

European Commission

Notice on the Definition of Relevant Market for the Purposes of Community Competition Law

The Global Antitrust Institute (GAI) submits the following comments to the European Commission (Commission) for consideration in relation to its consultation on its Notice on the definition of relevant market for the purposes of community competition law (OJ C 372, 9.12.1997, p. 5–13, “Notice”).¹ As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the GAI welcomes the opportunity to comment on the Commission’s Market Definition Notice, based on our extensive experience and expertise in antitrust law and economics.²

As announced by Commissioner Vestager, the Notice will be updated to reflect market developments over the last 22 years, including the globalization of markets and the arrival of the digital economy.³ Recent reports commissioned or written by European competition authorities have sought to reimagine the market definition inquiry for use in cases involving the digital economy. Most notable among these are the European Union’s (EU’s) “DG Comp Report”⁴ and the United Kingdom’s “Furman Report,” among others.⁵

¹ COMMISSION NOTICE ON THE DEFINITION OF RELEVANT MARKET FOR THE PURPOSES OF COMMUNITY COMPETITION LAW (97/C 372 /03) (Text with EEA relevance), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN) [hereinafter NOTICE].

² The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University (Scalia Law), is a leading international platform for economic education and research that focuses upon the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world.

³ Vestager, *Defining markets in a new age*, EUR. COMM’N, (Dec. 9, 2019) https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en; See also, Reuters, *EU regulators to review rules defining companies’ market power*, Technology News (Dec. 9, 2019) <https://www.reuters.com/article/us-eu-antitrust/eu-regulators-to-review-rules-defining-companies-market-power-idUSKBN1YD127>

⁴ See DIR.-GENERAL FOR COMPETITION, EUR. COMM’N, COMPETITION POLICY FOR THE DIGITAL ERA (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> [hereinafter, DG COMP REPORT].

⁵ See DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [hereinafter, FURMAN REPORT]. See also e.g. AUSTL. COMPETITION & CONSUMER COMM’N, *Digital Platforms Inquiry Final Report* (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>; BRICS COMPETITION LAW AND POLICY CENTRE, *Digital Era Competition: A Brics View*, (2019), <http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf>; COMPETITION AUTHORITIES WORKING GROUP ON DIG. ECON., *BRICS in the Digital Economy: Competition Policy in Practice 1st Report* (2019),

We respectfully suggest that the Notice should be updated to reflect modern economic theory and practice by European enforcers and courts. In particular, the amendments should consider that since the Notice was issued in 1997, markets have increasingly extended to a global scale and innovative products and services have become central to the world economy. This reality calls for a competition policy and enforcement approach that reflects business dynamics and prevents anticompetitive behavior without unnecessarily inefficient market interventions. Importantly, we respectfully caution against the adoption of formalistic or static structural presumptions of market power or dominance.

We therefore respectfully recommend the following revisions to the Notice: (i) competitive constraints between e-commerce and physical stores should be analyzed as any other case involving separate distribution channels (that is, the revised rules should recognize that online sales do not necessarily constitute a separate product market); (ii) multisided platforms should generally be analyzed considering markets representing all sides of such platforms and taking account of the relationships among all sides; and (iii) the possibility of geographical markets broader than the EU and EEA should be recognized.

I. Any meaningful analysis of market power should take place in the context of a market within which such power may be thought to exist

Market definition remains a central part of competition analysis. While there have been efforts since 2010 to reduce the role of market definition within antitrust analysis,⁶ the reality is that it is still at the center of every antitrust case, other than cases involving naked cartels. Even in cases where available data seem sufficient to run quantitative tests to help determine competitive effects, it remains essential to perform at least that degree of market definition analysis sufficient to assure that enforcement efforts are not misdirected against conduct unlikely to have cognizable anticompetitive impact. In practice, most cases will primarily rely on indications of market power derived from market definition to estimate competitive effects. Moreover, market definition is

http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf ; COMPETITION BUREAU CAN., *Big Data and Innovation: Key Themes For Competition Policy in Canada*, (2018), [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/\\$file/CB-Report-BigData-Eng.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CB-Report-BigData-Eng.pdf/$file/CB-Report-BigData-Eng.pdf); AUTORITÉ DE LA CONCURRENCE AND BUNDESKARTELLAMT, *Algorithms And Competition*, (2019), [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5; ...](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5;...)

⁶ See Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

important even in cartel cases (to determine the level of fines) and where antitrust agencies prove direct harm, courts and stakeholders still need to understand the boundaries of the affected market.

While market definition⁷ and market shares⁸ are not in themselves dispositive indicators of market power, market definition continues to be a crucial step in competition and antitrust analysis.⁹ In practice, market concentration is “a convenient starting point for a broader inquiry into future competitiveness.”¹⁰

U.S. antitrust authorities routinely define markets in relation to single-firm conduct under Section 2 of the Sherman Act, agreements under Section 1 of the Sherman Act, and merger control under Section 7 of the Clayton Act. An inquiry into anticompetitive effects in a market generally involves an inquiry into market definition and market power.¹¹ In analyzing both monopolization and attempted monopolization it is necessary to ask whether the defendant possesses monopoly power or is in a position to obtain monopoly power. Both issues are analyzed in the context of a relevant market.¹² Some modern decisions suggest that the use of direct evidence of monopoly power can eliminate the need to define markets. However, these suggestions have not been widely accepted by courts.¹³ The narrow exception in the U.S. involves cases in which harm is inferred from a type of conduct considered especially destructive of competition, such as horizontal price fixing, considered *per se* illegal, and “inherently suspect” conduct derived “from the close family resemblance between the suspect practice and another practice that already stands convicted (...).”¹⁴

⁷ As underlined in the U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (Aug. 19, 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.htm>.

⁸ *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

⁹ See, e.g., *City of New York v. Group Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011) (“To state a claim under [the antitrust laws], a plaintiff must allege a plausible relevant market in which competition will be impaired.”). In EU law the definition of a relevant market is a necessary precondition for the assessment of the effects on competition of a concentration. See Joined Cases C-68/94 and C-30/95 *Kali & Salz* [1998] ECR I-1375,

para 143; Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585, para 19; Case T-151/5 *NVV v Commission*, [2009] ECR II-1219, at 51.

¹⁰ *United States v. Baker Hughes, Inc.*, 908, 982-83 F.2d 981 (D.C. Cir. 1990).

¹¹ *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-1 (1986).

¹² OECD, *ROUNDTABLE ON MARKET DEFINITION, NOTE BY THE DELEGATION OF THE UNITED STATES* (June 7, 2012), <https://www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf>

¹³ *Id.*

¹⁴ *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005); *FTC v. Indiana Federation of Dentists* 476 U.S. 447 (1986) (holding that product market analysis is but a surrogate for detrimental effects).

The European Commission applies the technique of defining markets in its enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and its merger control under Council Regulation No 139/2004 (EUMR). In line with the U.S., conduct deemed anticompetitive *by object* does not require market definition.¹⁵

Market definition is also a crucial step in the analysis of the levels of competitiveness of a particular industry or sector. Different market definitions can lead to radically different perceptions of how an industry operates when identifying market failures or tailoring remedial measures such as ex ante or ex post interventions. A notable example is the recent policy debate surrounding concerns about labor's declining share of national income.¹⁶

Finally, market definition may determine the outcome of a case, especially when tied to the analysis of the effects of conduct. The distinct features of multisided platforms are at the center of the discussion of market definition. Some argue that each side of the platform should be considered a separate market and others argue for an integrated view that considers all sides. Recognition of the unique features of multisided markets first arose in connection with the study of four-party payment systems – specifically, electronic funds transfer and general-purpose credit card networks.¹⁷ Proper analysis of such markets requires an examination of how all sides of a platform or network interact, because the existence of effective substitutes for the services provided by such networks may depend on direct and indirect interactions among all participants, including different user/customer categories (*e.g.*, credit-card holders and merchants that accept credit cards). The analytical soundness of this approach was recently recognized and adopted by the U.S. Supreme Court.¹⁸ We therefore respectfully suggest that the assessment of competition involving multi-sided markets consider the impact on all sides, both in defining relevant markets and in assessing competitive effects.

¹⁵ See Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, 3 KLUWER L. INT'L., 40. See Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Service* (holding that where a restriction by object is noted there is no need to assess the effect of a restriction). This view was later confirmed by the Court of Justice in Case C- 56/64 and C- 58/64 *Consten and Grundig*, and by subsequent cases.

¹⁶ See OECD, *ROUNDTABLE ON COMPETITION ISSUES IN LABOR MARKETS*, (2020), <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

¹⁷ William F. Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives*, 26 J.L.&Econ. 541 (1983).

¹⁸ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018).

II. The Notice should be updated to reflect the realities of current globalized and innovation-heavy markets

The Notice provides a general overview of the concepts for the analysis of competitive constraints including demand substitution, potential competition, and the evidence relied upon to define relevant markets.¹⁹

The Notice gives precedence to demand substitution as the most effective disciplinary force on the suppliers of a given product. The main instrument to measure demand substitution is the SSNIP (small but significant non-transitory increase in price) test. This test assesses whether customers would switch to other readily available substitute products or suppliers in response to a hypothetical small (5-10%) but non-transitory increase in price of the product in question.²⁰ This same method is used for geographic market definition to determine whether customers of a product would switch to suppliers in other regions.

Supply substitution is considered only in cases where it is at least equivalent to demand side substitution in terms of effectiveness and immediacy.²¹ The question is whether other suppliers would start producing the product in question if there is a SSNIP by other suppliers. Specifically, the question is whether other firms not currently competing in the market would be able and willing to switch their production to the proposed market in a short time period without incurring significant additional costs or risks.²²

The Commission uses different qualitative and quantitative methods for defining markets depending on the facts of each case.²³ Qualitative data is usually gathered from questionnaires sent to customers, professional associations, competitors, and end users or consumers. The Commission also relies on internal company documents and studies commissioned by companies analyzing the market. Quantitative methods include price correlation analysis,²⁴ critical loss analysis,²⁵ natural experiments,²⁶ and demand

¹⁹ See NOTICE *supra* note 1.

²⁰ See NOTICE *supra* note 1 at 17.

²¹ See NOTICE *supra* note 1 at 17-18.

²² See OECD, ROUND TABLE ON MARKET DEFINITION (2012) at 335, <https://www.oecd.org/daf/competition/Marketdefinition2012.pdf>

²³ See *Id.* at. 336.

²⁴ See Case COMP/M.5153 Arsenal/DSP; see Case COMP/M.4799 OMV/MOL.

²⁵ See Case COMP/M.4734 INEOS/Kerling.

²⁶ See Case COMP/M.5335 Lufthansa/SN Airholding.

estimation.²⁷ While not acknowledged in the Notice, in practice the Commission heavily relies on questionnaires sent to consumers and market definitions reached in its previous decisions.

As we briefly explain in this comment, the following policy changes would seem appropriate to make the Notice applicable to the current reality of growing and predominantly global markets involving innovative technology: (i) clarifying that competitive constraints between e-commerce and physical stores will be analyzed as any other case involving different distribution channels (*i.e.*, that online sales of a particular product do not necessarily constitute a product market separate from sales of the same product through “brick-and-mortar” outlets); (ii) clarifying that multisided platforms will generally be analyzed considering all sides and their relationships; and (iii) amending the notice to recognize broader geographical markets than the EU and EEA.

III. Product market definition and e-commerce

The growth of online commerce has created many questions for antitrust enforcers trying to define markets involving distribution and retailing. As distribution and retail activity has increasingly moved online, it is critical not to apply a rigid presumption that brick & mortar stores operate in markets separate from ecommerce outlets. This issue must be examined based on the specific facts of particular cases.

The Commission is already revising its Vertical Block Exemption Regulation, No 330/2010 (VBER) and its Guidelines on Vertical Restraints (VGL)²⁸ which drew differences between the rules applicable to physical stores versus those applied to online sales.²⁹ The Commission’s efforts to tackle the challenges brought by digital

²⁷ See Case COMP/M.5658 Unilever/Sara Lee, Case COMP/M.5644 Kraft/Cadbury.

²⁸ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010 O.J. (L 102) 1 [hereinafter, VBER]; Commission notice - Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1 [hereinafter, VGL]. See Press Release, *Antitrust: Commission publishes findings of the evaluation of the Vertical Block Exemption Regulation* (Sep. 8, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1564

²⁹ The VBER and VGL also specifically address limitations on online sales. The VGL state that in principle every distributor must be allowed to sell its products on the internet and that those sales are usually considered passive sales. (VGL at 52). This assumes that a ban on selling through the internet constitutes a hardcore restriction because it restricts the territory into which or the customer to whom the buyer may sell the goods or services. (*Id.*) The VGL also gives examples of when these restrictions are likely to be considered hardcore: (i) geo-blocking or rerouting customers to another territory; (ii) requiring

technologies to the distribution of goods and services within the EU had already motivated prior changes to the VBER in 2010,³⁰ the Digital Single Market Strategy³¹ and the E-Commerce Inquiry.³² As stated in the E-Commerce Inquiry final report, eliminating barriers to trade and unnecessary territorial regulatory barriers is important for achieving both competitiveness and a digital single market.³³ However, when balancing the tradeoff between achieving a single market and consumer welfare, vertical agreements should be analyzed according to their effects as evaluated on a case by case basis. The goal of a single market should not be pursued through rules that create an unnecessary loss in efficiency in the distribution of goods and services.

These efficiency-based considerations also call for abandoning formalistic assumptions that artificially separate products that may in fact compete through different distribution channels, like those sold through both physical and online stores versus those sold exclusively online. Respondents to the VBER market inquiry largely agreed on the need for a revision of the guidance regarding online restrictions, especially its distinction between passive and active sales.³⁴

Some National Competition Authorities (NCAs) have already issued decisions recognizing that online and physical stores either compete in the same market or exercise significant competitive constraints on each other. In 2016, the French Competition Authority (FCA) approved the takeover of Fnac, active in the retail sale of TV sets, cameras, and audio sets, by the Darty group, one of the leaders in the French electronic retailing sector subject to the divestment of several physical stores. The FCA defined the relevant markets as including both in-store and online retail channels. The FCA explicitly stated that:

distributors to terminate internet transactions when credit card data reveals the buyer is located in another member state; (iii) requiring a distributor to limit the proportion of sales made over the internet; (iv) requiring a distributor to pay a higher price for products intended to be resold online (however, a supplier may offer a fixed fee to a distributor to support off line efforts).

³⁰ See Press Release, *IP/10/445 Antitrust: Commission adopts revised competition rules for distribution of goods and services* (Apr. 20, 2010), http://europa.eu/rapid/press-release_IP-10-445_en.htm

³¹ For further details on the Digital Single Market Strategy, see EUR. COMM'N, PRIORITY DIGITAL SINGLE MARKET BRINGING DOWN BARRIERS TO UNLOCK ONLINE OPPORTUNITIES, https://ec.europa.eu/commission/priorities/digital-single-market_en

³² See EUR. COMM'N, ANTITRUST SECTOR INQUIRY INTO E-COMMERCE, http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html

³³ See EUR. COMM'N, PRIORITY DIGITAL SINGLE MARKET BRINGING DOWN BARRIERS TO UNLOCK ONLINE OPPORTUNITIES, https://ec.europa.eu/commission/priorities/digital-single-market_en

³⁴ See DG Comp, *Factual summary of the contributions received in the context of the open public consultation on the evaluation of the Vertical Block Exemption Regulation (EU) No 330/2010* at 16, https://ec.europa.eu/competition/consultations/2018_vber/factual_summary.pdf

“Competitive pressure exerted by online sales has become significant enough to be integrated in the concerned market, whether it comes from pure players (such as Amazon or Cdiscount) or from stores’ own websites which complete in-store physical sales.”³⁵

Similarly, in 2018 the Portuguese Competition Authority (AdC) cleared the acquisition of Nortravel, a travel and tourism agency, by Escalatur, part of the Barcelo group and active in several tourism services including hotels, tourism operation and travel agencies.³⁶ The AdC considered the two relevant overlaps in the market for the provision of tourism services and travel agency services without differentiating between those provided over the internet and those offered in physical stores.³⁷

The Commission has traditionally drawn a separate market for online and “distance sales” excluding sales for physical stores. For example, in *Otto/Primondo Assets*³⁸ the Commission defined the relevant market as comprising “home-shopping” of a wide range of consumer goods to include shopping by internet catalogue or other types of home shopping but excluding brick and mortar stores.³⁹ The Commission argued that consumers do not view online and catalogue sales as interchangeable with brick and mortar sales.⁴⁰ However, when dealing with the retail sale of books the Commission identified a single market for all sales to final customers regardless of the distribution channel.⁴¹ In light of these different perspectives, the Notice should clarify that the Commission defines markets including online sales on a case by case basis.

More generally, some commentators have mentioned that when dealing with services offered through different online and physical distribution channels, the Commission is defining very narrow markets.⁴² For example, the Commission found separate online advertising markets in the *Google/DoubleClick*,⁴³ *Microsoft/Yahoo! Search*

³⁵ Décision n°16-DCC-111 du 27 juillet 2016 relative à la prise de contrôle exclusif de Darty par la Fnac, <https://www.autoritedelaconurrence.fr/sites/default/files/2019-09/16dcc111.pdf>

³⁶ Decisão de Não Oposição Da Autoridade Da Concorrência Processo Ccent. 13/2018–Escalatur / Nortravel, http://www.concorrenca.pt/FILES_TMP/2018_13_final_net.pdf

³⁷ *Id.*

³⁸ Case No COMP/M.5721 -OTTO/ PRIMONDO ASSETS , https://ec.europa.eu/competition/mergers/cases/decisions/m5721_20100216_20212_en.pdf

³⁹ *Id.* at 4-8.

⁴⁰ *Id.*

⁴¹ Case No COMP/M.4611 - Egmont/Bonnier, at 13, 19.

⁴² See Daniel Gore, *Market definition in merger control: An overview of EU and national case law*, E-COMPETITIONS ANTITRUST CASE LAWS E-BULLETIN, CONCURRENCES, (Feb. 2020).

⁴³ Case No COMP/M.4731 – Google/ DoubleClick, at 17 *et seq.*, https://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

*Business*⁴⁴ and *Facebook/WhatsApp*⁴⁵ decisions. As commentators highlight,⁴⁶ this approach largely differs from the finding by other European and foreign regulators and competition authorities.⁴⁷ For example, the UK telecommunications regulator OfCom had already found that radio advertising was competitively constrained by online media.⁴⁸ Along the same lines, the Canadian Competition Bureau acknowledged growing competitive constraints to newspaper advertisements from online advertisements in its analysis of the *Transcontinental/Quebecor* media merger.⁴⁹ Similarly, the FCA found a single market composed of both online and offline advertisement in the *Aufemininpar/TF1* transaction.⁵⁰

Market definition should also consider technological advances that lead to the convergence of different services into one, as the Commission considered when analyzing fixed and mobile telecommunications services in *Liberty Global/BASE Belgium*.⁵¹

In brief, the notice should reflect that market definition is based on an empirical case by case analysis that considers competitive constraints and focuses on demand substitution. In the current globalized markets where goods and services may compete head to head through different technological and/or physical distribution channels there is no sound basis to define a relevant market comprised only of e-commerce.

⁴⁴ Case No COMP/M.5727 - MICROSOFT/ YAHOO! SEARCH BUSINESS,

https://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf

⁴⁵ Case No COMP/M.7217 – Facebook/ WhatsApp, at 13-14,

https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

⁴⁶ See Daniel Gore, *supra* note 42.

⁴⁷ See Daniel Gore, *supra* note 42.

⁴⁸ OFCOM, RADIO ADVERTISING MARKET RESEARCH RADIO ADVERTISING MARKET RESEARCH ASSESSMENT OF THE CONSTRAINTS ON THE PRICE OF DIRECT AND INDIRECT RADIO ADVERTISING,

https://www.ofcom.org.uk/__data/assets/pdf_file/0013/24070/research.pdf

⁴⁹ See CANADIAN COMPETITION BUREAU POSITION STATEMENT, COMPETITION BUREAU STATEMENT REGARDING THE ACQUISITION BY TRANSCONTINENTAL OF QUEBECOR MEDIA’S COMMUNITY NEWSPAPERS IN QUEBEC, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03740.html> (“As a result, for the purposes of the present merger review, the Bureau determined that the relevant market was comprised solely of advertising in community newspapers. However, the Bureau recognizes that the degree of substitutability between advertising in community newspapers and online advertising is evolving, particularly as technology and advertisers are becoming more effective in targeting consumers in specific geographic locations, and should be considered on a case-by-case basis.”)

⁵⁰ Décision n° 18-DCC-63 du 23 avril 2018 relative à la prise de contrôle exclusif de la société Aufemininpar TF1,

⁵¹ Case No COMP/M.7637 – Liberty Global / BASE Belgium,

https://ec.europa.eu/competition/mergers/cases/decisions/m7637_1290_3.pdf.

IV. Product market definition in multisided platforms and zero priced markets

The difficulties of defining product markets for multisided platforms are focused on how to conceptualize and apply market definition tools, such as the SSNIP, to multisided and zero-priced markets.

A. Multisided platforms

The unique features of multisided platforms such as payment cards, ridesharing and hotel booking apps and online search engines are at the center of many recent antitrust investigations, reports, and decisions. Their uniqueness, based on cross-group effects, has long been recognized in the work of Tirole (2003, 2006) and Evans (2003).⁵²

Recent high-profile tech reports have framed this discussion within the predominant theme that platforms have insulated themselves from competition through entry barriers arising from network effects, access to big data, and economies of scale and scope. Such reports include the DG Comp Report⁵³ and Furman Report.⁵⁴ These inherent characteristics, which may or not be sufficient to create “monopolies”, are not necessarily the result of anticompetitive business strategies.

The evolution of multisided platforms over time requires consideration of *dynamic efficiency* elements in any competitive analysis of markets they may affect, strong competitive constraints *for the market* should not be ignored.

Importantly, there are differences between natural monopolies, characterized by steeply declining long-run average and marginal cost curves, such that there is room for only one or few firms to fully exploit available economies of scale; exclusive rights created by law, such as IP rights;⁵⁵ and the so called “platform monopolies”. Digital platforms may share some characteristics with natural monopolies. Whether or not their network effects are strong enough to create “winner takes all” or “winner takes

⁵² Joshua D. Wright & John M. Yun, *Ohio v. American Express: Implications for Non-Transaction Multisided Platforms*, GEO. MASON L. & ECON. RES. PAPER 18-50 (2018) <https://ssrn.com/abstract=3308516>.

⁵³ See, e.g., DG COMP REPORT, *supra* note 4 at 2-3 (“Indeed, experience shows that large incumbent digital players are very difficult to dislodge, although there is little empirical evidence of the efficiency cost of this difficulty.”).

⁵⁴ See, e.g., FURMAN REPORT, *supra* note 5 at 4 (“In many cases, digital markets are subject to ‘tipping’ in which a winner will take most of the market.”).

⁵⁵ Note that such exclusive rights are usually not economic monopolies. See e.g. *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45–46 (2006) (holding that a patent does not necessarily confer market power upon a patentee).

most” scenarios, however, is an empirical question in each specific instance.⁵⁶ Moreover, if network effects are sufficiently strong to sustain only a few players, such effects would be driven by demand side preferences and not government or firm behavior.⁵⁷ As the OECD explained in the context of its global forum on Competition for the Market:

“In particular, the flexibility of demand, relative to the inflexibility of fixed cost investment in achieving economies of scale, **means that these market have at least the potential to occasionally re-tip if demand shifts**, while supply-side economies of scale will not. For instance a rail network will never re-tip, it may be usurped by a flightpath, a road, or a bullet train, but coordinated switching alone would not pose a threat.”⁵⁸ (emphasis added).

This observation is supported by the history of tech industries where firms considered “dominant” at a particular time were replaced by other competitors. Examples such as IBM, Yahoo, Alta Vista, MySpace, AOL, MSN Messenger, and Friendster, are well known. Additionally, “[c]onsumer heterogeneity and product differentiation tend to limit tipping and sustain multiple networks.”⁵⁹

The DG Comp Report calls for giving market definition less weight while giving more prevalence to anticompetitive effects theories.⁶⁰ In the absence of market definition, the agencies normally present evidence of direct harm through quantitative tools. However, as mentioned before, not all cases will allow for accurate direct effects analysis and agencies will therefore need to revert to market definition. Additionally, the report advocates for the adoption of “ecosystem-specific” markets⁶¹ in which the platform would become the relevant market (making it a monopoly by definition). The report therefore implicitly suggests that market definitions should be drawn to fit the desired theory of harm. The lack of economic rigor in defining markets is highly undesirable, however, as it would distance competition policy and enforcement from the consumer welfare standard and make competition enforcement dependent on

⁵⁶ See OECD, COMPETITION FOR THE MARKET, BACKGROUND NOTE BY THE SECRETARIAT, (2019) at 10 (“To be clear, this paper does not take a view on whether the strength of the effects in existing digital products meet such a threshold, only that such a threshold must exist”), [https://one.oecd.org/document/DAF/COMP/GF\(2019\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2019)7/en/pdf)

⁵⁷ *Id.* at 11.

⁵⁸ *Id.*

⁵⁹ Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 105 (1994); see also Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. ECON. PERSP. 125 (2009).

⁶⁰ See DG COMP REPORT *supra* note 4 at 3.

⁶¹ See *Id.*, at 3, 10-11.

social, political, and protectionist goals. It will be very difficult to place acceptable and disciplined constraints on the manner in which such goals are defined and applied in specific competition matters.

There is a lack of consensus among scholars on how to properly define markets in multisided platforms. Some advocate for a “separate market approach” which considers each side of a platform a separate market where effects and efficiencies may be produced. This entails a similar analysis to single-sided markets.⁶² Under this approach a finding of competitive harm on one side of a multisided platform would be sufficient to deem conduct anticompetitive regardless of the relationships among all sides.

A second approach considers the relationships among the various sides of multisided platforms and defines product markets based on an integrated view of how such platforms function. At the very least an analysis of markets should consider the cross-group effects among all sides in the multisided platform context.⁶³ If cross-group effects are strong then this suggests an “integrated market” should be defined. Under this approach competitive effects are analyzed based on an assessment of all sides of the platform.⁶⁴

Regardless of how markets are defined, we generally recommend an *integrated effects analysis* which views effects on all sides of the platform as an essential component to an understanding whether there is harm to competition in the first place.⁶⁵ This approach would also reduce the problems associated with applying the SSNIP test to two sided markets, as each side may be considered first separately, and then the overall effects on consumer welfare may be assessed.

Additionally, output effects should be the primary emphasis in competitive effects analysis.⁶⁶ While price may serve as a reliable predictor for changes in consumer welfare in single-sided markets, it is not reliable for multisided markets. This is true for

⁶² See Katz, M., & Sallet, J. *Multisided platforms and antitrust enforcement*, 127 Yale L.J. 2142–2175 (2018); see also, Patrick Ward, *Testing for multisided platform effects in antitrust market definition*, 84 U. CHI. L. REV. 2059-2012 (2017), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6063&context=uclrev>

⁶³ See e.g. James Ratliff & Daniel Rubinfeld, *Is there a market for organic search engine results and can their manipulation give rise to antitrust liability?*, 10, J. COMPETITION L. & ECON. 517-541 (2014), [https://www.law.berkeley.edu/files/Search_Engine_Paper\(1\).pdf](https://www.law.berkeley.edu/files/Search_Engine_Paper(1).pdf)

⁶⁴ Joshua D. Wright & John M. Yun, *supra* note 52.

⁶⁵ *Id.* at 7.

⁶⁶ Joshua D. Wright & John M. Yun, *Burdens and Balancing in Multisided Markets: The First Principles Approach of Ohio v. American Express*, 54 REV. INDUS. ORG., 717-740, 732-34 (2019).

transaction platforms (such as payment cards and services like Uber and Airbnb) because there are two prices that determine output. It is also true for non-transaction platforms (such as search engines and newspapers) because prices on both sides are interrelated due to cross-group effects.⁶⁷

This reasoning was adopted by the Supreme Court of the United States in *Ohio v. American Express*.⁶⁸ The district court found that American Express operated in two separate markets, and consequently required two separate competitive effects analyses. The Second Circuit reversed and found that American Express operates in one integrated product market and consequently there must be a single, integrated competitive effects analysis. The Supreme Court affirmed and endorsed the integrated effects approach. The court further held that “evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power.”⁶⁹

In brief, when defining markets, it is important to consider whether there are cross-group effects that call for defining a single integrated market. However, regardless of this definition the *prima facie* antitrust assessment of competitive harm must incorporate the impact to consumers *on all sides of the platform* via output effects.

B. Zero priced markets

The main issue is how to apply traditional quantitative tools for market definition, such as the SSNIP test, when goods and services are “free” for consumers. This is not to propose that there is no consideration given by consumers for such services. As the DG Comp Report and the Furman Report point out, consumers may be paying the platform with their attention, data, and privacy.⁷⁰ The common feature presented by zero priced markets is that there is *almost always an interrelated product or service* that is offered in the market which benefits from the popularity of the zero priced product.⁷¹

⁶⁷ *Id.*

⁶⁸ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018).

⁶⁹ *Id.* at 15.

⁷⁰ DG COMP REPORT *supra* note 4 at 44; FURMAN REPORT *supra* note 5 at 4.

⁷¹ GONENC GURKAYNAK, ESRA UÇTU & ANIL, ACAR, APPLYING THE DYNAMIC COMPETITION APPROACH TO ZERO-PRICED MARKETS, DOUGLAS H. GINSBURG, AN ANTITRUST PROFESSOR ON THE BENCH - LIBER AMICORUM 310 (Nicolas Charbit et al., eds. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149317

As a starting point, zero priced markets as innovation markets are best understood under the Schumpeterian dynamic efficiency concept where the value is introduced by new products and new processes.⁷² The value to consumers is enhanced by allowing long run competition. The dynamic model of competition focuses not only on short-run price competition, but on non-price competitive outcomes that may translate to increased investment and innovation.⁷³

A proposed solution is to apply a test that considers a “small but significant non-transitory decrease in quality” (SSNDQ) proposed, among others, by Gal and Rubinfeld.⁷⁴ The obvious downside of this proposal is that including a qualitative measure in a quantitative test would make it extremely uncertain. This methodology, which was part of the conceptual framework that the Commission used for its assessment of dominance in *Google/Android*,⁷⁵ is subject to many caveats and qualifications.⁷⁶ How do competition authorities measure a reduction in quality equivalent to a 5-10% price increase? Even more complex would be determining the specific extent of quality degradation that would be sufficient to reduce the firm’s revenue to make such degradation profitable.⁷⁷

Another proposed test is the “small but significant and non-transitory increase in (exchanged) costs on customers” (SSNIC).⁷⁸ However, there are evident complexities involved in measuring the cost to customers.

In practice, European enforcers have been able to define markets for zero priced services applying qualitative analysis based on demand substitution via *observing the functionalities of the product*. In fact, the Commission considered product functionalities

⁷² See J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J.C.I. & E. 4, 582 (2009).

⁷³ GONENC GURKAYNAK, ESRA UÇTU & ANIL, ACAR, *supra* note 71 at 312.

⁷⁴ Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 Antitrust L.J. 521, 522 (2016), <https://www.law.berkeley.edu/wp-content/uploads/2015/04/Gal-Rubinfeld-The-Hidden-Costs-of-Free-Goods-2015.pdf>

⁷⁵ See OECD, QUALITY CONSIDERATIONS IN THE ZERO-PRICE ECONOMY – NOTE BY THE EUROPEAN UNION, (2018) at 6, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)135/en/pdf#page=1&zoom=auto,-46,842](https://one.oecd.org/document/DAF/COMP/WD(2018)135/en/pdf#page=1&zoom=auto,-46,842)

⁷⁶ See OECD, ROUNDTABLE ON THE ROLE AND MEASUREMENT OF QUALITY IN COMPETITION ANALYSIS, (2013) <https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>

⁷⁷ This test has also been applied by Chinese competition authorities in *Beijing Qihoo 360 Technology Co. v. Tencent Technology (Shenzhen) Co.*, (Sup. People’s Ct. 2013) (China).

⁷⁸ John M. Newman, *Antitrust in Zero-Priced Markets* 164 U. Pa. L. Rev. 149 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474874.

⁷⁸ See J. Gregory Sidak & David J. Teece, *supra* note 72.

in *Google/DoubleClick*,⁷⁹ and *Microsoft/Yahoo! Search Business*,⁸⁰ by defining the market for paid advertising but ultimately leaving open whether the services offered for free constituted part of the same relevant market. Additionally, as mentioned before, the Commission drew very narrow markets based on *supply substitutability* which, arguably, lead to an artificial separation of online advertisements from other forms of advertisement. The Commission also defined markets according to functionality in the *Microsoft/LinkedIn*⁸¹ merger, where it separated the market of “social networking” from the market of “professional social networking”.

As mentioned above, zero priced services almost by default comprise another interrelated product or service that benefits from the “free one.” This brings us back to the analysis of multisided platforms and the importance of taking an integrated effects approach. We therefore respectfully suggest that the analysis of the functionalities of products consider the inherent nature of zero priced services which involve analyzing *prima facie* effects on both sides of the market.

V. Updating geographic market definition to account for global markets

The Commission’s practice of analyzing whether competition happens at a local, regional, EEA, and worldwide level should be reflected in the Notice. The existence of global markets is not novel and has been enhanced by digital platforms, which provide services without regard to distance, national border, or transportation costs.⁸²

The Commission itself already highlighted the need to amend the Notice to account for global effects in 2016,⁸³ when it commissioned a study on geographic market definition in the context of merger control.⁸⁴

⁷⁹ Case No COMP/M.4731 – Google/ DoubleClick, at 17 *et seq.*

https://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf

⁸⁰ Case No COMP/M.5727 - MICROSOFT/ YAHOO! SEARCH BUSINESS, at 5 *et seq.*

https://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf

⁸¹ Case No COMP/M.8124–Microsoft/ LinkedIn,

https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf

⁸² OECD, ROUNDTABLE ON GEOGRAPHIC MARKET DEFINITION ACROSS NATIONAL BORDERS, (2016)

<https://www.oecd.org/daf/competition/geographic-market-definition.htm>

⁸³ OECD, WORKING PARTY NO.3 ON COOPERATION AND ENFORCEMENT, GEOGRAPHIC MARKET DEFINITION, NOTE BY THE EUROPEAN UNION (2016),

[https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)50/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)50/en/pdf)

⁸⁴ See Amelia Fletcher & Bruce Lyons, *Geographic Market Definition in European Commission Merger Control*, Center for Competition Policy, University of East Anglia, Norwich (2016),

https://ec.europa.eu/competition/publications/reports/study_gmd.pdf

The definition of a geographical market is introduced in the Notice with a quotation from *Hoffman-La Roche*:

“The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”⁸⁵

This concept, which considers demand and supply substitution as well as potential competition, generally aligns with the U.S Horizontal Merger Guidelines (HMG).⁸⁶ However, while the Commission looks at supply substitutability at a second stage, HMG explicitly mentions that market definition focuses solely on demand substitution factors. Supply substitution is considered when analyzing entry. Arguably both of these guidelines fail to account for the dynamic and global nature of markets, which calls for considering potential entrants at a global level. Properly accounting for this reality would entail a more detailed consideration of supply substitution.

Additionally, the Notice should reflect the possibility of defining global markets in line with prior experience. Notably, the Commission found the market for the sale of hard drives in *Western Digital Ireland/Viviti Technologies*,⁸⁷ as well as the mining industry in *Glencore/Xstrata*.⁸⁸

The Notice should also reflect the Commission’s practice of incorporating imports when these create relevant competitive constraints on the companies within a proposed market definition. Examples include *ArcelorMittal/Ilva*,⁸⁹ where the commission considered the competitive constraints of imports of certain types of steel in the European market. The Commission also considered, and finally discarded the effects of imports in the blocked transaction *Tata Steel /Thyssenkrupp/Jv*.⁹⁰

⁸⁵ See NOTICE *supra* note 1 at 10.

⁸⁶ See U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines, at 13-14 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

⁸⁷ COMP/M.6203 – Western Digital Ireland/Viviti Technologies, (2011) https://ec.europa.eu/competition/mergers/cases/decisions/m6203_20111123_20600_3212692_EN.pdf

⁸⁸ COMP/M.6541 – Glencore/Xstrata, (2012), https://ec.europa.eu/competition/mergers/cases/decisions/m6541_7449_2.pdf

⁸⁹ Case No COMP/ M.8444 – ArcelorMittal/Ilva, (2018) https://ec.europa.eu/competition/mergers/cases/decisions/m8444_6740_3.pdf

⁹⁰ Case No COMP/M.8713 TATA STEEL/ THYSSENKRUPP/ JV, (2018), https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8713

Additionally, the discussion regarding geographical markets has largely centered around the Commission's decision to block the *Siemens/Alstom*⁹¹ merger. The Commission blocked the transaction on the basis that it would have harmed competition in the markets for railway signaling systems and very high-speed trains, creating an undisputed market leader in some signaling markets and a dominant player in very high-speed trains.⁹²

This decision has motivated France and Germany to directly advocate for the relaxation of merger control rules to allow for the creation of "European Champions."⁹³ The proposal included granting new powers to the European Council to override European Commission decisions. This statement was followed by another document joined by Poland. While this second manifesto seems to step back from the strong idea of overriding the Commission's decisions, it again directly calls for amendments to strengthen national companies in the face of the "excessive market power of big tech firms."⁹⁴

Other European enforcers voiced opposition towards this petition, which would depart from the consumer welfare standard and be subject to the uncertainties of political decision-making.⁹⁵ This concern was also shared by the over 90 high-profile competition lawyers and economists who signed an open letter stating that changes to existing rules could "risk undermining the principles on which European Merger Control is based".⁹⁶

⁹¹ Case No COMP/M.8677 -SIEMENS/ALSTOM, (2019), https://ec.europa.eu/competition/mergers/cases/decisions/m8677_9376_3.pdf

⁹² See Press Release, Mergers: Commission Prohibits Siemens' proposed acquisition of Alstom, (Feb. 6, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881

⁹³ See BUNDESKARTELLAMT & CONSEIL DE LA CONCURRENCE, A FRANCO-GERMAN MANIFESTO FOR A EUROPEAN INDUSTRIAL POLICY FIT FOR THE 21ST CENTURY, , https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2

See BUNDESKARTELLAMT, CONSEIL DE LA CONCURRENCE & OFFICE OF COMPETITION AND CONSUMER PROTECTION OF POLAND, MODERNISING EU COMPETITION POLICY, https://res.cloudinary.com/gcr-usa/image/upload/v1562345593/Poland_France_Germany_EU_merger_paper_grxov0.pdf

⁹⁵ See Press Release, Chronicle: The Nordic Competition Authorities support a strict merger control regime, (Jun. 27 2019), <https://www.en.kfst.dk/nyheder/kfst/english/news/2019/201906278-the-nordic-competition-authorities-support-a-strict-merger-control-regime/>

⁹⁶ See Vanessa Turner *et al*, Open letter https://res.cloudinary.com/gcr-usa/image/upload/v1556637328/Open_letter_on_EU_competition_policy_FINAL_dtavjw.pdf

While we agree on the need to modernize the Notice to better account for potential supply side substitution at a global level, we strongly suggest that changes to the Notice should be based exclusively on sound economic principles and exclude non-economic public policy or political goals. Aside from any questions about the merits of those goals, we respectfully suggest that they should be addressed through rules and institutions distinct from those of competition enforcement.

VI. Recommendations

We recommend the Commission amend the Notice to reflect a sound economics-based approach to current markets which are increasingly globalized, and innovation-driven.

We also strongly caution against the adoption of formalistic static presumptions of market power or dominance which will lead to a reduction of legal certainty and innovation. Proposals that oversimplify the existence and extent of network effects or that downplay the importance of rigorous market definition for circular propositions that tailor markets to proposed theories of harm should be rejected.

We recommend: (i) Clarifying that sales of goods and services over the internet should not automatically be deemed a separate market; (ii) Clarifying that multisided platforms should be analyzed considering both sides, *i.e.*, following an integrated market approach, or at least a “single effects approach;” and (iii) Amending the Notice to reflect the possibility of geographical markets broader than the E.U. and EEA.