



**GSMA Response to the European Commission's consultation
on the Commission Notice on the definition of the relevant
market for the purposes of Community competition law**

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About the GSMA

The GSMA is a global organisation unifying the mobile ecosystem to discover, develop and deliver innovation foundational to positive business environments and societal change. Our vision is to unlock the full power of connectivity so that people, industry, and society thrive. Representing mobile operators and organisations across the mobile ecosystem and adjacent industries, the GSMA delivers for its members across three broad pillars: Connectivity for Good, Industry Services and Solutions, and Outreach. This activity includes advancing policy, tackling today's biggest societal challenges, underpinning the technology and interoperability that make mobile work, and providing the world's largest platform to convene the mobile ecosystem at the MWC and M360 series of events.

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Introductory remarks

The GSMA welcomes the European Commission (the “Commission”)'s consultation on the draft revised Market Definition Notice (the “Draft Notice”). As the GSMA explained in its response to the Commission's public questionnaire in 2020, the 1997 Market Definition Notice (the “Notice”) has provided useful guidance and promoted legal certainty in relation to how authorities and companies should define markets for the purposes of competition law. The GSMA believes it is important that prior to commencing a substantive assessment of a potential theory of harm (whether that be under Article 101, 102 or the EU Merger Regulation), competition authorities take the step of setting a framework within which that assessment should be carried out - i.e. defining the relevant market(s).

Since the adoption of the Notice, digitisation and globalisation of the economy have transformed the way that almost all economic sectors operate. Competition authorities and companies therefore face the challenge of applying existing rules to business models and market structures which have significantly different characteristics and pose different competition problems to those present when the Notice was initially put in place. It is therefore imperative that the Draft Notice recognises the fundamental shift in how markets operate and provides the much-needed guidance in relation to defining digital and digitally enabled markets.

Most notably, telecommunication operators have increasingly been facing competitive constraints from digital players such as OTT (“Over-The-Top”) platforms providing streaming services over the internet and other verticals that rely on mobile and wireless networks. These companies should be included in the market definition of certain telecommunications markets. Therefore, the Commission's acknowledgment that it is not bound to apply the definition of a relevant market from past decisions in future cases is especially relevant, and the GSMA believes that market definition should always be undertaken on a case-by-case basis as the market is continuously evolving.

The GSMA also welcomes the Commission's acknowledgement in para (2) of the Draft Notice that competition policy has a broader contribution to the EU economy and that the Commission recognises the significance of digitalisation and new ways of offering goods and services.

This submission provides the GSMA views on each of the sections of the Draft Notice.

1. Introduction and general principles of market definition

The GSMA appreciates the clarifications in the Draft Notice, in particular regarding digital and multi-sided markets. However, it should be noted that a strict application of market definition may still be challenging given the specificities of those markets. The GSMA would

query whether market definition relying solely on market shares can still consistently provide the basis for traditional market power assessments. The GSMA also considers that the Draft Notice should go beyond the concept of market shares, and introduce specific guidance tailored to closed or quasi-closed ecosystems which are characterised by having such extensive market power that they are unavoidable trading partners. Given the specificities of those markets, other factors such as competitive constraints, barriers to entry and conglomerate effects are more appropriate measures. Failure to consider these factors results in a real risk that the market power of these ecosystems is not captured in the calculation of market shares, which rely heavily on a precise market definition.

Market definition is a core tool with many implications for competition policy. Care should be taken to guarantee the utmost consistency between the Draft Notice, the forthcoming Horizontal Guidelines, recently adopted legislation such as the Digital Markets Act, and future competition rules such as the expected review of the EU Merger Regulation (EUMR).

2. Concept of the relevant market and general methodology

In general terms, the GSMA welcomes the update of section 2 of the Draft Notice.

First, the concept of product and geographic market remain consistent whilst there is an explicit recognition of temporal considerations (e.g. seasonality, peak/off-peak times).

As regards the general methodology for market definition:

- Para (25): as established in point 16 of the Draft Notice, the Commission may take into account expected transitions in the structure of a market when the case calls for a forward-looking assessment. Following the Commission's logic, the GSMA believes that potential competition should be part of market definition when it is likely to affect the structure of a market and to become a competitive constraint that the undertakings involved face when offering certain products to customers in a certain area. This is particularly the case for digital streaming platforms in audio-visual markets, and the emergence of OTT/verticals competing with traditional operators in mobile markets. Potential competition also plays a relevant role in merger control assessment of so-called "killer acquisitions". To this end, the Commission should introduce a benchmark to assess whether potential competition should be considered in market definition as opposed to more remote competitive constraints. For example, internal documents of undertakings operating in the market might point to potential competitors that are likely to become a competitive constraint in the relevant product/geographic market.

- Para (26): the GSMA welcomes the explicit recognition of price discrimination between different customer groups. For example, in the telecommunications sector, the customers of one product or geographic market may be willing to pay more for a differentiated service (e.g. more capacity). It is commonly accepted that there may be different prices for the same product. Caution should therefore be exercised when using price discrimination to define a separate market, and such an exercise should be confined to the specific circumstances identified. In practice, price discrimination will not be applied in the same manner across a market and assessing the delineation of markets based on price discrimination would therefore lead to the definition of overly narrow markets.

As regards the general methodology for defining product markets:

- Para (29): the GSMA welcomes the fact that the Commission considers competitive parameters other than price, such as quality and innovation when defining product markets. In this regard, the GSMA believes that sustainability, privacy and consumer choice should be given appropriate weighting (which in relevant cases might be equal to or even greater than the weighting given to pricing) when considering the assessment of the relevant product market.
- Paras (31) and (32): as a conceptual principle for defining product markets, the SSNIP test remains a useful concept. However, the GSMA welcomes the Commission's explicit acknowledgement of the limitations in applying the SSNIP test when parameters such as quality and innovation are more relevant than price in a certain market. Additionally, the GSMA supports the Commission's explicit recognition that in such cases there is no obligation to use the SSNIP test. Likewise, the substitutability logics of the SSNIP test should be adapted with non-monetary indicators. In addition to the "SSNDQ" test for quality, as referred in the footnote 47 of the Draft Notice, which should be expanded to give relevance to any change in quality (including either a decrease or increase), other indicators should be considered such as attention e.g. using the "advertising load" of a service as the key variable instead of price changes ("Attentional-SSNIP"), or changes in other non-monetary costs such as privacy (Small but Significant and Non-transitory Increase in Costs or "SSNIC").
- Para (33): the wording of this para seems to suggest that the Commission will give the same value to empirical evidence as to available qualitative evidence. For the sake of legal certainty, the GSMA would welcome further guidance from the Commission on the hierarchy of the evidence that will be used to inform market definition.
- Para (42): as regards the general methodology for defining geographic markets, the GSMA welcomes the additional guidance⁵ on imports, swing lines, and other relevant

factors in the assessment (i.e. presence of suppliers in different geographies, preferences and trade barriers).

3. Process of defining markets

Overall, the GSMA agrees with the Commission on the set of parameters or criteria the Commission might rely on to define relevant markets. Nevertheless, with those parameters in mind, the GSMA would like to make the following remarks:

- Para (55): the Commission identifies rapidly evolving industries as those characterised by fast technological progress, new or newly developed products or processes, as well as technological or regulatory changes that may lead to structural market transitions which affect existing competitive dynamics. In this sense, the GSMA believes that the Draft Notice fails to recognise other scenarios in which technological changes do not happen in rapidly evolving industries, especially in convergent markets or industries (e.g., markets that interrelate and go in the same direction). These trends are breaking traditional business silos: the digital ecosystem is not the result of multiple separate markets but instead a cohesive system with layered interrelations. Product market definition should therefore include convergent products and services into the same market regardless of the technology in which it is based. For instance, the SMP Guidelines already recognise such issues when defining the product market as they state that “product substitutability between different services may arise through the increasing convergence of various technologies, which often allows operators to offer similar retail product bundles. The use of digital transmission systems, for example, can lead to similarities in the performance and characteristics of network services using distinct technologies”. This is the case of OTTs that compete in the same market as traditional telecom operators but through different types of technology (while OTTs provide services over the internet, telecom operators provide their services over IPTV - internet protocol television - copper or satellite). Similarly, some verticals are acquiring spectrum to supplement telecoms in niche areas. However, in terms of demand substitutability, customers regard the service independently of the technology used to provide it. This should be taken into consideration for market definition to reflect the dynamics and realities of the market in question.
- Para (56): GSMA welcomes that industry associations’ views are specifically referred to as a way to provide useful information on the market and evidence on competitive constraints.
- Para (71): to define geographic markets, the Commission considers the barriers and costs associated with supplying customers⁶ in different areas. In this sense, the GSMA

believes it is important to include the potential competition to define the geographic boundaries in a market. As regards the telecommunications sector, regulation generally determines the geographic market.

- Para (76): as to the hierarchy of evidence, it would be useful if the Commission provided some specific guidance on the most reliable types of evidence according to the case.

3.4 Gathering and evaluating evidence

With regards to the evidence gathering process to define relevant markets, the GSMA would like to draw the Commission's attention to the way it makes information requests, not only to the undertakings that are the object of the assessment, but particularly for third party companies. It is important that the Commission targets RFIs appropriately to avoid an extensive and cumbersome process for undertakings in the collection and process of the data requested.

The GSMA is of the view that the Commission should find a way to reduce the administrative burden of RFIs used in the assessment of the relevant market. The RFIs, when possible, should be short and self-explanatory, while at the same time avoiding repetitive and inconsistent questions. The extensive amount of detailed information currently requested in the RFIs is, in many cases, neither required nor helpful to obtain a realistic picture of the conditions on the relevant market. Indeed, RFIs are often identical for customers and competitors and therefore are not tailored to the specific market participant being questioned. The burden on business created by these RFIs are consequently disproportionate to the additional value they are presumed to create for the Commission.

In addition, in gathering this evidence, either through meetings or written requests for information, the Commission should approach the issue of market definition openly, using clear and straightforward questions. When the Commission relies on consumer surveys that were not conducted in the context of the investigation at hand, it must carefully scrutinise the data and consider whether it can actually be relied upon for the present purposes.

The GSMA recognises that evidence from internal documents can be taken into account, and the Commission indicates a preference for assessments made prior to any transaction or investigation. The GSMA is therefore of the view that the evidence extracted from internal documents should be considered on a holistic basis, and contradictory views should be weighted accordingly, considering that such assessments are often created with a different goal in mind. The Commission should give appropriate weight to the contextual explanations provided by the parties. This would also ensure that value can reasonably be placed upon such documents by the Commission in its assessment of the parties' motivations.

4. Market definition in specific circumstances

The GSMA understands that under specific circumstances a more detailed assessment of market definition may be required. However, it should be emphasised that this only applies in very exceptional circumstances.

4.1. Market definition in the presence of significant differentiation

The GSMA believes that, overall, very few products will be exactly the same. Therefore, there will almost always be some product features that will be somewhat different. In the majority of cases, it would therefore be too limiting to only consider the closest substitutes as being within the same product or geographic market. The reference to the telecoms industry in footnote 95 is a good example. While the Commission considered whether the mobile retail market could be further split into sub-markets in the T-Mobile NL/Tele2 NL merger, in a different set of circumstances it may be possible for a market to be considered as broader than just mobile retail, especially given the growing trend of convergence and hybrid products. To date, the approach taken by the Commission in various telecoms merger cases where convergence has been considered has demonstrated the nuance and case by case approach required. In general, the GSMA's view is that the delineation of markets should err on the side of a broader market definition, to allow for all relevant competitive factors to be taken into account throughout the analysis process. Independently of the delineation taken, the GSMA agrees that market definition is only a point of departure and that market shares may not be the decisive factor for the determination of market power.

4.2. Market definition in the presence of price discrimination

It is commonly accepted that there may be different prices for the same product. Caution should therefore be exercised when using price discrimination to define a separate market, and such an exercise should be confined to the specific circumstances identified. This is particularly the case when price discrimination is based on geography. In practice, price discrimination will not be applied in the same manner across a market and assessing the delineation of markets based on price discrimination would therefore lead to the definition of overly narrow markets.

4.3. Market definition in the presence of significant investments in R&D

The GSMA would caution looking at nascent R&D as a separate market in all but very specific types of industries. While the GSMA believes that the Commission generally needs to broaden the time horizon for the assessment of markets depending on the characteristics of a specific industry, R&D usually still involves a lot of uncertainty as to whether this will result in a product at all or what form the final product will take. The same goes for innovation, e.g. a pipeline product that is still 15 years away from launch. Therefore, the GSMA's view

is that R&D and future innovation should not be considered at the initial stages of market definition, but instead examined at a later stage of the assessment.

4.4. Market definition in the presence of multi-sided platforms

The GSMA appreciates that the Draft Notice addresses some of the key challenges posed by digital markets and by the digitalisation of other industry sectors, recognising the increased relevance of multi-sided platform-based business models, based on - often closed - ecosystems made up of an ever-increasing number of linked products and services. In particular, the GSMA welcomes a sufficiently flexible definition for multi-sided platforms being provided, and a recognition that the Commission will take into account the “indirect network effects” between user groups on different sides of the platform when defining relevant markets.

It is also positive that the Commission provides for possible definitions of the relevant product market for the products offered by the platforms (“platform as a whole” and “separate relevant product markets”) and will decide which one to apply depending on the facts of the case (i.e. following a case-by-case analysis); providing for explanation on the factors to consider and making reference to the related case law.

The GSMA also welcomes the greater emphasis given to “non-price elements”, and in particular the fact that zero monetary prices are considered as an integral part of multi-sided platforms’ business strategy i.e. the fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product. This is of course correct and to be welcomed, although, in those cases, the non-price elements relevant for the assessment of substitution cited in para 98 should be integrated to include dynamic competition resulting from fast-paced innovation, accumulation and monetisation of data, and conglomerate effects.

In fact, the demand side should consider that often price is only one of several competitive factors and determinants of substitution. This is important when analysing markets with “zero-priced” products, where consumers might choose one product over the other based on e.g. the level of data protection or the quality of the offer. The Draft Notice should explicitly allow for the consideration of such additional parameters as data, economies of scale and scope, timing as to parameters to analyse the supply-side substitutability, speed of consumer habits and tipping. In addition to direct and indirect network effects, barriers to entry and multi-homing must also be recognised. An example of this is in person-to-person messaging services in which consumers are understood to choose between competing zero-priced services based on perceived enhanced security protections.

Regarding the test to be used in cases of zero monetary price products, and as set out above,

the substitutability logics of the SSNIP test should be adapted with non-monetary indicators such as attention (Attentional-SSNIP), and a variation of metrics should be applied, including non-monetary costs such as privacy (SSNIC). Quality considerations must also allow for both increases and decreases in quality (SSNIQ/SSNDQ).

Para 98 states that in those cases the Commission “may” also consider alternatives to the SSNIP framework, namely by assessing the switching behaviour of customers in response to a small but significant non-transitory decrease of quality (“SSNDQ”). Here, the GSMA believes that the word “may” should be substituted with the word “shall also consider”, to ensure that the Commission will always “consider” (i.e., at least, take into consideration) alternative techniques, with its discretionary power to choose the appropriate tool on a case-by-case basis.

4.5 Market definition in the presence of after markets, bundles and digital ecosystems

The GSMA appreciates that the new chapter 4.5 reflects relevant dynamics developed in the internal market (“after-market”, “bundle” and “digital ecosystems”). The concepts are explicitly defined and seem to be sufficiently clear and flexible, leaving the Commission with the ability to determine market definition on a case-by-case basis, depending on the specific case at hand. Also, the GSMA appreciates the Commission's attempts to define broader markets rather than narrow/smaller markets when different products are involved.

As per the GSMA’s response to the Commission’s public questionnaire in 2020, defining a product or service as a bundle or as part of a wider product and service eco-system, can be of decisive relevance during the market assessment phase. This is particularly the case given the convergence and leveraging strategies relevant to digital markets, particularly by gatekeeper platform operators who often single-home or use customer data to link different products and services, making it difficult for users to switch (lock-in effect).

5. Market shares

The GSMA welcomes the clarification that market shares may not always be the best indicator of market power and therefore should not be the decisive criterion in all circumstances.

In the previous consultation, the GSMA had asked the Commission to provide guidance on how to calculate market shares when sales volumes and values were not reliable, as is the case in zero-priced and multi-sided markets. The GSMA highlighted that in these cases, alternative parameters could help calculate market shares in the absence of a monetary price, such as the time spent on a platform, numbers of users, and the amount of data a user provides compared to another platform. For this¹⁰ reason, the GSMA welcomes, in particular,

the new para (107) of section 5 of the Draft Notice, detailing the complementary metrics that could be taken into account in addition to sales. Indeed, additional metrics such as the number of active users, number of visits, time spent or audience numbers are particularly relevant for calculating market shares in digital markets.

Although the GSMA appreciates the clarifications the Draft Notice brings with regards to digital and multi-sided markets, it should be noted that a strict application of market definition may still be difficult given the specificities of those markets. It is therefore questionable whether defining a market based on an assessment of market shares can still consistently provide the basis for traditional market power assessments. As emphasised above, the Draft Notice should introduce specific guidance tailored to closed or quasi-closed ecosystems which are characterised by having such extensive market power that they are unavoidable trading partners. Given the specificities of those markets, other factors such as competitive constraints, barriers to entry and conglomerate effects are more appropriate measures. Failure to consider these factors results in a real risk that the market power of these ecosystems is not captured in the calculation of market shares, which rely heavily on a precise market definition. It would therefore be more effective to focus the assessment of other factors such as competitive constraints, barriers to entry and conglomerates effects.