

Summary of the contributions of the National Competition Authorities to the Evaluation of the Market Definition Notice

This document contains a factual summary of the contributions made by National Competition Authorities. It does not represent the official position of the European Commission or its services and does not prejudge the European Commission's findings which it will publish in a Staff Working Document at the end of the evaluation.

The European Commission ("the Commission") is currently evaluating the Commission Notice on the definition of relevant market for the purposes of Community competition law (the "Market Definition Notice" or the "Notice").¹

The Market Definition Notice was published in 1997 to provide guidance as to how the Commission applies the concept of relevant product and geographic market in its enforcement of EU competition law. The Commission expected to increase the transparency of its policy and decision-making in competition law by rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision.

The purpose of this Evaluation is to gather evidence on the functioning of the Market Definition Notice in order to assess whether this Notice is still "fit-for-purpose" in light of developments since its adoption in 1997. In line with Better Regulation Principles,² the Evaluation covers the following evaluation criteria:

1. **Relevance:** Is the objective of the Market Definition Notice to provide correct, comprehensive and clear guidance on market definition still pertinent, taking into account market developments and evolving techniques, for instance for assessing competitive effects?
2. **Effectiveness:** To what extent has the Market Definition Notice met its objective of providing correct, comprehensive and clear guidance to all stakeholders, taking into account market developments, evolving approaches to market definition and evolving quantitative and qualitative techniques used in defining markets since 1997?
3. **Efficiency:** Are the costs involved in applying the Market Definition Notice proportionate to the benefits?
4. **Coherence:** How well have the different components of the Market Definition Notice operated together? Is the Notice in line with the judgments of the EU courts and changes in the legal competition framework, and with other instruments of EU competition policy and other EU policies?
5. **EU added value:** To what extent has the Market Definition Notice at EU level provided clear added value, for instance by contributing to a consistent approach to market definition by the Commission and the EU national competition authorities?

¹ OJ C 372, 9.12.1997, p. 5–13, available in all EU languages here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29>.

² https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

As part of this assessment, the Commission asked the National Competition Authorities of the European Economic Area and the EFTA Surveillance Authority (jointly referred to as the “NCAs”) to provide their views on the five evaluation criteria.³

The Commission received 29 responses, 27 of which came from EU national competition authorities. This summary outlines the main points raised by the NCAs without regard to the number of contributions addressing a particular point or whether a particular point of view is shared by all the NCAs. The summary also takes into account the views outlined in stand-alone position papers. For issues on which NCAs expressed diverging views, the summary presents both sides of the arguments.

1. General Questions on the Notice

Around half (13) of the NCAs confirmed that they have national guidelines on market definition in place in their jurisdictions, with two additional NCAs flagging that they have plans to adopt such an instrument in the coming months.

The authorities with national guidelines in place are those from Bulgaria,⁴ Croatia,⁵ Finland,⁶ France,⁷ Hungary,⁸ Ireland,⁹ Latvia,¹⁰ Lithuania,¹¹ the Netherlands,¹² Poland,¹³ Portugal,¹⁴ Romania,¹⁵ as well as the EFTA Surveillance Authority.¹⁶ The remaining 14 NCAs do not have national market definition guidelines in place. An NCA not having a notice on market definition of its own flagged that it was much more efficient for a small NCA to rely on European case law or European soft law than to issue their own guidelines.

When asked whether their existing or planned national guidelines on market definition contain guidance that differs from the Notice, only four NCAs among those expressing a view replied “partially” and none replied in the negative.

Most national notices focus on market definition for the purposes of national merger control procedures and their structure is largely similar to that of the Market Definition Notice. Some,

³ In addition to the general questionnaire on the five evaluation criteria, the Commission also asked the NCAs to provide information on national cases and judgments where market definition played a central role. The Commission will analyse those replies separately and reflect the results in its Staff Working Document.

⁴ https://www.cpc.bg/storage/file/Methodology_EN.doc.

⁵ http://www.aztn.hr/uploads/documents/eng/documents/legislation/REGULATION_ON_THE_DEFINITION_OF_RELEVANT_MARKET.pdf.

⁶ <https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/suuntaviivat/en/guidelines-1-2011-mergers.pdf>.

⁷ https://www.autoritedelaconcurrence.fr/sites/default/files/Lignes_directrices_concentrations_2020.pdf.

⁸ https://www.gvh.hu/pfile/file?path=/szakmai_felhasznaloknak/osszefonodasok_fuziok/Szakmaifelhasznalok_fuziok_piacmeghatarozas_2010_09_16.pdf&inline=true.

⁹ <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2017/04/CCPC-Merger-Guidelines.pdf>.

¹⁰ https://www.kp.gov.lv/oldfiles/38/citi%2Fvadlinijas_konkreta_tirgus_noteiksanai_2016.pdf.

¹¹ <https://www.e-tar.lt/portal/lt/legalAct/c76622a0166c11ea9d279ea27696ab7b/asr>.

¹² <https://www.acm.nl/sites/default/files/documents/werkwijze-analyse-productmarkten-msz.pdf> for mergers in the medical care sector.

¹³ <https://www.uokik.gov.pl/download.php?plik=11899>.

¹⁴ http://www.concorrenca.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Linhas%20de%20Orienta%C3%A7%C3%A3o%20para%20a%20An%C3%A1lise%20Econ%C3%B3mica%20de%20Opera%C3%A7%C3%B5es%20de%20Concentra%C3%A7%C3%A3o%20Horizontais.pdf.

¹⁵ http://www.consiliulconcurentei.ro/wp-content/uploads/2020/02/ordin_nr388_din_05082010_cu_instruțiuni.pdf.

¹⁶ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:200:0046:0057:EN:PDF>.

however, differ somewhat from the Notice because they focus on a specific type of case (e.g., the Portuguese guidelines concern horizontal mergers) or a specific sector (e.g. the Dutch guidelines concern the health sector). Others differ from the Notice because they seek to supplement the theoretical elements with practical examples (France) and/or case-law (Lithuania and France) to help companies in their self-assessment. The EFTA guidelines reflect the nature of the association agreement and seek to ensure a coherent approach to market definition in the application of EEA competition law.

2. Relevance (Do the objectives of the Notice match current needs or problems?)

All but two NCAs indicated that they consider the objectives pursued by the Notice to be still relevant. These objectives are namely to provide correct, comprehensive and clear guidance on market definition in EU competition law. The NCAs that agreed with the relevance of the Notice flagged that the text is a useful tool for companies and their advisers as well as for competition authorities, when considering how to define relevant markets in antitrust and merger assessments.

Two NCAs indicated that the objectives of the Notice are no longer relevant because the guidance focuses on static patterns of substitution between products whereas dynamic aspects of competition should be taken into account, in view of the technological developments in many sectors. One of those NCAs further noted that the guidance on certain issues (differentiated markets, aftermarket or differences between antitrust and merger assessments) is not sufficiently detailed.

The view that the Notice should be updated to provide guidance on dynamic markets and other developments has also been expressed by some (6) of the NCAs that consider the overall objectives of the Notice to remain relevant. These comments are explained more in detail in Section 3.1 below.

3. Effectiveness (Does the Notice meet its objectives?)

3.1. The Notice in light of major trends and developments since its publication

Points of continuity

All but one of the NCAs who expressed a view on this point (24) consider that there are points of continuity that have not changed since 1997 and that should continue guiding the principles of the Market Definition Notice going forward. The following points were explicitly highlighted by the NCAs as specific points of continuity:

- Three NCAs indicated that, while some points need to be updated or further clarified, all concepts mentioned in the Notice were still relevant.
- Seven NCAs noted that the relevance of the product and geographic dimensions of the relevant market and the definition of the relevant product market remained valid and should not be changed. Six of these NCAs noted that the same applied as regards the definition of the relevant geographic market.
- Among other points of continuity which should continue to guide the general principles of the Notice, the following were mentioned by NCAs: the objectives of competition policy and the role played by market definition in that context (4), market definition as a tool to identify the boundaries of competition between firms (5), the fact that the market definition methodology may lead to a different result depending on the type of competition issue analysed (3) and the possibility of leaving the market definition open when this does not affect the outcome of the assessment (3). As regards leaving market definition open, one

NCA suggested that it could be interesting for the Notice to mention situations where market definition may not be as useful or necessary as is usually assumed (for instance if diversion ratios are available in a horizontal merger or if a dominant position can be excluded due to significant competitive pressure exerted by a competitor).

- NCAs (16) also indicated that the basic principles of market definition, in particular the identification of the sources of competitive constraints, with a focus on demand-side substitutability as the main criterion, have not changed and should continue guiding the Notice. Eight NCAs noted that the principles set out in paragraphs 15-19 of the Notice, and in particular the conceptual framework of the hypothetical monopolist test should continue to guide the assessment of demand-side substitution (even when the SSNIP test cannot be carried out in practice). Some NCAs also explicitly mentioned the continued relevance of the principles for assessing supply-side substitutability, in particular its impact on market definition only when it is equivalent to demand substitution in terms of effectiveness and immediacy (4), and of considering potential competition in the competitive assessment rather than in market definition (1).
- Finally, several NCAs mentioned the continued relevance of the process (6) and type of evidence (7) relied on in defining relevant markets and of the notion that there is no rigid hierarchy of sources of information used in the assessment (2).

Major trends and developments

While there is agreement that many of the principles expressed in the Market Definition Notice do not need to be changed, most NCAs (21) consider at the same time that there are major trends and developments that have affected the application of the Notice and need to be reflected in it. Only 3 NCAs indicated they saw no such developments:

- The 21 NCAs indicated that digitalisation is the main trend and that it calls for guidance on issues like multi-sided platforms (17), services offered “for free” (at zero monetary price) (13), the role of data (4), digital “ecosystems” (3), and market definition in online retail when the products are also sold through offline channels (7). Several NCAs also mentioned the need to clarify the application of the SSNIP and of alternative (non-price) tests in such contexts (5), and the calculation and interpretation of market shares (3).
- Other (related) trends noted by the NCAs were the increasing importance of markets in which competition revolves around factors other than price (5), including those in which innovation plays an important role (5).
- Two NCAs noted globalisation as a trend which may impact the outcome, albeit not necessarily the methodology, of the geographic market definition.
- Several NCAs (6) also mentioned the development of quantitative techniques and the availability of data as assisting market definition; in this context, the NCAs suggested that the Notice could elaborate on the use of isochrones, catchment areas and other methods relevant for delineating geographic markets (5). One NCA noted that it is increasingly possible today to retrieve a full, disaggregated inventory of all deliveries or customer journeys, which may constitute strong evidence for geographic market definition. One NCA further noted that when quantitative methods allow carrying out an effects analysis, less emphasis should be put on defining the relevant market.

- On the role of market definition more broadly, NCAs indicated that the Notice should further clarify that it is a tool to assist the competitive assessment rather than a goal in itself and that it could be left open even when competition concerns arise (3), or that market definition could depend on the type of competition analysis or on the theory of harm investigated (2). Two NCAs suggested that the consequences of leaving the market definition open should however be clarified, in particular considering the increasing reliance on market share thresholds in certain types of assessments (1).
- Some NCAs (4) also noted that the Notice should provide updated guidance on the SSNIP test, as regards its conceptual limitations (2), implementation techniques (3), and its role relative to other types of evidence for assessing demand substitution, e.g. revealed preferences in past behaviour (1).
- Among other issues on which the Notice should provide more guidance, NCAs also mentioned asymmetric substitution (2), aftermarkets (2), bidding markets (1), vertical integration and indirect constraints (1), bundles (1) and differentiated products (1).

3.2. The Notice in light of its objective to provide correct, comprehensive and clear guidance

The Commission asked the NCAs for feedback on whether each of the sections of the Market Definition Notice had provided correct, comprehensive and clear guidance in their view. The NCAs' feedback on those sections is set out in the sections 3.2.1 to 3.2.7 respectively.

3.2.1. Definition of relevant market

There was overall support for the idea that the Notice provides correct, comprehensive and clear guidance in its paragraphs 7-12 as regards the definition of the relevant market:

- Definition of the relevant product market and geographic market (paragraphs 7-9): more than two-thirds (20) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the definition of the relevant product market and geographic market detailed in paragraphs 7-9 of the Notice. The remaining (9) NCAs disagreed to some extent.¹⁷ While some of these NCAs (2) indicated that the general definition of product and geographic market given in this section of the Notice does not seem to fully reflect the importance of supply-side substitutability in market definition, others (3) noted that the Notice is overly reliant on price analysis and that, particularly for digital markets where services are often provided at zero monetary prices, it should rely on other sources of evidence. One NCA in particular questioned how the wording "*because the conditions of competition are appreciably different in those areas*" in the definition of the relevant geographic market is compatible with the SSNIP test. Another NCA noted that the SSNIP test is hardly ever used due to unreliable data and the cellophane fallacy. Finally one NCA noted that the wording in the paragraph that refers to effects on consumers should be revised and rather refer to the opposite market side. One NCA also indicated that it could be worthwhile to stress that not all or not even a majority of consumers need to be willing to substitute a product with another for these two products to exert competitive pressure on each other.

¹⁷ For the purposes of this summary and in an abundance of caution, in multiple choice questions where possible answers were "Yes", "No" and "Partially" the Commission has grouped the last two options under the same category, namely that of a disagreement. It needs to be noted, however, that throughout the questionnaire most negative answers were "Partially" answers, rather than "No".

This NCA suggested that the reference to “*a consumer*” in paragraph 7 was too abstract and that the Notice could instead refer to a critical share of consumers and explain how to assess a sufficient or critical share of consumers (i.e., “critical loss” analysis).

- Concept of relevant market and objectives of Community competition policy (paragraphs 10-11): around two-thirds (18) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the concept of relevant market and objectives of EU competition policy detailed in paragraphs 10-11 of the Notice. The remaining (11) NCAs disagreed and nearly all of these (7) noted that the wording of the Notice should be harmonised with the “significant impediment of effective competition” test of the 2004 EU Merger Regulation. Others (3) argued that it should be made clear that market definition is not a goal in itself but an instrument to assess competitive pressure. One NCA noted that the revised Notice should take into account the development of quickly evolving markets (especially digital ones), including multi-sided markets where some services are not provided against a monetary price and hence consumers perceive them as being provided for free. Another NCA proposed to further develop the concept of closeness of substitution as far substitutes may not be part of the relevant market but would need to be taken into account in the competitive assessment.
- Difference between market definition in antitrust and merger control (paragraph 12): around half of the NCAs (14) indicated that the Notice provides correct, comprehensive and clear guidance as regards the differences between market definition in antitrust and merger control as detailed in paragraph 12 of the Notice. The remaining (15) NCAs disagreed. These NCAs noted that market definitions in merger control and antitrust can reach different results. They noted that the Notice should explain more explicitly that there can be different market definition procedures and results depending on the type of case, type of practice (in particular whether it is a past or a prospective practice), market level or type of investigation (in particular whether it is a preliminary or an in-depth investigation) and should explain how procedures and results of market definition may be affected specifically. For example, one NCA pointed out that market definition is not static and that the fact that a market was defined in a certain way in the past does not mean that the market definition is set in stone. Another NCA noted that, in the context of mergers, it may be interesting to include in the relevant product market a product that currently does not constitute a real substitute to another but which will reasonably become such a substitute due to anticipated changes in consumer behaviour in the short term. One NCA also indicated that it believed that in merger cases an NCA could use more of an effects-based approach – putting less weight on market definition – and that this should be reflected in the Notice.

3.2.2. Basic principles

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards the basic principles for market definition in its paragraphs 13-24, there was mixed feedback from the NCAs:

- Competitive constraints (paragraphs 13-14): more than two-thirds (20) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the competitive constraints detailed in paragraphs 13-14 of the Notice. The remaining (9) NCAs disagreed. One NCA, for example, noted that although the high-level principles of market definition have not changed over the past 20 years, some recent issues, in particular digital

markets, are not reflected in the Notice. Other elements of disagreement are summarised in the remaining part of this section 3.2.2.

- Demand-side substitutability (paragraphs 15-19): just under half (13) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards demand-side substitutability. The remaining (16) disagreed. One NCA pointed explicitly to conceptual shortcomings. Others made different points, among them that the SSNIP test is sometimes not fully applicable either due to the cellophane fallacy, lack of robustness regarding starting points and inclusion candidates, lack of data or limitations in its applicability to geographic market definition. Some NCAs consider that this is particularly true as regards digital or zero-monetary-price services and they suggested that authorities should rather rely on other elements besides price such as the SSNDQ (3). Some NCAs also noted that demand-side substitution is the most important factor in market definition whereas the SSNIP test contains further elements that are unrelated to demand-side substitution, such as supplier margins and non-consumption. Some NCAs note there is too much reliance on the SSNIP test and that there are other tools one can rely on for market definition, particularly in digital markets (5). Other NCAs consider that the SSNIP test is an important tool and provides a conceptual framework for defining the relevant market (4). Other NCAs (4) generally note that more guidance is needed on the application of the SSNIP test and one pointed out that this concept should not be limited to demand-side substitutability while other NCAs (2) argued that it would be helpful if the Notice provided guidance on the assessment of asymmetric substitution in the context of demand substitution.
- Supply-side substitutability (paragraphs 20-23): around one third (10) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards supply-side substitutability. The remaining (19) disagreed. There was a general view that while demand-side substitutability is the primary concept in market definition, the situations where supply-side substitutability is applicable to market definition should be further detailed in the Notice regarding, for instance, the concepts of barriers to entry, “significant additional costs”, “short term”, “effectiveness and immediacy”, and “most suppliers”. One NCA noted that it would also be useful to clarify which “suppliers” are relevant to include in the analysis and how, including any differences in the approach depending on whether they are already producing and/or selling the product in question. Another NCA argued that markets are defined at a particular moment in time whereas the competitive assessment is prospective by focusing more on supply-side substitution and on potential competition and that the Notice currently puts too much emphasis on supply side substitution for geographic market definition.
- Potential competition (paragraph 24): half (14) of the NCAs expressing an opinion indicated that the Notice provides correct, comprehensive and clear guidance as regards the role of potential competition, namely that is not assessed in the context of market definition but rather at later stages of the competitive assessment where necessary. One NCA did not express an opinion and the remaining NCAs (14) disagreed. The overall view was that – while there was near-consensus that supply-side substitution and potential competition have different roles – more guidance was needed regarding the differences between them. For example, one NCA asked to clarify “the dividing line” between supply-side substitution in defining markets and potential competition in the competitive assessment. This could be done by giving a relevant time-frame or situations, or point out which factors one should examine in order to determine the relevant time-frame. One NCA argued that the

Commission should consider whether more guidance on supply-side substitution and potential competition is warranted and whether these concepts should be assessed at the stage of the competitive assessment rather than at the market definition stage. The same NCA also noted that the assessment of potential competition for the purpose of identifying competitors in the relevant markets and their market shares can be challenging in the case of markets that are going to exist in the future (e.g. bidding procedures to select future providers of a service). In contrast, one NCA raised the issue of whether the exclusion of potential competition at the level of market definition could be questioned – whether, in merger control, it could be relevant, in some cases, to include in the relevant market a product that is not currently a direct substitute of another one, but which will probably become a substitute in the short term.

3.2.3. The process in practice

There was overall support for the idea that the Notice provides correct, comprehensive and clear guidance in its paragraphs 25-35 as regards the process of defining the relevant market in practice:

- Product dimensions (paragraphs 25-27): around two-thirds (18) of the NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the product dimensions detailed in paragraphs 25-27 of the Notice. The remaining (11) NCAs disagreed. Several NCAs (3) considered that it would be useful if the Notice included more quantitative techniques and evidence used for defining markets, such as more examples and references to case law that illustrate best practices. Two NCAs considered it would be useful to provide further clarity in what circumstances the market definition may be left open and what the consequences are of doing so. One NCA considered that paragraphs 26 and 27 should be re-phrased to explain that market definition is only a first step in informing the competitive analysis, and that the market definition can also be left open in cases with concerns. Another NCA considered that there is in fact a “hierarchy of evidence” whereby, for instance, evidence from customers’ actual behaviour is more informative than survey responses, and that this should be factored in when concluding on the relevant market.
- Geographic dimensions (paragraphs 28-31): around half (15) of the NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the geographic dimensions detailed in paragraphs 28-31 of the Notice. The remaining (14) NCAs disagreed. Among these, there was consensus that the Notice should provide more guidance to assess the geographic dimension of the market with several (3) noting the increased difficulties in defining geographic markets in the context of digitisation and e-commerce. While one NCA noted that the Notice should explicitly refer to global markets in its text, others (4) suggested that the Notice should provide more guidance on local/regional markets. One NCA also noted that the Commission’s definition of markets that are “national with local differences” can cause problems for NCAs and suggested that the approach and criteria of defining a broader relevant market with local differences should be included in the guidance. As regards the value of trade flows in defining geographic markets, while one NCA considers that trade flows are more important than “supplemental information” since they determine where merging parties’ supply overlaps, another considers that paragraph 31 can be misinterpreted and that the fact that parties in a merger case export to other member states does not necessarily indicate that the geographic market is broader than the member state where the customers of interest are located. Finally, two NCAs note that the process of defining geographic markets as set out in the Notice is static as it focuses too much on

historical prices and market shares, which can yield different results to a more dynamic assessment of demand and supply side substitution.

- Market integration in the Community (paragraph 32): around two-thirds (19) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the market integration in the Community detailed in paragraph 32 of the Notice. Two NCAs did not express an opinion and the remaining eight disagreed. While two NCAs noted that the Notice should be extended to include some examples of how market integration has been taken into account in market definition, another one argued that, as the single market has become a reality, referring to market integration adds no real value to the preceding paragraphs of the Notice.
- The process of gathering evidence (paragraphs 33-35): just under two-thirds (17) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the process of gathering evidence detailed in paragraphs 33-35 of the Notice. The remaining (12) NCAs disagreed. Among these NCAs there was a general consensus that the description of the process of gathering evidence should take account of the techniques and technology currently used when defining the product and geographic markets. Three NCAs also noted that the simple opinion of the parties and other market participants should only matter inasmuch as they are supported by facts.

3.2.4. Evidence – product dimension

Regarding the question whether the Notice provides correct, comprehensive and clear guidance in its paragraphs 36-43 as regards the evidence to define the relevant product market there was mixed feedback from the NCAs:

- Introductory paragraphs (paragraphs 36-37): two-thirds (20) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the introduction to the evidence used in defining the relevant product market detailed in paragraphs 36-37 of the Notice. The remaining (9) NCAs disagreed. Three NCAs asked for a clarification regarding the usefulness of previous cases, case law and decisions from NCAs to complement evidence. Four NCAs noted that explanations about how to weigh the different elements of evidence is necessary, in particular when there is conflicting evidence. One NCA noted that the terms used are too broad and should be more precise. One NCA explained that it would be beneficial to explain what the starting point of the market definition is and to provide further guidance on the initial choice of potentially substitutable products. One NCA noted that it should be made clearer that demand substitution can also be triggered by changes in quality or innovation.
- Evidence of substitution and quantitative tests (38-39): less than one-third (8) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence of substitution and quantitative tests detailed in paragraphs 38-39 of the Notice. One NCA did not express an opinion and the remaining (20) NCAs disagreed. Five NCAs pointed out that further guidance on the SSNIP test was necessary, including as regards its relevance, its applicability and its relationship with other evidence of substitution. Seven NCAs also noted that it would be important to illustrate the information provided with relevant cases and examples, whereas eight NCAs asked for practical guidance on how to apply the quantitative tests, including pros and cons and the data required. Two NCAs noted that the guidance lacked a reference to the evidence and quantitative tests on non-price variables, with one NCA explaining that in dynamic markets, past evidence was less relevant.

Five NCAs also explained that the list of evidence should include market evolutions in terms of digitisation (e.g. online vs. offline sales, multisided platforms), non-price variables and globalisation. One NCA suggested additional elements of evidence to evaluate supply side substitutability, while another NCA noted that a clarification about the applicability of the described tests to supply side substitution is required, namely as regards past events and shocks in the market.

- Views of customers/competitors and consumer preferences (40-41): one-third (11) of NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence on views of customers/competitors and consumer preferences detailed in paragraphs 40-41 of the Notice. The remaining (18) NCAs disagreed. Individual NCAs pointed out that sustainability should be included in the Notice as an element of consumer preferences and that online behaviour or tracking data are currently a useful source of data to determine preferences. One NCA noted that more guidance would be helpful on how to test consumer preferences in zero-monetary-price settings and how to assess multi-homing. Four NCAs indicated that the role and design of consumer surveys should be further detailed.
- Barriers and costs of switching (42): half (15) of the NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence on barriers and costs of switching detailed in paragraph 42 of the Notice. The remaining (14) NCAs disagreed. Three NCAs pointed to the relevance of switching costs in digitalisation, including network effects, access to data and lack of interoperability. Another NCA noted that the behaviour of a dominant company (e.g. exclusivity contracts) is also relevant.
- Different categories of customers and price discrimination (43): eleven NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence on different categories of customers and price discrimination detailed in paragraph 43 of the Notice. One NCA did not express an opinion and the remaining (17) NCAs disagreed. Five NCAs pointed to the lack of clarity of paragraph 43 and the need for more examples and guidance (e.g. second price discrimination). One NCA requested guidance regarding personalised and AI pricing. Two NCAs noted that different groups can also be defined on non-price variables (e.g. time of purchase, distribution channels). One NCA explained that narrowing the product markets to specific customer groups relates also to questions of supply-side substitution.

3.2.5. Evidence – geographic dimension

Regarding the question whether the Notice provides correct, comprehensive and clear guidance in its paragraphs 45-52 as regards the evidence to define the relevant geographic market there was mixed feedback from the NCAs:

- Evidence of diversion to other areas (45): around half (14) of the NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence of diversion to other areas detailed in paragraph 45 of the Notice. One NCA did not express an opinion and the remaining (14) NCAs disagreed. Seven NCAs considered that the Notice could provide some guidance on the different approaches to diversion to other areas and include examples of the methodologies and quantitative tests which could be used, with a particular emphasis on catchment areas and isochrones. One NCA also suggested including catchment areas adjusted for distance and time of arrival (*radius clausula*). One NCA in particular noted that there is a need for the Notice to provide details on when evidence

should be based on customers' location or on suppliers' location. One NCA noted that the Notice should address asymmetric behaviour in the market where national producers may have a strong presence abroad but where, due to local characteristics or specific requirements of demand, national customers do not consider suppliers without a local presence. Another NCA noted that the guidance on geographic market definition does not explain sufficiently how to define relevant markets when products are delivered at the address of the customer, an issue that is increasingly relevant with e-commerce.

- Demand characteristics and views of customers and competitors (46-47): twelve NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards demand characteristics and views of customers and competitors as explained in paragraphs 46-47 of the Notice. The remaining (17) NCAs disagreed. One NCA, for instance, noted that it would be useful if the Notice could provide guidance on the relative weight to be attached to different sources of evidence, like submissions prepared for the purpose of the case at hand as compared to surveys conducted by the parties during the regular course of business.
- Geographic patterns of purchases and trade flows (48-49): eleven NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards geographic patterns of purchases as explained in paragraphs 48-49 of the Notice. The remaining (14) NCAs that answered this question disagreed. Several NCAs (7) considered that the Notice should better explain under which conditions the guidance on trade flows can go beyond a static analysis and more into a dynamic hypothetical monopolist test and when evidence on trade flows can be conclusive in geographic market definition. One NCA, in particular, would like the Notice to provide greater clarity on the implications of supply-side substitution by imports in determining the boundaries of the geographic market. Two NCAs thought the Notice should further elaborate on the alternative approaches to define local markets and on the link between catchment areas and the theory of chains of substitution. One NCA argued that when assessing customers' current geographic pattern of purchases, the Commission could conclude on a worldwide market if customers purchase from companies located anywhere in the world. Finally, one NCA noted that paragraph 49 could be misleading when trade flows/patterns of shipment are applied as an indication of a geographic market. This NCA proposed clarifying that import flows (rather than export flows) to the group of customers in question is a relevant indication for defining the geographic market.
- Barriers and switching costs (50): thirteen NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards barriers and switching costs detailed in paragraph 50 of the Notice. The remaining (16) NCAs disagreed. One NCA, for instance, noted that the Notice should not only deal with transportation costs as a relevant factor but should also include the customers' willingness to travel. Another NCA argued that paragraph 50 could generate the wrong impression that geographic purchase patterns have to be "justified" by trade barriers or switching costs, before they can be used for the definition of the relevant geographic market, while these may only be a result of customer preferences varying by geography. Another NCA suggested that the Notice discusses further how information on barriers and switching costs relates to market definition tests such as the SSNIP test. The same NCA also suggested that the Notice should give a magnitude on how high barriers and switching costs would have to be for a geographic area to constitute a distinct relevant geographic market.
- Examples from Commission practice and relevance of different factors (51-52): sixteen NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the

examples from the Commission’s practice and the relevance of different factors detailed in paragraphs 51-52 of the Notice. The remaining (13) NCAs disagreed. There was a general view among these NCAs that the Notice would benefit from more examples, taking into account developments in data analysis and availability of data. One NCA, for instance, suggested explaining in which situations different types of evidence can be used for defining a geographic market, in particular when a well conducted SSNIP-test points to a local geographic market while significant trade flows could point to a wider market.

3.2.6. Market share

Eleven NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the calculation of market shares detailed in paragraphs 53 to 55 of the Notice. The remaining (18) NCAs disagreed.

Eight NCAs noted that the Notice should clarify what type of instruments should be used in the case of services provided at a zero monetary price, multi-sided markets, online services, platform “ecosystems” and data markets. For instance, one of those NCAs specifically asked for guidance on new metrics in digital markets (e.g. shares based on views or transactions). Five NCAs mentioned that it would be useful to illustrate the points made with some examples, for instance when to use volume, value, etc. Three NCAs explained that market shares is a static concept and should be complemented with elements about the dynamics of an industry (e.g. innovation, bidding markets, multisided markets). Other four NCAs also noted that clarification was needed as regards the treatment of in-house and captive sales. One NCA pointed out that the Notice does not provide guidance in cases where not all market participants can be covered. Two NCAs noted that guidance is needed on how to calculate market shares when the market is widened by supply side substitution, while another NCA asked for more guidance about the treatment of imports from companies outside the relevant geographic area. Two NCAs explained that more guidance is needed about the role of market shares, while one NCA explained that the calculation of market shares does not fit well in the Notice since it is already part of the competitive assessment.

3.2.7. Additional considerations

Nine NCAs indicated that the Notice provides correct, comprehensive and clear guidance as regards the additional considerations detailed in paragraphs 56 to 58 of the Notice. One NCA did not express an opinion and the remaining (19) NCAs disagreed. The following topics were mentioned by NCAs as needing guidance: digital markets (including multisided markets, zero monetary prices) (9), aftermarket (6), bidding markets (3), non-price competition, including innovation (3), bundles (3), asymmetric substitution (2), product and price differentiation (2), indirect substitution and intermediate products (2). The following were mentioned by single NCAs: captive customers; suppliers competing in both national and local markets; multi-plant operations; route-by-route markets; bargaining power, buyer power and intermediation power; and catchment areas.

Regarding chains of substitution, three NCAs noted that it may not be necessary to refer to them any more while one NCA asked for guidance as regards breaks in the chain, relation with the SSNIP test, role of niche products, and price differentiation. One NCA noted that the role of chains of substitution in geographic markets should be explained in more detail. One NCA explained that these paragraphs should not be separated from the remaining text, and instead should be incorporated in other relevant sections.

4. Efficiency (Are the costs involved proportionate to the benefits?)

There is consensus among the 25 NCAs that expressed a view on efficiency that the net benefits of the Notice are positive. In other words, NCAs consider that the benefits of having the Notice in place exceed the costs thereof.

Among the benefits, NCAs noted that the Notice provides guidance and transparency to companies and their advisers, which increases legal certainty and avoids the need to explain the basic principles of market definition in every case, thereby allowing the analysis to focus on the more important aspects of market definition. The Notice also provides a reference tool for NCAs that do not have their own market definition guidelines, as well as to courts reviewing competition cases. The NCAs further mentioned that the Notice plays an important role in ensuring consistency across the European Competition Network – including with NCAs that have issued their own guidance on market definition.

NCAs believed the costs of the Notice to be limited or even zero but they noted that a quantification is difficult to undertake.

5. Coherence (Is the Notice internally coherent? Does the Notice complement other actions or are there contradictions?)

The NCAs expressed strong agreement that the Market Definition Notice is internally and externally coherent:

- Internal coherence of the Notice: all but one NCA indicated that the different components of the Notice work well together without apparent contradictions. The NCA that indicated that there were “some contradictions” indicated that, unlike for product market definition, where supply-side substitution is only a complementary aspect, the Notice seems to put more weight on supply-side factors in geographic market definition. The same NCA noted that the SSNIP test described in paragraphs 15 to 19 was not consistent with paragraphs 7, 13 and 14 of the Notice. A second NCA also thought it worthwhile to clarify certain aspects of supply-side substitutability and align them with demand-side substitutability. Another NCA pointed out that there is no clear logic for separating the sections on the process (paragraphs 25-35) and on evidence to define markets (paragraphs 36-52). A fourth NCA indicated that the Notice could better illustrate the different steps in defining markets in their product, geographic, and when relevant temporal, dimensions depending on the type of investigation (antitrust/merger). Finally, one NCA suggested putting less emphasis on the SSNIP, making a better explanation of how the factor of homogeneous conditions of competition influences geographic market definition or better explaining the use and role of the Notice in digital markets.
- Coherence with antitrust instruments: NCAs expressed similar support as regards the Notice’s coherence with instruments providing guidance on EU antitrust rules (horizontal and vertical block exemption regulations and other instruments based on Articles 101 and 102 TFEU), with only two NCAs expressing disagreement. For one NCA, the Notice should be updated in order to make reference to the “significant impediment to effective competition” test. The other NCA indicated that paragraph 43 had to make the different categories of customers and price discrimination more detailed and explicit. One NCA indicated that some of the aspects pointed out in the Guidelines on Vertical Restraints, especially in their paragraph 89, could be included in the Market Definition Notice as well, e.g. the discussion

on how the difference between the preferences of direct buyers and final consumers may influence market definition.

- Coherence with merger instruments: 21 NCAs found that the Notice is coherent with the EU Merger Regulation and with other instruments providing guidance on EU merger control rules (in particular the horizontal and non-horizontal merger guidelines). The four NCAs disagreeing indicated in particular that the Notice still refers only to the dominance-test while the EU Merger Regulation has established “significant impediment to effective competition” as the main test since 2004. NCAs also provided specific suggestions: one NCA advocated for better explaining the potential differences between defining markets in antitrust and merger cases; another NCA suggested that the market share calculation be moved to guidance on the competitive analysis; a third NCA suggested providing further guidance in relation to conglomerate mergers in innovation industries. Finally, two NCAs suggested better linking the Notice and notices dealing with competitive assessments in merger control so as not to give the “unjust impression that market definition and competitive assessments are separate and largely unrelated exercises”, with one of them also highlighting the question of whether the Notice should have in mind the digitisation and globalisation of the economy.
- Coherence with EU case-law: the NCAs expressing a view were in near-consensus that the Notice is coherent with the case law of the General Court and the Court of Justice of the European Union. Only one NCA disagreed and stated that recent (unnamed) developments should be included. The need to update the Notice with recent developments was also raised by some NCAs expressing that there exists coherence in the Notice.
- Coherence with EU policies: all but two NCAs agreed that the Notice is coherent with other existing or upcoming EU legislation or policies (including legislation and policies in fields other than competition law). The NCAs disagreeing with this statement explained that recent or upcoming legislative developments were sometimes not reflected in the Notice. One NCA explicitly flagged the importance of maintaining coherence between the Notice and ongoing initiatives concerning contestability of digital markets (Digital Services Act and Digital Markets Act). Another NCA flagged the necessity to keep market definition as a technical concept and to avoid lowering its evidentiary standards to promote policies outside competition law. In this respect, the review of the Notice should also take into account other ongoing initiatives such as the White Paper on Foreign Subsidies, which may be a more suitable way to address issues such as the existence of subsidised competitors from third countries.

6. EU added value (Does the Notice at EU level provide clear added value?)

All NCAs expressing a view were in consensus that the Notice had added value in the assessment of relevant product and geographic markets in the application of EU competition law (including application by national competition authorities). Similarly, the NCAs expressing a view agreed that the Notice had helped in aligning the definition of the relevant markets by the NCAs and the European Commission.

In their replies, NCAs flagged that the Notice provides them with a useful focal point for their work and that it makes their antitrust and merger work more effective. Two NCAs indicated that the value of the Notice to a large degree follows from the broad principles set out in the Notice, and that the Notice should not reflect every topic in detail. One of these NCAs indicated that it was important to bear in mind who the audience was (for example, an advanced version of the Notice might be

helpful if its target audience were also economists – in addition to judges and prosecutors). One NCA also indicated the importance of having a solid Notice that provides clear and accurate guidance to reinforce merger control and its legitimate role in competition enforcement.

Some NCAs pointed towards possible ways to improve the EU added value of the Notice. These suggestions included the inclusion of examples and references to cases (three NCAs) and a better explanation of geographic market definition, including explanations regarding markets smaller than a single Member State or the extent to which NCAs could in practice assess global markets with limited resources (two NCAs).

One NCA also indicated that, while the English language version of the Notice was seen as the reference document, it was highly relevant and important to provide access to top-quality translations of the Notice, including professional and technical terms.

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