Comments on the public consultation

European Commission's draft revised Market Definition Notice

13 January 2023

Introduction

1. Positive Competition welcomes the opportunity to comment on the draft revised Market Definition Notice ("Draft Notice") published on 8 November 2022 by the European Commission. While the Notice currently in force has served its purpose for 25 years, the proposed revision addresses long-awaited clarifications as well as market developments. This will certainly improve compliance and facilitate antitrust and merger proceedings.

2. There are a number of topics for which we believe the Draft Notice would benefit from further clarifications, among others on the following issues:

   2.1. The link between market definition and the theory of harm;

   2.2. The definition of relevant geographically differentiated markets and the computation of market shares;

   2.3. The market definition for multi-sided platforms;

   2.4. The reflection of capacity, captive production and merchant sales in market shares;

   2.5. The importance of the quality of translations.

3. However, even before focusing on these various technical aspects, it seems important to recall that market definition is a mere tool to an end: the assessment of a theory of harm. Market definition is only useful insofar as it allows designing insightful market investigations and provides legal certainty for undertakings and their advisers. Unfortunately, our experience is that market definition can attract too much attention in proceedings, not only to the detriment of the efficiency of proceedings but, what is even more concerning, to the detriment of a proper articulation and documentation of the theory of harm related to the conduct or transaction at stake. It would therefore be useful if the Draft Notice started with a clear and pedagogical description of the role of market definition in antitrust proceedings.

The link between market definition and the theory of harm

4. It is important to emphasise that antitrust markets are not natural objects, but rather intellectual constructs intrinsically related to theories of harm. While the Draft Notice insists, in paragraph 17, that antitrust markets might differ from markets as described in business documents and mentions the link between antitrust markets and theories of harm in footnote 20,[1] the overall impression projected by the document is that market definition can be construed independently of the conduct at stake.

5. Paragraph 11, for example, states that "[t]*he 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.*" This statement is correct because the type of proceedings is secondary to the theory of harm to delineate the relevant antitrust market(s). However, this statement is incomplete because the relevant antitrust market(s) might differ between two antitrust or merger cases.

6. For instance, the same antitrust market is likely relevant when assessing coordinated effects in merger proceedings, or the sustainability of an alleged

[1] Footnote 48 also refers to this link, though in the context of technicalities related to the SSNIP test.

collusive agreement in an antitrust proceeding under Article 101. This is because the theory of harm is of the same nature in both cases.

7. Conversely, the assessment of the ability and incentives of firms to enter into vertical or horizontal foreclosure likely warrants different market definition(s). It is in fact common that the assessment of the ability to enter in a particular conduct warrants a different market definition than the assessment of the firm's incentives to do so, or the competitive assessment. This is particularly the case in merger proceedings or abuse cases with vertical or multi-sided dimensions.

8. This incompleteness of paragraph 11, only partly remedied by footnote 20, is unfortunate and, to use an expression coined by Glasner and Sullivan (2020),[2] the reader of the Draft Notice might fall victim to the "*independent market fallacy*".

9. The incompleteness of paragraph 11 is reinforced by paragraph 15, which states that "*the markets defined are often the same across cases and assessments*". While this statement is followed by a dedicated list of exceptions, the document currently does not mention explicitly the theory of harm or the observed conducts among the elements it lists as ones that might lead to different market definitions.

10. In fact, the three types of factors mentioned in paragraph 15 directly relate to theories of harm and conducts, but without acknowledging it. For instance, the Commission refers to the "*parameters of competition*" to justify the definition of different markets. It bases its analysis, in footnote 25, on M.7932 – *Dow / DuPont*. In this case, the Commission assessed the static unilateral effects based on refined classifications of crop/pest combinations. In addition, the Commission was concerned that the merger would reduce rivalry in innovation, to the detriment of consumers. The Commission assessed this dynamic impact based on the parties' positions at more aggregated levels and justified this approach "*because innovation is an important parameter of competition in the crop protection industry*".[3]

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[2] Glasner, David and Sean Sullivan: "The Logic of Market Definition", *Antitrust Law Journal*, 83(2), 2020, pages 293-338.

[3] COMP/M.7932 – *Dow / DuPont*, paragraph 2003.

11. The justification of this reasoning does not seem entirely correct to us. Firms do not compete in innovation. Instead, firms compete to sell products or services to customers, and innovation is a means to this end. The expected competition they will face determines the intensity of their R&D. Firms can be pushed to innovate by the fear that other firms will, putting them at a competitive disadvantage if they then fail to do so as well. When two firms merge, each of them stops being concerned about successful innovation by the other entity to the merger. This might lead to reduced incentives to innovate for the merged entity (the literature has recently emphasized that this direct unilateral effect on innovation is not always of a large magnitude and that this is not the only effect to consider[4]). The assessment of historical disaggregated data of R&D for products that do not yet exist is impossible. Besides, R&D is often to a large extent fungible between different classes of drugs/chemicals/crops. It is therefore justified to assess the impact on innovation at more aggregated levels relevant for R&D (from a supply perspective), and where robust data exists. However, what guides this choice is the nature of the theory of harm and not the existence of alleged different parameters of competition (as innovation is in fact not a parameter of competition).

12. In the second example of paragraph 15, the European Commission mentions the "*undertakings involved*" as relevant, based on two telecom examples in footnote 26. The example emphasises that substitution patterns might be asymmetric: residential customers might consider mobile internet access as an alternative (provided that speed and prices are attractive), while mobile customers might not consider fixed internet as an alternative (because what they need is to access the internet exactly when they are not at home). This means that the result of a SSNIP test might depend on the initial candidate relevant market. While all this reasoning seems correct, it in fact means that the two cases mentioned by the

[4] See for example Jullien, Bruno and Yassine Lefouili: "Horizontal Mergers and Innovation", *Journal of Competition Law & Economics*, Volume 14, Issue 3, Pages 364–392.

Commission relate to two different theories of harm: the ability and incentives of market players to increase prices for mobile or fixed internet access.

13. The third example is of a different nature, as it mostly means that market conditions evolve over time and differ between places, such that market definition at one point in time in one place might differ from the market definition somewhere else at the same time or at a different point in time, even for the same "product". There is nothing wrong with that. As Paul Samuelson put it: "W*hen the facts change, I change my mind. What do you do sir?*" The European Commission focuses its examples in footnote 27 on geographic markets, but the argument is in fact more general. The same logic applies to product markets: to follow the previous example of telecoms, mobile internet is more likely to be an alternative for residential users when technology moves from 3G to 4G and even more from 4G to 5G. Therefore, in essence, the third item of paragraph 15 is conceptually closer to the items in paragraph 16 than to the two previous items in paragraph 15.

14. However, both the third item of paragraph 15 and paragraph 16 as a whole also relate to theories of harm as some firms have an influence on the way markets develop. The simplest example here is a drug manufacturer preventing the emergence of molecular competition by preventing generic entry. Another one is the one of firms pushing markets into closed system competition when open system competition would be possible and more beneficial to consumers.[5] Last, firms may also have an influence on the way cross-border or regional trade emerges. In this context, the theory of harm has a dramatic influence on the way competition agencies should assess the influence of time, market offerings and/or likelihood of entry on market definition.

15. As a conclusion, the Draft Notice includes welcome clarifications, in particular footnote 20. However, we suggest that further conceptual clarifications are necessary to fully embrace the correct reasoning behind the European

[5] See also Section 4.5 of the Draft Notice.

Commission's recent decisional practice. This clarification would be relevant for all stakeholders, including National Competition Agencies.

The definition of relevant geographically differentiated markets and the computation of market shares

16. The Draft Notice provides, in paragraphs 73-74, welcome guidance on the definition of relevant geographically differentiated markets and introduces the notion of catchment areas. Geography and the location of the competitors' premises are often significant factors in the brick-and-mortar retail sector as well as in industrial sectors.[6] In addition, the Commission has developed different approaches in its decisional practice, mostly for merger proceedings.

17. In particular, the Draft Notice emphasises in paragraph 74 that, "[w]*hile it is often preferable to assess competitive conditions at each customer location, it may not be possible to draw catchment areas around customer locations* [...]. *For practical purposes, the Commission may therefore draw catchment areas around supplier locations.*" This needs to be read in conjunction with the Commission's recent practice to compute metrics based on suppliers' presence in such so-called supplier-centric catchment areas, sometimes weighted by sales value or volume, which the Commission then considers to be "market shares" and which it uses to assess market power.

18. However, defining relevant geographic markets based on the so-called supplier-centric catchment areas is at odds with the principles of market definition set out in the Draft Notice, which are customer-centric. Besides, the metrics typically computed by the Commission based on these supply areas do not constitute approximations of market shares, and they normally do not reflect the relative market power of suppliers in the relevant market.

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[6] Distance is not conceptually different from the other dimensions of customer tastes. However, it is more common to measure distances between customers and retailers or wholesalers than to be able to directly assess customers' preferences in other dimensions. Nevertheless, whenever quantitative information about customer tastes is available, this should also influence the discussion on market definition and competitive assessment, in particular in merger proceedings, and a significant portion of our comments apply to this situation as well.

19. To illustrate this, let us discuss the case of a retailer of a homogenous product (the reference retailer) located on the only road of a region. Let us assume that the European Commission intends to focus on a catchment area of 10 minutes driving time. Let us delineate three different scenarii depending on the location of the other retailers:

    19.1. all competitors are located at the exact same place as the reference retailer (a situation in which one would expect head-to-head competition across all retailers);

    19.2. all competitors are located at the same location but exactly at 10 minutes from the reference retailer (in which case the reference retailer might be insulated from the expected fierce competition amongst the other retailers);

    19.3. all competitors are evenly distributed in both directions within 10 minutes of the reference retailer (likely leading to a level of competitive constraint imposed on the reference retailer by its competitors that lies in between the two preceding situations).

20. However, using its supply-centric and "presence" approach, the Commission will consider that all retailers on the right or on the left of the reference retailer belong to the same relevant geographic market, irrespective of their actual position, as long as the journey to the reference retailer's position takes less than 10 minutes.

21. Moreover, customers located in these supplier-centric catchment areas typically face significantly different competition conditions. In the example described in paragraph 19.2, a customer located at the same place of the road as all competitors to the reference retailer is likely to benefit from fierce competition between these competitors. On the other hand, a customer located at the other side of the road, and who can either supply from the reference retailer located at 10 minutes or from other competitors located at 20 minutes, is likely to face

higher prices from the reference retailer.[7] This illustrates the inadequacy of supplier-centric catchment areas to form the basis of the relevant geographic market in geographically differentiated markets.

22. More importantly, the assumption made by the European Commission in paragraph 74 is, in fact, debatable. It is generally possible to draw catchment areas around each customer if there exist a limited number of industrial customers, even if this number is large.[8] It is also possible to draw catchment areas around an arbitrarily small grid of representative customers in the case of consumer goods. It is also possible to compute metrics tantamount to market shares based on assumptions that are not more fragile than those regularly used by the European Commission in other instances.

23. Besides, as described in Section 4.1 of the Draft Notice, market shares are not particularly useful in the context of strong differentiation, which is of course always present in the cases we just described. In such cases, a robust direct competitive assessment is usually more useful than market shares. In the case of geographic differentiation, it is therefore particularly useful to directly make a competitive assessment based on the analysis of how the merger affects consumer choices.

24. For these reasons, we encourage the European Commission to acknowledge the clear limitations of its recent approach to geographic markets in the Draft Notice, to admit that the case of geographic differentiation falls within the conclusions of Section 4.1, and to favour alternative approaches, typically customer-centric ones, to make a proper competitive assessment in cases with strong geographic differentiation.

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7 If the retailer cannot price discriminate customers, it is likely to have larger prices overall, due to this captive demand.

8 See, for example, COMP/M.3976 – *Omya / Huber*.

The market definition for multi-sided platforms

25. The Draft Notice's discussion of multi-sided platforms in Section 4.4 is a welcome addition, given their importance in the modern economy.

26. It is however unfortunate that the Draft Notice uses AT.34579 – *MasterCard* as an example of situations in which the two sides of the platforms belong to separate relevant markets. The payment card industry investigated in AT.34579 – *MasterCard* is, indeed, a very peculiar case of a two-sided platform. MasterCard's four-party scheme connects not only two different user groups, but two groups of users on each side of the payment (and hence four user groups overall): accepting banks and merchants, customers and issuing banks. Moreover, most banks operate as both issuing and accepting banks and, therefore, these "two sides" are likely to have largely identical alternatives when considering payment cards. For these reasons, the Draft Notice would benefit from including a different example, for instance the case of third party merchants and customers in a hybrid platform.

27. Moreover, let us assume that a platform has a supplier side and a customer side, and that this platform is dominant on the supplier-side but not on the customer-side. Let us assume also that the platform develops a conduct with respect to its suppliers, which the Commission believes could constitute an abuse of a dominant position. Paragraph 94 of 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 and/or in the competitive assessment*". In the above example, paragraph 94 seems to suggest that the Commission would consider the extent to which buyers' behaviour limits the ability of the platform to exploit its positions on the seller side in both the dominance and competitive assessments. We believe that this is the correct approach, and it would be useful if the Draft Notice could clarify this point.

The reflection of capacity, captive production and merchant sales in market shares

28. Markets with vertically integrated firms are often prone to discussions on how to adequately reflect the firms' market position and power at different levels of the value chain, in particular when some firms only supply intermediate products internally while others sell these intermediate products (merchant sales) to suppliers with which they compete further down the value chain.

29. In a recent case, M.8674 – *BASF / Solvay's Polyamide Business*, the Commission discussed extensively the benefits of using various market share measures in merger proceedings involving vertically integrated firms: merchant sales shares, capacity shares, and the sum of merchant sales and captive production.[9] Merchant sales, which include sales to third parties and imports into the relevant geographical market considered, typically attempt to capture the direct constraints exerted on the merchant market. Moreover, firms may exert some constraints on merchant market prices whenever they have (or are perceived as having) the ability to participate or to expand their sales in such market, even though they might not be active on this market. This can be reflected using capacity shares, which attempt to reflect the production capabilities within the relevant geographical market. Eventually, vertically integrated firms may exert indirect constraints on the price of intermediate merchant markets if they compete with merchant market customers (or these customers' customers) further down the value chain. The third market share measure above attempts to capture this effect by including both the sales to third parties and internal or captive consumption used by vertically integrated firms, in the relevant geographical market considered.

30. The Draft Notice mentions, in paragraph 107, the possibility to use market shares based on capacity. It also refers to the case M.8674 – *BASF / Solvay's Polyamide Business* in footnote 127. However, the Draft Notice does not describe in which

[9] COMP/M.8674 – *BASF / Solvay's Polyamide Business*, paragraphs 455-461, available at https://ec.europa.eu/competition/mergers/cases/decisions/m8674_3832_3.pdf.

specific context it would consider capacity as relevant. More generally, it does not make the link between the metrics it proposes to compute and the competitive concerns, i.e. the theory of harm it intends to investigate. Whether captive sales or capacity matters certainly depends on the theory of harm, and for instance, on whether this theory is horizontal or vertical by nature.

31. We would therefore invite the Commission to reflect its recent decision practice in the Draft Notice, and to link this practice with the theories of harm.

The importance of the quality of translations

32. Our experience is that national language versions are widely used in some jurisdictions and imperfections in translation can jeopardise the cohesion of interpretation and compliance across jurisdictions in the European Union. We have noticed some translation issues with various languages. We illustrate these issues with a few examples identified in the Polish version of the Draft Notice. We invite the Commission to ensure that the letter and spirit of the English version is correctly reflected in all other languages, for instance by the review of each version by native speaker case officers.

Table 1 Selection of translation issues in Polish

Original word or phrase in English	Paragraph where it is first mentioned	Current translation in Polish	Suggested translation in Polish
competitive assessment	paragraph 13	ocena konkurencji	ocena wpływu na konkurencję
competitive constraints	paragraph 13	ograniczenia konkurencji	źródła presji konkurencyjnej / ograniczenia konkurencyjne
Merger Regulation	footnote 8	rozporządzenie w sprawie kontroli łączenia przedsiębiorstw	rozporządzenie w sprawie kontroli koncentracji przedsiębiorstw
customers	paragraph 5	klienci	odbiorcy, nabywcy
market power	paragraph 7	władza rynkowa	siła rynkowa
image conveyed	paragraph 12	przekazywany obraz	przekazywany wizerunek
import	paragraph 42	przywóz	import
product migration	paragraph 52	migracja produktu	migracja popytu na produkt
shipments	paragraph 75	przesyłki	dostawy