



**13 January 2023**

## Contribution to the European Commission's public consultation on the review of the 'Revised Draft Market Definition Notice'

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**JP|PolitikensHus**



## Introduction

- 1) JP/Politikens Hus welcomes the possibility of commenting on the Revised Draft Market Definition Notice (the “**Revised Notice**”) presented by the European Commission on November 8, 2022.
- 2) JP/Politikens Hus provided comprehensive comments as part of the hearing process on the Market Definition Notice launched by the European Commission in April 2020. However as critical issues remain, JP/Politikens Hus finds that the Revised Notice does not effectively capture the specific features of digital markets and has summarised the most critical issues that should be addressed in the Final Market Definition Notice (the “**Final Notice**”).
- 3) Specifically, JP/Politikens Hus would like to address
  - i. *that* the Final Notice should more clearly address the competitive constraints stemming from the presence of platforms expanding<sup>1</sup> into adjacent markets. See section 1.
  - ii. *that* to avoid misuse, the Final Notice should provide more guidance on the migration vs substitution argument, in particular, in relation to the switch from analogue to digital products. See section 2.
  - iii. *that* the Final Notice should sharpen the application of the SSNIP test to account for the consumption of product portfolios, the application of aggregate diversion ratios and address under what conditions the theoretically correct open-form SSNIP question is reasonably replaced with a closed-form SSNIP question. See section 3.
- 4) JP/Politikens Hus is a Danish media company publishing several news media online and offline. As such JP/Politikens Hus has first-hand experience facing multisided platform competition for readers’ attention and in turn advertisers’ spending in a market comprising a wide set of different business models, including offline- and online distribution channels offering a combination of free and paid-for services.

### **1 The Final Notice should include potential competition from large platforms enveloping into adjacent digital markets in the market definition**

- 5) The Revised Notice considers the competitive pressure from potential competition in paragraphs 25 and 39 and notes that the distinction to supply-side substitution lies primarily in whether the restriction of competition is immediate or not. As such, more remote competitive constraints (potential competition) can be considered in the competitive assessment but requires an analysis of additional factors.
- 6) The Final Notice should in more detail consider the practical implications or provide examples of potential competition. In particular, in a digital era, the Market Definition Notice should relate to the significant competitive constraints of large platforms utilising

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<sup>1</sup> In the literature this has also been coined “enveloping”.



their customer/user bases to envelope into adjacent markets by adding another platform's functionality to their own and offering a multiplatform bundle.<sup>2</sup> Such constraints are significant and relevant in fast-changing digital markets where rapid technological change requires that existing operators accommodate to the vivid threat of potential competitors.

- 7) The massive user bases of large platforms effectually lower the entry barriers of entering adjacent markets causing the competitive constraint to be very close to actual supply-side substitution and in some cases exactly the same. For example, Facebook and Google utilised their user bases to provide access to news media, posing a direct competitive constraint on traditional news media, including JP/Politiken. The share of people using social media as a source of news has increased significantly from 31% in 2013 to 43% in 2022 in Denmark hence posing a direct competitive constraint on traditional media and effectually redirecting advertise spending previously placed on publishers' websites to the social media platforms.<sup>3</sup> Other examples of platforms enveloping into adjacent markets include Spotify using its music platform to envelope into news podcasts, and the Danish podcast app Podimo expanding into providing audiobooks.
- 8) The Final Notice should address the competitive constraints stemming from the platforms in the market definition, specifically, for dynamic markets such as news media.

## **2 To avoid misuse, the Final Notice should provide more guidance on the migration vs substitution argument**

- 9) The Revised Notice states that a shift in consumer patterns unrelated to changes in relative supply conditions is less informative for demand substitution since they may reflect product migration related to changes in consumption patterns and preferences over time, cf. paragraph 52. The EC further refers to M.6576 Munksjö/Ahlstrom for an example in which a shift in consumer patterns had not been determined or accentuated by short-term changes in relative prices, cf. footnote 69.
- 10) As stated in the introduction of the Revised Notice, the main purpose of market definition is to identify the immediate competitive constraints that the undertaking(s) involved face when offering certain products in a certain area. Accordingly, the market definition leads to the identification of the relevant competitors of the undertaking(s) involved when offering those products as well as the relevant customers, cf. paragraph 5 of the Revised Notice.
- 11) In JP/Politiken's experience the term *migration* has been misapplied by authorities to describe shifts from traditional to more digitised products. Particularly, by neglecting that changes in consumer preferences and behaviour over time are in fact driven by the competitive dynamics of market entry and product disruptions.

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<sup>2</sup> For a more detailed discussion of the envelopment strategy for platforms, see Thomas Eisenmann, T., G. Parker and M. Van Alstyne (2007), "Platform Envelopment" HBS WP 07-104, available at <https://hbswk.hbs.edu/item/platform-envelopment>.

<sup>3</sup> Reuters Institute Digital News Report 2022, page 75, available at [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-06/Digital\\_News-Report\\_2022.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-06/Digital_News-Report_2022.pdf).



- 12) For example, availability of high-speed internet access makes video streaming platforms relatively more valuable for consumers due to higher flexibility compared to analogue TV channels. Here, general infrastructure improvements and the dynamics of competition have driven consumers towards streaming platforms at the expense of TV channels who in the same period observed consumers downsizing flow-tv spending. The fact that the increase in product quality from new digital products is boosted by a positive general infrastructure development does not change the fact that it is the dynamics of competition that bring about innovative business models competing against traditional players. The relative value of the products offered by traditional players compared to digital products has, in other words, decreased because of market innovation. The market definition exercise must capture this dynamic to be a suitable tool to measure the competitive constraints of alternatives and hence consider such changes in the format of substitution and not migration.
- 13) In M.7000 Liberty Global/Ziggo the EC argued that “*non-linear broadcasting is increasingly constraining linear broadcasting with viewers replacing linear broadcasting with a selection of their preferred non-linear content.*”<sup>4</sup> Hence, indicating that shifts to non-linear content, such as Netflix, exert a competitive constraint on traditional broadcasters, including TV channels.<sup>5</sup>
- 14) For many markets where traditional offline players face digital alternatives, consumers often use a portfolio of products, and a change in the relative supply conditions shifts some share of consumption towards the alternative products. The fact that consumers, to a certain degree, consider the products as complements does not rule out that there is also substitutability between them. A change in relative supply conditions will likely result in a shift in the share of consumption moving towards the digital product and not only a total switch in consumption. In the news media market, traditional media is experiencing customers downgrading subscriptions of printed news as a reaction to new easy accessible digital formats such as news-podcasts. The same downgrading tendency is also witnessed within printed books where availability of audiobooks and streaming services has significantly increased. This shift occurs because in the eyes of the consumer, the price/value coefficient of the printed product has decreased relative to the digital alternative. The decrease in the price/value coefficient is comparable to a price increase (or a deterioration of the supply conditions), and the consumer downsizing should be considered as a reaction to this change (i.e. as substitution) rather than being ignored as migration.
- 15) To avoid misuse, the Final Notice should provide more guidance on the migration vs substitution argument, in particular, in relation to the switch from analogue to digital products.
- 16) In addition, in context of digital offerings, it should be clear that digital products offered at a zero monetary price are equally capable of posing a significant competitive con-

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<sup>4</sup> Case M.7000 Liberty Global/Ziggo, 2018, paragraph 72, available at [https://ec.europa.eu/competition/mergers/cases/decisions/m7000\\_4325\\_3.pdf](https://ec.europa.eu/competition/mergers/cases/decisions/m7000_4325_3.pdf).

<sup>5</sup> For the sake of completeness, the EC finds that linear and non-linear broadcasting are still “*seen more as complements than as substitutes*” and that non-linear is not yet a viable alternative.



straint as paid-for competitive offering. For instance, in Denmark the state-funded media organisation, Danmarks Radio, who is operating with a sizeable budget and enjoys wide recognition within the population, offers a wide range of free digital news offerings including news articles and podcasts alongside its traditional news channels (TV and radio).

### **3 The Final Notice should provide more guidance as to the use of the SSNIP test**

- 17) The Revised Notice defines the SSNIP question as to what extent and to what readily available alternative products the customers of the undertaking(s) involved would switch in response to a deterioration in the supply conditions of the products of the undertaking(s) involved relative to other products, cf. paragraph 29.
- 18) Several areas of the SSNIP could be sharpened to better guide the practical implications.
- 19) The Final Notice should include more guidance as to the phrasing of the SSNIP question. In particular, whether the question should be phrased as a switch of the total consumption from one product to another or whether alternative phrasings can be applied. For the news market, a SSNIP question asking the consumers of whether they would switch their total consumption to an alternative news provider is not meaningful, as most readers access news through multiple sources. As such, a change in the relative supply conditions would most likely shift a *share* of the consumption towards the alternative product and not *total* consumption.
- 20) Aggregate diversion ratios are increasingly being used to define markets as part of a “Critical Loss Analysis”. The Final Notice should provide guidance on how to elicit or construct aggregate diversion ratios, especially in markets with differentiated products where a uniform price increase across products may not be the theoretically correct approach.
- 21) Further, in several cases the open-form SSNIP question (i.e. would you switch or not in response to a small price increase) is replaced with a closed-form SSNIP question (i.e. to which alternative would you switch if the store closed or the product could not be bought) without proper justification.<sup>6</sup> Rephrasing the SSNIP question implies that diversion ratios are based on the average consumer as opposed to the marginal consumer. To ensure proper guidance, the Final Notice should address under what exact conditions, if any, open-form SSNIP question is reasonably replaced with a closed-form SSNIP question.

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<sup>6</sup> See e.g., Konkurransetsynet, 2015, V2015-24 Coop Norge Handel AS – ICA Norge AS, available at <https://konkurransetsynet.no/decisions/1229-v2015-24/>, and Markets Authority, 2016, Ladbroke’s and Coral, available at <https://assets.publishing.service.gov.uk/media/5797818ce5274a27b2000004/ladbroke’s-coral-final-report.pdf>.