on the type of analysis carried out’ particularly if the focus is on changes in market power or current or past market power/competition (repeated in footnote 48).

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<sup>2</sup> Paragraph 2 of the 1997 Notice included the following wording: ‘It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares ...’. This implied that market definition had other functions beyond just the calculation of market shares to establish market power.

Given that paragraphs 8 and 11 and footnote 20 are related, the Commission has an opportunity to enhance the coherence of the Notice by clarifying: 1) what the link is between the objectives of competition law and market definition more generally, 2) whether market definition may vary in its process or outcomes because of the different ways it is used under each instrument.

The Notice already accepts that the relevant market may vary depending on the specificities of the case (paragraph 46), which may be because the parameters of competition or time period differs (para 15). These paragraphs go a long way towards providing better understanding of the definition of markets for the purposes of competition law. Further clarification on whether the different objectives may impact the relevant market would increase the clarity and completeness on the practice of the European Commission.

Similarly, undertakings and enforcers would likely welcome an explicit clarification in the Notice on whether the alleged conduct and theory of harm is relevant to the market definition process. As mentioned, the Notice acknowledges in paragraph 46 that the specificities of the case – particularly the parameters of competition (paragraph 15) – influence the relevant market. In paragraph 15, the Notice notes that the competitive constraints on prices may be different from those on investments in product improvements. Which competitive constraints matter will depend on the alleged conduct and theory of harm, so it seems there is a link between the conduct and theory of harm in a case and its market definition, which might be worth discussing more explicitly.

### **Out-of-market constraints and potential competition**

The Notice expands the information on supply substitution and out-of-market constraints. This additional information is very welcome. The Notice still refers to the ‘criteria of immediacy and effectiveness’ to determine when competitive constraints are to be included in the market or only assessed at the stage of the competitive analysis. This makes sense, although in practice, there is still uncertainty about what will constitute ‘immediacy’ and ‘effectiveness’. It may not be possible or advisable to set out the different criteria and examples of immediacy and effectiveness in the Notice itself, but the lack of clarity is something to be mindful of. As it stands, the further explanations given in paras 34, 35, 38 and footnote 51 are a welcome development.

### **Parameters of competition**

The Notice’s greater emphasis on non-price elements such as innovation and quality of products and services is very welcome. It is highly commendable that the Notice reflects on

the fact that there are other parameters, aside from price, which may be relevant to market definition and can be incorporated into the assessment of demand substitution. It suggests, for example, innovation, quality (in durability, sustainability, value and variety of uses, image of security and privacy) and availability (paragraph 12).

The Notice acknowledges the difficulties in operationalising this in a revised SSNIP test, such as the SSNDQ test. It does not attempt to set out exactly how the inclusion of quality and other non-price parameters would work in practice. This is a sensible approach, as there will likely be further practical developments and research in the near future. If the Notice is meant to provide correct, comprehensive and clear guidance (as set out in 2020 by the Commission) on the approach adopted by the European Commission, then it should not include guidance on tools the Commission does not intend to use or provide too confusing an explanation. However, the Commission should keep track of the developments of new tools and approaches. If it intends to adopt (or does adopt) these in its decisional practice, it should incorporate them in the Notice, to ensure the Notice complies with certainty and transparency objectives.

### **Forward-looking, structural changes in supply and demand, product migration**

The Notice includes clarifications regarding the forward-looking application of market definition, especially in markets that are expected to undergo structural transitions, such as technological or regulatory changes. This is a significantly positive development, as the importance of these issues to practice have increased in recent years and are likely to continue doing so.

Paragraph 55 explicitly notes that in rapidly evolving industries, the Commission may take into account expected changes in substitution possibilities resulting from the change of competitive dynamics. This is a welcome acknowledgement.

It is also positive that the Notice seems to recognise that there is a distinction between the satisfaction of the same want (same demand) and shifts in production to satisfy new or significantly altered wants.

The Notice notes that the Commission can take into account expected transitions in the structure of the market as a forward-looking assessment (paragraph 16). This is a promising start at providing guidance on assessments of the market in evolving industries. The Notice here refers to transitions expected in the short-term or medium-term, but does not provide clarity on what this would mean in practice. This could be further clarified in the Notice or in other guidance or decisional practice, provided it is more transparent (see below).

I was very pleased to see that the Notice includes a reference to the issue of ‘product migration’. In paragraph 52, it reflected that product migration is not informative of demand substitution: ‘By contrast, evidence of customers shifting away from a product as a result of factors unrelated to changes in relative supply conditions are less informative for demand substitution as such shifts may rather reflect product migration, namely changes in consumption patterns and preferences over time.’ Product migration may, however, be relevant to a forward-looking assessment. As such, it may be beneficial to consider more explicitly whether and how product migration may be incorporated into the assessment, and indeed for what purposes (how would it affect the identification of boundaries and participants of competition, findings of market power, and analysis of harm). This is something I refer to in my PhD dissertation and intend to develop in my book.

The Notice is also explicit in the possibility of defining markets for future products or around innovation efforts. In doing so, the Notice also reflects on the continuum between future product markets and innovation markets or innovation spaces. Both of these inclusions in the Notice are very welcome. The Notice arguably uses more accurate wording: new markets for pipeline products and ‘the boundaries within which undertakings compete in ... innovation efforts’, see paragraphs 90-91).

The information provided in the Notice is useful, with reference to decisional practice. Although it could have provided more detail on the tools and processes to identify relevant pipeline products and innovation efforts, there is likely to be further development in this area, but the guidance set out in the Notice is sufficiently broad to remain applicable.

### **After markets, bundles, and digital ecosystems**

The inclusion of a discussion on market definition in the presence of digital ecosystems is very welcome and indeed highly anticipated. The fact that this is explicitly linked to aftermarkets and bundles is very sensible. It reflects both existing practice and scholarship.

The Notice is not ground-breaking and could maybe have provided further clarification. However, as also mentioned above for non-price parameters, if the Notice is meant to provide correct, comprehensive and clear guidance reflecting actual (current or intended) practice of the Commission, it may be sensible to limit its content to what reflects actual decisional practice or scholarship on which there is consensus. However, the Commission should keep track of the developments of new tools and approaches. If intends to adopt or does adopt these in its decisional practice, it should incorporate them in the Notice, to ensure the Notice contributes to certainty and transparency objectives.

## Transparency

In my 2020 submission, I acknowledged that the Notice is a very important tool to enhance transparency – and thus objectivity in the context of market definition.<sup>3</sup> However, I suggested that the European Commission should also increase transparency in actual decisional practice, by publishing more detailed information on the steps undertaken and evidenced used to reach a conclusion on the antitrust market in a particular case. This could take the form of a detailed communication separate from, or annexed to, the decision.<sup>4</sup> Having more frequent updates of the Notice would be welcome, for example to incorporate further developments on quality and ecosystems, but more transparency in its decisional practice would also be welcome.

This would not only increase transparency for undertakings, important to legal certainty, but also to national competition authorities, aiding in contributing to coherence and consistency across the Union.

## Final reflection on digital commerce and online services

In my 2020 submission, I noted that the challenges raised by digital products and business models are not entirely new.<sup>5</sup> In fact, addressing these challenges requires a consideration of the meaning of the underlying concepts of market definition (products, price, competitive constraints). This is important in any industry, yet seems to have become more challenging particularly in the context of online services.<sup>6</sup> Thus, I put forward, a revised Notice ought to define these concepts, before explaining how these concepts translate into a digital context.

The Notice could have taken the opportunity to do this more explicitly.

Overall, the Notice represents an impressive and welcome development. The Commission should take this as the starting point for further engagement with scholarship – which is developing more tools and approaches relevant particularly to the digital economy – as well as a chance to provide more ongoing guidance and dialogue.

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<sup>3</sup> See M. Eben, ‘The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process’ (2021) 17(3) *Journal of Competition Law & Economics* 614, available at <https://eprints.gla.ac.uk/232899/>.

<sup>4</sup> M. Eben, ‘The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process’ (2021) 17(3) *Journal of Competition Law & Economics* 615, available at <https://eprints.gla.ac.uk/232899/>.

<sup>5</sup> See also M. Eben V.H.S.E. Robertson, ‘Digital market definition in the European Union, United States, and Brazil: past, present, and future’ (2022) 18(2) *Journal of Competition Law & Economics* 417-455, available at <https://eprints.gla.ac.uk/249520/>.

<sup>6</sup> M. Eben, *Addressing the Main Hurdles of Product Market Definition for Online Services: Products, Price, and Dynamic Competition* (2019) PhD thesis at University of Leeds, p.14; M. Eben, ‘Market Definition and Free Online Services: The Prospect of Personal Data as Price’ (2018) 14(2) *I/S: A Journal of Law and Policy for the Information Society* 227, available at <http://eprints.gla.ac.uk/202096/>.

I remain at your disposal,

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