



8 October 2020

Commission Notice on the definition of relevant market for the purposes of Community competition law

Evaluation

Introduction

BUSINESSEUROPE is pleased that the Commission is evaluating whether its 1997 Notice on market definition is fit for the modern economy. EU competition policy should ensure that effective competition between companies exists thereby contributing to job creation, growth and investment. It should also address the global challenges which businesses are facing to boost their and the EU's overall competitiveness. As such it is one of the key components of a successful EU industrial policy.

Market definition is a core element of EU competition policy allowing the calculation of market shares in the enforcement of the rules regarding competition and merger control to identify the competition constraints that companies face. The Notice on market definition has given important guidance to stakeholders about the Commission's application of the concept of relevant product and geographic market and as such has contributed greatly to transparency.

BUSINESSEUROPE believes that the existing legislative framework regarding competition, relevant notices and guidelines, and the existing body of case law and practice, give the Commission enough discretion to resolve and limit distortions, ensure efficiency and innovation by allowing competitors to enter new markets, protect consumer choice, and to identify the competitive constraints that firms face. In our view, there are no structural competition problems or gaps that would justify the introduction of new tools or any changes to the substantive test and other provisions in the Merger Regulation. Changes to the law would create new uncertainties, nullify some of the well-established case law, and increase existing discretion. Instead, the Commission should explore how EU competition policy can adapt to developments on global and rapidly evolving markets and where necessary change and expand relevant notices and guidelines, such as the Notice on market definition.

In our view, the fundamentals of the Notice are still valid. The relevant perspective is that of the consumer and the fundamental question to be posed is still relevant, namely, what products do consumers consider as substitutes, and to test this by assessing what happens when prices change.

In this context, there is a need for a new section on how to treat zero-price markets as is the case with many digital markets. Also, the digitalization process has contributed to the growing of multi-sided platform operators who often supply goods and services exploiting advertising revenues, and in some other cases to the blossoming of particular business models that raise the question how the relevant market coincides with them. In connection to that, the intersection between digital markets (selling online) and traditional markets should also be elaborated further. In fact, due to the digitalization process, businesses pursue their commercial activities on both online and offline channels, thereby questioning the existence of an actual partition between the two of them and



further requiring to distinguish the phenomena of substitution from those of authentic migration from a channel to another one.

In addition, the Commission should further develop how geographical markets are to be determined, not only taking into consideration trade patterns, as is currently stated, but also the development on global markets, investment and merger patterns.

In any case, it is important that the Notice provides clear guidance for the definition of relevant market that is relevant for all involved sectors/situations to avoid having diverse subjective approaches that could raise difficulties when comparing different analyses of structural market conditions. Often, analyses are carried out in the context of civil judicial disputes dealing with competition issues and there is a risk that the assessment will be inaccurate if guidance is unclear and the relevant assessment is left to the judicial parties and judge involved.

Global market environment

Overall, regarding the definition of markets, the Commission defines geographic markets correctly, setting the right framework to assess competitive constraints in and outside the EU. However, the Commission should identify on the basis of objective and transparent criteria whether there are situations where it should put more weight on the global market environment, for example when assessing certain concentrations, bearing in mind overall market developments as well as competition within the internal market.

For example, in cases where merging parties compete outside the EU and where third country competitors do not (yet) have business activities or revenues in the EU, sufficient consideration should be given to the global market environment, especially when determining the relevant geographic market. Also, when the non-European business of the merging companies is vital to support their European activities, in times when EU demand is low and technical development is mainly driven by demand from outside, the EU should not focus predominantly on the market conditions in the internal market, notwithstanding the importance of a proper consideration of the conditions in the internal market. This is even more valid if there is an indication, following a proper economic analysis, that non-European competitors might become active in the EU after a longer period within the foreseeable future (see also below). In such circumstances, the Commission should consider adopting a more dynamic analysis and long-term view of the markets.

Rapidly evolving markets and potential competition

In situations where markets are rapidly evolving, dominance is often temporary. In such cases, the Commission should adopt a dynamic analysis and long-term view of the markets when appraising the existence of competitive pressure. The Notice on market definition states that potential entry should not be considered when defining the relevant market but only at the substantive stage of assessment (para 24). In particular, the Commission examines whether entry is fast and lasting enough to prevent or nullify the exercise of market power; entry is usually considered timely only if it takes place within two years.

However, in rapidly evolving markets, entry can be easy and quick so the Commission should take potential competition into account when defining the relevant market. Therefore, the market temporal dimension comes to the fore. The relevant market is

determined by applying the concept of substitution to different market dimensions. To this extent, in the EU only two dimensions are essential: the product and the geographical one; other jurisdictions tend to take into account other dimensions, such as the temporal one.

Subsidies

The Commission should also take account of the various forms of public subsidies (e.g. export subsidies, loans, funding of state-owned companies, etc.) that companies enjoy. These subsidies are relevant for potential entry but also for assessing both markets' dimensions (as they may allow companies from outside the EU to sell globally, while EU companies often cannot, thereby giving the impression of the market being smaller) and market players' power on the same markets (as companies benefiting from public subsidies might consequently have much stronger market power). This issue has become more relevant following the recently adopted White Paper dealing with the distortive effects caused by foreign subsidies in the Single Market.

Information collection

The EU should improve its ability to collect information about (global) markets. Companies should be granted more flexibility when responding to an information request. Unclear, overly detailed, voluminous, irrelevant requests, short deadlines, formalities of requests, may affect the quality of the information provided, especially regarding markets outside the EU. Moreover, they put an unnecessary burden on those asked to respond. In addition, the requests for information should be objective and neutral to avoid that those consulted are led in a specific direction that does not reflect a true and independent assessment of the market situation. The requests should also be more tailored to the specific market participant being questioned (e.g. customers and competitors) to avoid identical request that are unnecessarily broad and detailed. Also, the Commission should consider having more (virtual) meetings and calls to reduce burdens and there should be enough transparency to establish a constant dialogue with operators, especially involving SMEs.

Guidance on supply-side substitution

The guidance of the Notice on supply-side substitution, and also its relation to potential competition as mentioned, is insufficient and raises concerns on how to determine the relevant market in a number of cases. This concerns both, the definition of the relevant product market and the relevant geographic market

In general, the Notice states in para 20 supply-side substitution can take into account suppliers, which “are able to switch production to the relevant products and market them in the short term”. It defines short term as “a period that does not entail a significant adjustment of existing tangible and intangible assets”. But it is unclear how this definition can be applied in practice, since significance (time and/or investment requirements) of such adjustments can greatly vary depending on the product in question. This lack of guidance leads to the issue on how to distinguish between supply-side substitution and potential competition. While supply-side substitution shall be taken into account when defining the relevant market (para 20), it is also considered a form of potential competition (para 23), which shall not be taken into account when defining the relevant market (para 24).



Self-supply a. k. a. captive sales

The Notice should also contain rules on how self-supply could be taken into account when determining the relevant market. In vertically integrated sectors some companies meet their supply needs by buying solely or partly from another company of the same undertaking. This is a common practice to ensure stable production. Currently, the Notice does not give guidance on how such self-supply can be taken into account when determining the relevant market, e. g. in merger cases. Examples for guidance on this subject could be drawn from guidelines of member states, such as the UK merger assessment guidelines.

Integrated supply and bundle to bundle competition

The increasingly widespread integrated supply of goods and services to end-customers (e.g. for the energy sector) requires a rethinking of the traditional categories of relevant markets. For these kinds of offer, the final good sold to the customer represents only a complementary and functional element to the provision of the overall service considered. These offers aim to fulfil specific needs of the final customers which are not linkable to the single good or service itself, but they are attributable to the integration of such goods and services in one and only solutions. Therefore, it would be inconsistent to consider such offers as the sum of single goods and services they are composed of, which corresponds to different relevant markets. Hence, these kinds of integrated supply properly require a new relevant integrated market definition, which considers the overall supply of goods and services.

Furthermore, the increasingly integrated nature of goods and services circulating in the market highlights the need to outline in which circumstances product packages offered by different operators can be considered in competition and which parameters are relevant when assessing the market power deriving from such combined offers.

Guidance on demand-side substitution, including the SSNIP-test

The current Notice lacks guidance on demand-side substitution (para 15-19) concerning products, which are only used as supplies for manufacturing another product, but which are comparable to products sold as end products. In combination with self-supply, this aspect should also be considered in the guidance of the calculation of market shares (chapter IV). If self-supplied products, used only as supplies, were to be included in the market for end products, it might be difficult for the self-supplied undertaking to determine the sales of the self-supplied product, which is only used as an ingredient.

The demand-side substitution and its focus on the SSNIP (small but significant, non-transitory increase in price) test is of paramount importance in the current Notice. It generally provides reasonable information in traditional markets, but its applicability is already greatly diminished when it comes to bidding markets. The SSNIP-test does not function well with digital markets and not at all in cases of “zero-price” products and services. Especially for digital markets, the current approach to market definition is too static. Digital enterprises have evolved into entire ecosystems, encompassing a variety of complementary services and goods. Aside from pricing criteria, these ecosystems take into account other competitive parameters such as quality and innovation. In these constellations, there should be less emphasis placed on the SSNIP-Test.
