

## **ETNO comments on the draft European Commission Notice on the definition of the relevant market for the purposes of Union competition law**

January 2023

### **General observations**

ETNO welcomes the revision of the Notice on the definition of the relevant market, in light of the new challenges faced by many sectors, including in particular the telecom sector. We welcome the fact that this updated guidance takes into account the significant developments of the past twenty years, including the digitalisation of services and the globalised nature of commercial exchanges.

Although we appreciate 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, and that it is even questionable whether market definition relying on market shares can still consistently provide the basis for traditional market power assessments. Beyond the concept of market shares, the Notice could also introduce specific guidance to apprehend closed or almost closed ecosystems which are characterised by having such market power that they are unavoidable. Given the specificities of those markets, other factors such as competitive constraints, barriers to entry and conglomerates effects are better placed. Indeed, the risk is that the market power of the ecosystem would not necessarily be captured in the calculation of market shares which relies heavily on a precise market definition and which often cannot catch the whole ecosystem.

Moreover, Market Definition is a core tool with many implications for competition policy, including for horizontal cooperation agreements. As per the draft Horizontal Guidelines, the relevant market for the purpose of applying Article 101 to such agreements will be defined on the basis of the Notice on Market Definition. Care should be taken to guarantee the utmost consistency between the Notice and the upcoming Horizontal Guidelines, but also with recently adopted legislation such as the Digital Markets Act, and future competition rules such as a possible review of the EU Merger Regulation (EUMR).

Lastly, ETNO welcomes that the draft Notice specifies the importance of EU competition law to contribute to the European Commission's objectives, including the twin green and digital transitions and the resilience of the single market (point 2).

### **Concept of the relevant market and general methodology**

In general terms, ETNO welcomes the update of section 2 of the Notice:

- First, the concept of product and geographic market remains consistent whilst there is an explicit recognition to temporal considerations (e.g. seasonality, peak/off-peak times).
- As regards the general methodology for market definition:



- Point 25: as established in point 16 of the Draft, 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, we believe that potential competition should be part of market definition when it is likely to affect the structure of a market and to become an immediate competitive constraint that the undertakings involved face when offering certain products to customers in a certain area. This is the particular case of digital streaming platforms in audio-visual markets, or the competitive constraints posed to telecommunications operators by 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. In addition, potential competition has the capability to affect the structure of the market in the 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 an immediate competitive constraint in the relevant product/geographic market; market reports or academic reports can also give an overview of the rapid evolution of markets.
- Point 26: we welcome the explicit recognition that prices may differ by customer group (price discrimination). For example, in the telecommunications sector, the customers of one product/geographic market can be willing to pay more for a differentiated service (e.g. more capacity).
- As regards the General methodology for defining product markets:
  - Point 29: we welcome the fact that the Commission considers competitive parameters other than price, such as quality and innovation when defining product markets. In this regard, we believe that sustainability, privacy and consumer choice should be equally considered in the assessment of the relevant product market.
  - Points 31 and 32: SSNIP test remains as conceptual principle for defining product markets and should be retained as useful concept. However, we welcome that the Commission explicitly acknowledges the limitations in applying SSNIP when parameters such as quality and innovation are more relevant than price in a certain market. Additionally, it is positive that the Commission explicitly recognizes that in such cases there is no obligation to use SSNIP. Likewise, the substitutability logics of the SSNIP test should be adapted with non-monetary indicators, apart from the SSNDQ test for quality as referred in the footnote 47 of the Draft and expanded to give relevance to any change in quality (both decrease or increase). Other indicators such as attention (Attentional-SSNIP) or non-monetary cost such as privacy (Small but Significant and Non-transitory Increase in Costs, SSNIC) might be considered.



- As regards the general methodology for defining geographic markets, we welcome the additional guidance on imports, swing lines, and other relevant factors in the assessment (i.e. presence of suppliers in different geographies, preferences and trade barriers).

## Process of defining markets

(3.1) ETNO welcomes that the European Commission elaborates on the process of defining markets and the evidence to be provided. First of all, the European Commission indicates that in many cases a market definition can be left open, which is indeed common practice. While this might be an efficient approach for the European Commission, it does not preclude the European Commission from requesting a lot of market information from the parties concerned and other parties operating in the market. Due to the burdensome process for these parties, ETNO proposes that the European Commission should avoid extensive and cumbersome information requests if the European Commission aims to not specifically define the markets.

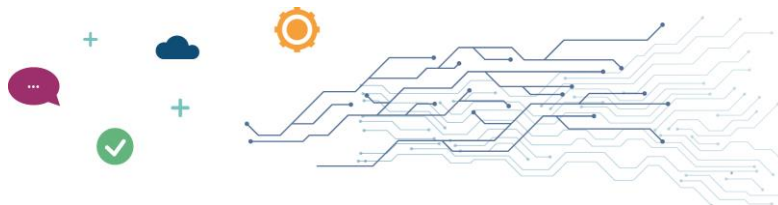
(3.2) The European Commission describes the way in which product markets can be defined from a demand and supply perspective. ETNO calls on the Commission to take a broad view on the evidence, meaning that the Commission should also consider evidence beyond the SSNIP test (e.g. product characteristics, use, etc.). Quantitative criteria should only be used if they are relevant to the respective markets. Therefore, the European Commission should not rely too much on the SSNIP test unless there is an adjustment mechanism to calculate the value so that services can be made comparable. ETNO feels that more studies are needed by academics and authorities to assess the factors beyond price that could be used as robust evidence for defining markets. More guidance on the robustness criteria of the European Commission should be developed especially for markets with fast technological developments, which might lead to switching demand to potential substitutes (see e.g. messenger services provided by online platform providers that should be taken into account when defining the electronic communications services market even if pricing methods in digital markets are different).

ETNO welcomes that industry associations' views are mentioned as a way to provide useful information on the market and evidence on competitive constraints (point 56).

(3.3) ETNO welcomes that the European Commission in its assessment of the geographical market takes into account the processes of market integration, and the removal of regulatory barriers as is more and more the situation in the telecommunication market.

(3.4) ETNO supports that data gathered by national regulatory authorities or prepared for the national regulatory authorities is used by the European Commission as evidence for the definition of the relevant markets on regulated markets or on markets monitored by the national regulatory authorities. However, the definition of relevant markets in the telecommunications sector might differ given its ex-ante approach as has been set forth by the European Commission in its Guidelines on Significant Market Power (OJ 2018 C 159/1).

ETNO agrees that evidence from internal documents should be taken into account when defining markets. The European Commission indicates to prefer assessments made prior to the transaction or investigation. ETNO believes that these assessments might indeed be useful, provided that the



European Commission takes into account that such assessments might have been prepared for different goals, which may make it difficult for the company to fit the data into the format the European Commission wishes to use for its market assessment. ETNO feels that it will often not be necessary to fit the internal data exactly in the requested format as other ways of gathering evidence, like interviews on internal documents, could provide the European Commission with insight into the market definition.

### **Information gathering process and evaluating evidence**

With regard to the evidence gathering process to define relevant markets, ETNO would like to emphasize the need for the European Commission to approach appropriately requests for information, especially for third party companies. It is important that the European Commission targets RFIs appropriately to avoid an extensive and cumbersome process for undertakings in the collection and process of the data requested.

We are of the view that the European Commission should make efforts in reducing the administrative burden of RFIs used in the assessment of the relevant market. 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. Therefore, to the extent possible, RFIs should be shorter and self-explanatory, avoiding repetitive and inconsistent questions.

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

ETNO recognizes that evidence from internal documents can be taken into account, and the European Commission indicates a preference for assessments made prior to any transaction or investigation. In this sense, we are of the view that the evidence extracted from internal documents should be considered on a holistic basis and any contradictory views should be weighted accordingly, considering that such assessments are often created with a different goal in mind. Therefore, paragraph 79 of the Draft Notice would merit a clarification in this sense.

### **Market definition in specific circumstances**

ETNO appreciates the acknowledgement of specific circumstances, however, it should be emphasized that these considerations only apply in very special circumstances.

#### **(4.1) Market definition in the presence of significant differentiation**

In general, very few services and products will be exactly the same, so that there always will be some degree of differentiation. In most cases it would be overly restrictive to only consider the closest



substitutes as being in the same market. For instance, looking at the telecoms industry example of the T-Mobile/Tele2, the Commission's definition of overall retail mobile markets - rather than narrower markets with different mobile products - corresponds to the actual market situation. Actually we observe more and more blurry lines in product markets as we see a growing demand of product bundles.

Therefore, we believe that the delineation of the market should rather err on the side of a broader market definition. In any case, it is right to emphasize that the market definition is only an estimation as point of departure, and therefore, the market shares may provide a less reliable indicator of market power.

#### (4.2) Market definition in the presence of price discrimination

Different prices for the same product can be common and the result of competition. Therefore, price discrimination as a criterion to define a separate market should only be applied in very exceptional circumstances. In particular, the difference based on location does not necessarily imply that there are different markets. Moreover, depending on the case, looking at the delineation of price discrimination could lead to overly narrow markets.

#### (4.3) Market definition in the presence of significant investments in R&D

In general, ETNO encourages the Commission to broaden the time horizon for the assessment of markets depending on the characteristics of the industry. On the other hand, we would caution to look at early R&D as a separate market. At the early stages, there is still a lot of uncertainty as to whether the process will result in a product at all; how this will emerge; and who potential competitors would be. The same goes for innovation, e.g. a pipeline product that is still 15 years away from launch.

In our view, R&D and future innovation should be considered in the market assessment, but it should not play a role in market definition, apart from very exceptional cases.

#### (4.4) Market definition in the presence of multi-sided platforms

ETNO welcomes that the new chapter 4.4 provides guidance in relation to market definition to some particular cases developed in digital markets (in line with ETNO recommendations highlighted in ETNO Response to the Questionnaire on the Market Definition Notice review submitted in October 2020).

In particular, ETNO appreciates that a definition of multi-sided platform is provided – and seems to be sufficiently open/flexible – and that the Commission will take 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.

Also, it is positive that the Commission provides for two options to define the relevant product market for the products offered by platforms (which are to be considered as “platform as a whole” or defined as “separate relevant product markets”) and that the Commission will decide which option to apply depending on the facts of the case (case by case) and providing for explanation on the factors considered with a reference to the related case law.

We also welcome the greater emphasis given to “non-price elements”:



- 1) Zero monetary prices are considered as an integral part of multi-sided platforms' business strategy, so the fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product.
- 2) In such cases, non-price elements, like the ones cited in point 98, are of course particularly relevant for the assessment of substitution.

However, as new factors emerged in the Digital Economy, said list should also expressly include other indicators to be considered in the market analysis, like monetization of data, data accumulation and conglomerate effects; giving explicit emphasis, for instance, to the conglomerate effects over/due to data accumulation (digital platforms typically offer zero priced services to end-users on one side of the market and monetize the customer data obtained on that side by offering paid services like advertising to business users on the other side).

Also, in digital markets, more emphasis should be given to economies of scale and scope, with timing as a parameter to analyse the supply-side substitutability, speed of consumer habits and tipping

- 3) Furthermore, par. 4.4. states that in those cases the Commission "may" also consider alternatives to the SSNIP framework, "namely" by assessing the switching behavior of customers in response to a small but significant non-transitory decrease of quality ("SSNDQ").

Vis-à-vis this last point, ETNO thinks that the word "may" should be substituted with the word "shall", to make sure that the Commission will always "consider" (i.e., at least, take into consideration) alternative techniques.

Moreover, as per ETNO Response 2020, when there is free side, 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 also non-monetary cost such as privacy (SSNIC), besides the already mentioned quality, where any changes could be relevant, both increase or decrease (SSNIQ/SSNDQ) (see ETNO Response 2020 - Question III.11).

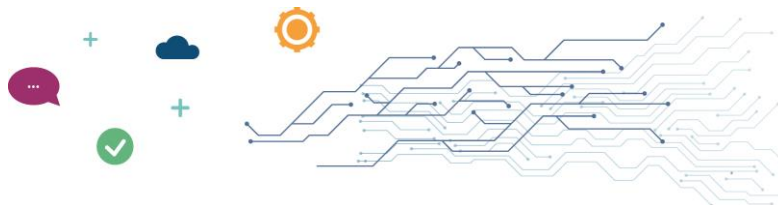
#### (4.5) Market definition in the presence of after markets, bundles and digital ecosystems

ETNO welcomes also the new chapter 4.5 that considers some dynamics developed in the internal market, such as the three situations therein described, linked by the presence of more than one relevant product.

The concepts individuated – "after market", "bundle" and "digital ecosystems" – seem sufficiently clear and flexible. The same can be said about the possible definition of the relevant product markets for which the Commission provides for some options, but which is still rightly left to the determination in the specific case. Also, ETNO welcomes the Commission's attempts to define broader markets rather than narrow/smaller markets when different products are involved. In particular, the new point 103 introduces specific guidance to apprehend closed or almost closed ecosystems which are characterized by having such market power that they are unavoidable.

Given the specificities of those markets, we highlight that factor such as competitive constraints, barriers to entry and conglomerates effects should be taken into account by the Commission and be expressly mentioned in point 103.





## Market shares

In the previous consultation, ETNO had asked the Commission to provide guidance on how to calculate market shares when sales volumes and values were not a reliable as it is the case in zero-priced and multi-sided markets. We had highlighted that in these cases, other kinds of parameters could help calculate market shares in the absence of a monetary price, such as the time spent in a platform, numbers of users, the amount of data a user provides compared to another platform. For this reason, we particularly welcome the new point 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 we appreciate 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, and that it is even questionable whether market definition relying on market shares can still consistently provide the basis for traditional market power assessments. Beyond the concept of market shares, the Notice could also introduce specific guidance to apprehend closed or almost closed ecosystems which are characterized by having such market power that they are unavoidable. Given the specificities of those markets, other factors such as competitive constraints, barriers to entry and conglomerates effects are better placed. Indeed, the risk is that the market power of the ecosystem would not necessarily be captured in the calculation of market shares which heavily relies on a precise market definition – which often cannot catch the whole ecosystem. In those cases, it may be more effective to put more emphasis on the assessment of other factors such as competitive constraints, barriers to entry and conglomerates effects.