Position Paper

Market Definition Notice Consultation Response

I. Introduction

We appreciate the opportunity to provide input[1] for the Commission's consultation for reviewing its market definition notice.[2] This position paper supplements our responses to the Commission's online consultation questionnaire.

Our response focuses on five topics which we believe are particularly pertinent to the consultation and which the Commission could usefully address in a recast market definition notice, namely:

- The necessity for defining market in all cases and the relevance of the market definition notice;
- The potential for clarifications in relation to the concept of a relevant market, in particular the relevance of market definition for zero price markets, innovation and data;
- The potential for clarifications in relation to the basic principles of defining markets, in particular in relation to multi-sided markets;
- The need for greater certainty on the processes and evidence used for defining relevant markets; and
- The framework for calculating and interpreting appropriate market shares.

Before addressing these specific topics, we observe that there has been significant discussion of how EU merger control addresses the competitive constraint from firms headquartered outside of the EU, particularly where such firms may benefit from state support.[3] While this falls outside the scope of the Commission's consultation, we do not believe that altering the analytical framework of EU merger control policy, in particular the approach to geographic market definition, is an appropriate solution to the specific issue of foreign subsidies. Instead, it risks undermining the objective of EU merger control which is to ensure a system of undistorted competition for the benefit of consumers. There are, in any case, more appropriate solutions including the Commission's recent proposals on foreign subsidies, which seek to address the root cause of such concerns and ensure a level playing field for all competitors in the EU.[4] In addition, market shares and market definition can and should be complemented by other possible indicators of market power, and financial strength through access to state resources can be taken into account in this context where appropriate.

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1 The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters.

2 Commission Notice of 9 December 1997 on the definition of relevant market for the purposes of Community competition law (97/C 372/03).

3 *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019, available at https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century; Fondation Robert Schuman (2020), Competition Policy and Industrial policy: for a reform of European Law, p. 25; Dutch government, Non-Paper on 4 December 2019.

4 White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020.

II. Necessity for defining market in all cases (Section II: Relevance of the Notice)

Market definition is a tool to identify the immediate competitive constraints on firms. We believe that it plays, and should continue to play, an integral role in EU competition policy.[5]

On the one hand, market definition is a crucial analytical and practical tool for the implementation and enforcement of EU competition policy. The market definition notice facilitates access to the European Commission's approach to market definition. It has an important role to play for legal certainty and for convergence between the approaches of national competition authorities. We believe that the market definition notice can and should continue to play this role.

In the case of merger control, market definition is an important step given the need for a clear and transparent framework for establishing competitive constraints.[6] Absent relevant markets, firms are less able to evaluate the consequences of their decisions and, ultimately, what merger control means in practice for them. The need for market definition is even more pronounced for antitrust. For instance, only undertakings that are dominant in the correctly defined market fall under the scope of Article 102 TFEU.[7] In a similar vein, an agreement between undertakings (which is not a restriction of competition by object) is assessed in light of its potential restrictive effects on competition *within relevant markets*.[8]

Market definition is, furthermore, crucial for legal certainty and rigorous analysis in both merger control and antitrust. In many cases, competition law intervention is based on the identification of market failures that stem from market power. Market definition is, and should remain, an important criterion to assess whether – and to what extent – a firm enjoys market power. Market definition is therefore key in delineating the scope of EU market intervention. In that respect, the need to define the relevant markets, and identify the competitive constraints at stake, contributes to reducing the prospect of over-intervention.

As a more practical matter, market definition is also key in assessing whether firms satisfy market share thresholds which set the scope of application of the Commission's block exemption regulations under Article 101 TFEU.[9] For that purpose, market definition (and the corresponding calculation of market shares) is a formal requisite for an undertaking to benefit from such exemption and is therefore key for firms' individual assessments of their compliance with competition law. Lastly, the applicability of a number of presumptions enshrined in the case law as well as soft-law and national competition laws within the EU equally depend on market definition.

On the other hand, there is scope for the market definition notice to clarify the role of market definition in the competitive analysis. In some cases, market definition has become an analytical framework rather than a tool for assessing market power (i.e. a precursor to a rigorous substantive assessment of the relevant market). The Commission might consider acknowledging that there are other ways to assess market power and that market definition is not always alone the definitive answer to the key competitive constraints on firms in every case. Since 1997 new tools to assess market power have been used where suitable[10] and the General Court has said that "*high market shares are not necessarily indicative of market power*" in fast-growing and innovative sectors.[11]

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5 J. Franck and M. Peitz, Market definition and market power in the platform economy, CERRE Report, May 2019 p. 21.

6 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) (**Horizontal Mergers Guidelines**), para. 10: "*The Commission's assessment of mergers normally entails:* (a) *definition of the relevant product and geographic markets*".

7 See, for instance: Court of First Instance 6 July 2000, T-62/98, Volkswagen v Commission, para. 230 ("[…] *before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined").*

8 Commission Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, OJ 2011 C 11/01, para. 28.

9 See, for instance Article 3 of the Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

10 Pricing pressure indices (e.g. the UPP or the GUPPI) for merger analysis, were not part of standard competition law practice in 1997.

11 General Court, Judgment of 11 December 2013 in case T-97/12 (Cisco vs. Commission), ECLI:EU:T:2013:635, para. 69.

Furthermore, market definition has difficulties to take into account fast changing markets, network effects, zero price markets and ecosystems.[12] The Commission may consider clarifying the complementary role of other ways of conveying '*meaningful information regarding market power*' and acknowledging that there may be cases where such other ways might convey more meaningful indicators than market shares.[13]

III. Definition of relevant market (Section III.1: Definition of Relevant Market)

A. Concept of a "market" (price vs non-price markets)

With the advent of the zero-price products / services, the Commission and the European Courts have consistently held that a "market" may equally exist where a product / service is offered for free (at least from a monetary perspective). For instance, the Commission delineated a market for streaming media players even though such product was offered for free to consumers.[14] In its subsequent merger control practice, the Commission often took for granted that monetary compensation was not an indispensable feature for the existence of a market, provided that they constitute an economic activity.[15] This approach has been confirmed over the years, including in *Google Shopping* where the Commission delineated a market for "general search services" and another for "comparison shopping services" both of which could be monetized and therefore constituted an economic activity, notwithstanding that both services are offered for free.[16]

However, the issue remains as to how concretely should the concept of a "market" capture products that are offered for free. It may be insufficient to only consider indirectly the "free side" of a market by adding it into the assessment of the "paid side" of the market (as such approach would necessarily fail to capture certain activities in the assessment, and shield them from competition law intervention). It remains however important to clarify the boundaries of such markets to ensure legal certainty (and establish what is, and isn't, in the scope of competition law).[17] It would therefore be helpful if the Commission could clarify that the concept of a "market" should more widely encompass any product involving a transaction between two or more parties at least one of which is acting for economic purposes, i.e. a direct or indirect remuneration or a long-term economic strategy (see also below Section IV. B. Multi-sided markets of this position paper).[18]

B. Innovation markets

A revised market definition notice could also usefully address the topic of market definition, including its appropriateness, for innovation markets.

Since the market definition notice was published, the Commission's approach to innovation has evolved, most notably in the Commission's *Dow / Dupont* merger decision.[19] In that case, the Commission found that a merger between competitors was capable of not only reducing innovation competition on specific product categories – which did not correspond to traditional product markets - but also of lessening innovation competition for "innovation spaces" and, even more broadly, at an industry level.[20] Yet the

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[12] U. Schwalbe (2019), Market Definition in the digital economy: An overview of EU and national case law, p.8; J. Crémer, Y.-A. de Montjoye and H. Schweitzer, Competition policy for the digital era, p. 42-50.

[13] See para. 2 of the market definition notice.

[14] Case COMP/C-3/37.792, Microsoft, 24 March 2004, paras 402–425.

[15] See for instances cases COMP/M.7217, *Facebook/WhatsApp*, 3 October 2014, paras. 31 and 34 or COMP/M.8124, *Microsoft/LinkedIn*, 6 December 2016, para. 87 ("*the vast majority of* [social networking] *services are provided free of monetary charge. They can however be monetised though other means, such as advertising or charges for premium services*").

[16] Case COMP/AT.39740, *Google Search (Shopping),* 27 June 2017, paras. 154 and s.

[17] CERRE Report (2019), Market Definition and Market Power in the Platform Economy, p. 55.

[18] CERRE Report (2019), Market Definition and Market Power in the Platform Economy, p. 56.

[19] Case COMP/M.7932 - *Dow / DuPont*, 27/03/2017, §352 "*in order to assess innovation competition, the Commission will both consider metrics of innovation taking place at industry level*, *as well as innovation taking place in spaces consisting of groupings of crop/pest combinations*".

[20] Case COMP/M.7932 - *Dow / DuPont*, 27/03/2017, §352.

Commission did not consider it necessary to define a relevant market for such innovation spaces or, indeed, innovation at an industry level, despite it not being consistent with the practice at the time.[21]

The approach adopted in *Dow / Dupont* is in sharp contrast with the Commission's prior practice where it limited its assessment to identified future products (e.g. pipeline products in pharmaceuticals).[22] The Decision indicates that this new approach is partially derived from the DOJ / FTC IP Licencing Guidelines which point out that a "*licensing arrangement* [or mergers] *may have competitive effects on R&D that cannot be adequately addressed through the analysis of goods or technology markets*". In particular, participants may be discouraged or deterred "*from engaging in R&D and development, thus retarding innovation*".[23]

Given the novelty of the Commission's approach in *Dow / Dupont,* it would be useful for the Commission to clarify the circumstances in which a broad innovation space should be defined, and address the way it would systematically analyse the competitive constraints in such cases. We believe that such clarification would have significant benefits for a consistent approach between the Commission and national competition authorities and it would provide much needed clarifications for risk management and self-assessment.

C. Data markets

The definition of data markets is not a new phenomenon. The Commission has for instance defined numerous distinct data markets in the financial sector.[24] However, in the more recent *Apple / Shazam* case the Commission distinguished between a market for licensing of music data (where it defined a relevant market) and the Parties' user behavioural data on their customers (where it did not define a relevant market because it was not licensed by the parties to third parties).[25] The Commission did, however, address the importance of Shazam's data in its foreclosure analysis in the market for licensing of music data.[26] In other words, the Commission's current position seems to be that there needs to be a transaction for the supply of data (through licensing or otherwise) between the data holders and the customers in order to define a separate data market.

Against this background, the Commission might consider to elaborate its approach to relevant markets and data, and clarify in particular the circumstances in which the Commission is likely to define a separate market for data. For example, in cases where data is partially or exclusively captive but is nevertheless a particularly important input, the Commission might consider to use market definition as an analytical tool to assess the market power that stems from such data and to what extent a company is subject to competitive constraints exercised by other companies (see also Section IV. C. After-markets of this position paper). The Commission might wish to give guidance on how the heterogeneity of data and the different use cases for data enable or prevent other firms from exercising competitive constraints on other firms.[27]

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[21] I. Kokkoris and T. Valletti (2020), Innovation considerations in horizontal merger control, pp. 21-22.

[22] Case COMP/M.7275, Novartis/GlaxoSmithKline Oncology Business, 28 January 2015.

[23] Antitrust Guidelines for the Licensing of Intellectual Property, issued by the US Department of Justice and the Federal Trade commission, 12 January 2017, pp. 11 and 31.

[24] See Thomson Corporation / Reuters Group Case M.4726 of 19 February 2008, where the Commission identified several distinct markets for financial data.

[25] European Commission, phase 2 decision in case M.8788 of 6 September 2018, Apple / Shazam, para. 119. The Commission defined a market for 'licensing of music data' but ruled out a market for user data, because the merging parties didn't license this data to third parties: *"No overlap arises in relation to the Parties' user behavioural data, which is not licensed by the Parties to third parties.*".

[26] European Commission, Guidelines of 18 October 2008 on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07), para. 31 and following. For an example of the Commission applying this, see sections 8.4.2.2 (on user data) and 8.4.2.1 (competitor data) of its phase 2 decision in case M.8788 (Apple / Shazam). See also I. Graef (2015) - Market Definition and Market Power in Data: The Case of Online Platforms, pp. 504-505.

[27] J. Crémer, Y.-A. de Montjoye and H. Schweitzer (2019), Competition policy for the digital era, p. 73.

IV. Basic principles of market definition (Section III.2: Basic Principles)

A. Competitive constraints and the relevant time horizon

A revised market definition notice could usefully elaborate on the time horizons that are relevant for the competitive constraints to which firms are subject and, in turn, for market definition. This would be especially the case in forward-looking merger control assessments and antitrust investigations where the effects of transactions and conduct are increasingly being assessed over a longer timeframe than was previously the case.

In most merger cases the competitive conditions existing at the time of the merger constitute the relevant comparison for analysing the effects of a merger.[28] According to the Horizontal Mergers Guidelines, the Commission may take into account future changes to the market, in particular the likely entry or exit of firms.[29] Current market shares may be adjusted to reflect "*reasonably certain future changes*".[30] The Court of Justice considered in *Tetra/Laval* that: "*A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events … or of current events, but rather a prediction of events which are more or less likely to occur in future.*"[31]

There is, however, an increasing focus on dynamic competition and innovation markets which require longer time horizons. In markets that are characterized by innovation and long development lead times, the Commission has even said that the competitive analysis is "*mostly forward-looking*".[32] Time horizons of 14[33] and 20[34] years were found to fall outside the scope of the merger assessment, but shorter future scenarios have had a significant impact on the competitive assessment in several Commission decisions. The Commission for example took into account a 10 year time horizon for crop protection products,[35] 3-5 years for offshore wind turbines,[36] 2-3 years in telecoms[37] and one year in air transport.[38] Against a backdrop of increasing digitalisation and the rise of fast-changing innovative markets, it would be helpful if any recast market definition notice could give guidance on how dynamic competition affects the time horizon for the purposes of market definition and for the purposes of the competitive assessment as well as on the evidence that it would consider when determining the relevant time horizon.

The Commission could also give guidance on when digital products and services should be included in market definitions for more traditional products and services (and *vice versa*). Digital markets are growing and will increasingly exercise constraints on (some) traditional markets. It would be helpful if an EU approach could be adopted for this EU wide development. This would decrease the risk of a fragmented landscape, as NCA's are confronted with parties arguing that digital services and products exercise significant constraints on traditional markets. The Autorité de la Concurrence has formulated four criterions for determining whether online and offline retail distribution channels are part of the same product market: [freely translated] "*(i) an important level of penetration of online sales in the relevant sector, (ii) a growing uniformity in price levels across the different distribution channels, (iii) the identity of the range of products and services offered in the shop and online, (iv) the adoption, at least by the parties, of an internal omni-channel organisation and a commercial and price strategy that takes into account players that are specialised in online sales and, more generally, the development of an 'omni-channel'*

[28] Horizontal Mergers Guidelines, para. 9.

[29] Horizontal Mergers Guidelines, para. 9.

[30] Horizontal Mergers Guidelines, para. 15.

[31] Case C-12/03 P, *Commission v Tetra Laval*, 15 February 2005, para. 42

[32] Commission decision imposing fines under Article 14(1) EUMR of 8 April 2019 in case M.8436 – GE / LM Wind, para. 12.

[33] Commission decision of 30 March 2012 in case M.6447 – IAG / BMI, para. 77.

[34] Commission decision of 20 December 2019 in case M.9585 – Siemens Gamesa Renewable Energy / Senvion (European Onshore Wind Turbine Service) / Ria Blades, para. 60.

[35] Commission decision of 27 March 2017 in case M.7932 – Dow / Dupont, paras. 2586-2588.

[36] Commission decision imposing fines under Article 14(1) EUMR of 8 April 2019 in case M.8436 – GE / LM Wind, para. 13.

[37] Commission decision of 27 November 2018 in case M.8792 – T-Mobile / Tele2 NL, paras. 420, 491, 551, 703, 874.

[38] Commission decision of 12 July 2018 in case M.8869 – Ryanair / Laudamotion, para. 299.

distribution model in the relevant sector".[39] Another example is the conclusion of Ofcom and the Dutch ACM that online communications do not exert sufficient pressure on (physical) mail to be considered part of the same product market.[40]

Finally any new market definition notice could usefully give guidance on how the Commission will take into account asymmetric competitive constraints. Asymmetric constraints exist when product A constrains product B, but product B doesn't constrain product A.

B. Multi-sided markets

The concept of multi-sided markets represents perhaps the most significant economic theory development since the market definition notice was issued. As is now well established, multi-sided markets bring together two or more different user groups that are linked through indirect network effects: the attractiveness of one product to one set of users depends on the number of other users.[41] While multi-sided markets have existed for decades (e.g. newspapers with advertising revenues), the practical need to evaluate such markets is of significant (and increasing) relevance, as the business models of many digital platforms are rooted in two- or multisided markets (the so-called "matchmakers").

The emergence of new multi-sided markets has given rise to a number of ambiguities over the correct application of market definition to such products and services. There is, for example, a lively debate over whether there is a need to define a single market encompassing both (or all) "sides" of the market or two or more markets in such circumstances. In a similar vein, some commentators have proposed distinguishing between multi-sided "transaction" markets,[42] such as payment cards, where a single market is appropriate, and multi-sided non-transaction markets, such as online search, where two markets are appropriate. Indeed, in two cases involving so-called transaction markets, the Commission decided differently. In several instances, including *Travelport / Worldspan* (in relation to electronic travel distribution services)*, Google / DoubleClick* (in relation to the online advertising intermediation market) the Commission defined a single relevant market, while noting that it is part of a two-sided platform.[43] In contrast, the Commission (and the Court of Justice of the European Union) defined several distinct but interrelated markets in *Mastercard* and *Cartes Bancaires*, given the importance to capture the different levels of interactions, namely the platform, the banks, and the clients.[44]

There is accordingly scope for any recast market definition notice to clarify how multi-sided markets should be addressed as part of market definition.[45] In particular, any competition analysis of multi-sided markets must at a minimum take into account the externalities created by indirect network effects at some

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[39] Autorité de la Concurrence, decision of 16 July 2019 in case 19-DCC-132, Fnac Darty / Nature & Découvertes, para 26: "*Dans le secteur de la distribution au détail, la récente pratique décisionnelle de l'Autorité23 a mis en lumière un faisceau d'indices justifiant le regroupement des ventes en ligne et des ventes en magasins au sein d'un marché unique: (i) un taux de pénétration important des ventes en ligne dans le secteur concerné ; (ii) l'uniformisation tarifaire croissante au sein des différents canaux de distribution ; (iii) l'identité des gammes de produits et des services offerts en magasins et en ligne ; et (iv) l'adoption, au moins par les parties, d'une organisation interne « omnicanale » et d'une stratégie commerciale et tarifaire tenant compte des acteurs spécialisés dans la vente en ligne et, plus généralement, le développement d'un modèle de distribution « omnicanale » dans le secteur examiné."*

[40] ACM, decision of 5 September 2019 in case 19/035460 – PostNL / SHM Beheer II B.V., para. 18-37. Ofcom, decision of 14 August 2018 in case CW/01122/01/14 – Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK, para. 6.47.

[41] J.-U. Franck and M. Peitz, Market Definition and Market Power in the Platform Economy, CERRE Report, dated 2019, p. 8.

[42] See G. Niels, Transaction versus non-transaction platforms: A false dichotomy in two-sided market definition, September 2019, p. 2 : Transactions markets are characterised by (i) the existence and 'observability' of a transaction between two groups and (ii) the charging of a fee or two-part tariff (for joining and using the platform).

[43] European Commission, decision of 21 August 2007 in case M.4523, *Travelport / Worldspan* and European Commission, decision of 11 March 2008 in case M.4731, *Google / DoubleClick*.

[44] Court of Justice, judgment of 11 September 2014 in case C-67/13 P, *Groupement des cartes bancaires / Commission*, ECLI:EU:C:2014:2204 and Court of Justice, judgment of 11 September in case C-382/12 P, *Mastercard / Commission*, ECLI:EU:C:2014:2201.

[45] See G. Niels, Transaction versus non-transaction platforms: A false dichotomy in two-sided market definition, September 2019, pp. 17-18 : "there exists a spectrum of interactions between the two sides, with transactions simply being at one end of the spectrum, and 'mere' interactions of various sorts on the other. What matters for market definition is the nature of the externalities between the two sides and how the platform takes these externalities into account when setting prices". Otherwise, there is a risk of having to engage in "long and possibly inconclusive debates" about "what is a transaction?".

point. Failing to consider the other side of the market would create a risk to misidentify the relevant competitive dynamics on a particular market, and miss the 'full picture'. For example, viewed in isolation, it may well be logical for firms offering a zero-price product to raise their prices from zero to €1 as they would still stand to benefit even if most of their customers switched away. However, if the product or service on the other side is revenue generating, such a strategy may be loss making if it results in lower revenues which outstrip the revenues on the zero price side of the market. For this reason a SSNIP test conducted only on the one side of the platform could lead to misleading results, as the firm might also be constrained by the behaviour of the users on the other side of the platform (see also Section V. A. SNIPP Test of this position paper). Accordingly, a recast market definition notice could usefully clarify how and when to take these cross-product product effects into account.

C. After-markets

A recast market definition notice could also clarify how the Commission will deal with after-markets in the digital economy, and in particular in relation to digital platforms. Market definition can be of crucial importance, particularly in abuse cases involving anti-competitive foreclosure from secondary markets. While the importance of after-markets has traditionally been downplayed if the primary markets are competitive primarily due to the "Chicago" critique of the U.S. Supreme Court judgment in *Kodak*,[46] the Commission should clarify whether it intends to take a similar approach in relation to digital markets. It would be particularly helpful if the Commission could clarify the criteria that it will use for defining separate after-markets for digital platforms of ecosystems, particularly in situations where access to data could be crucial for the ability of third party competitors in the after-markets to compete effectively,[47] or in situations where the platform or ecosystem has significant lock-in effects.[48]

V. Product and geographic market definition (Section III.3 – 5: Processes and evidence for defining the relevant market)

A. SSNIP Test

The SSNIP test represents both (a) a key conceptual framework for determining whether other products represent sufficient competitive constraints from a demand perspective to form part of the same relevant market and (b) an evidential test for demand-side substitution which can be used to evaluate the relevant market.[49] The Commission has also applied the conceptual framework to other parameters of competition: for example, using the thought experiment of a small but significant non-transitory decrease in quality to test the potential scope of a relevant product market in *Google - Android*.[50]

While the market definition notice contains a comprehensive framework for the SSNIP test in EU competition law, over the last 20 years a number of ambiguities have arisen over its relevance and application. As the Commission's own report on digitalisation commented, "*there is no clear theoretical guide*" on applying the SSNIP test (especially in the case of multi-sided and zero-price markets).[51] The Commission and the European Courts have also consistently reiterated that "*the SSNIP test is not the only method available to the Commission when defining the relevant product market*"[52] and that there is "*no hierarchy between the types of evidence*" that can be used by the Commission.[53] In short, the circumstances in which the SSNIP test and its variants are useful and, more importantly how to

[46] J. Cremer, Y-A. de Montjoye, H. Schweitzer, *Competition Policy for the Digital Era: Final Report* dated 2019, page 89.

[47] J. Cremer, Y-A. de Montjoye, H. Schweitzer, *Competition Policy for the Digital Era: Final Report* dated 2019, page 89.

[48] A new competition framework for the digital economy, Report by the Commission "Competition Law 4.0", Federal Ministry for Economic Affairs and Enery, page 28.

[49] Commission Notice on the definition of relevant market for the purposes of Community competition law, 97/C 372/03, 9 December 1997, paras. 15-20.

[50] Google Android

[51] J. Cremer, Y-A. de Montjoye, H. Schweitzer, *Competition Policy for the Digital Era: Final Report* dated 2019.

[52] Case AT.40099, *Google Android*, 18 July 2018, para. 264.

[53] Case AT.40099, *Google Android*, 18 July 2018, para. 265.

conceptually determine the appropriate threshold at which a product is a sufficient competitive constraint to be considered part of a product market are thus open questions.

To address these ambiguities, the Commission could, in the first instance, usefully clarify whether the SSNIP test – or its variants based on other parameters of competition – provide the correct conceptual framework for determining the threshold at which products exercise a sufficient competitive constraint on another product to be part of the same relevant market. If not, the Commission could alternatively clarify how best to conceptually distinguish between products that are sufficient competitive constraints so as to form part of the same market as the product or products under scrutiny, and those that are not and thus fall outside the scope of the relevant product market.

The Commission could also usefully clarify the circumstances in which it is "suitable" or "unsuitable" to use the SSNIP test and its variants as persuasive evidence for determining the boundaries of the relevant market. The Commission could, for example, clarify the type of cases in which the Commission regards the use of alternative tests as more appropriate or provide examples of where it is more or less appropriate. In a similar vein, the Commission could clarify when tests on parameters of quality (SSNDQ), user's cost (SSNIC) or even user's attention may be appropriate and provide useful evidence in relation to the relevant market. The Commission's decision in *Google Android* shows the potential utility and flexibility of the SSNIP concept and test: a recast market definition notice could help market participants know how to use the insights in a systematic manner to define markets and what weight should be attributed to each method.

B. Need for balanced approach to evidence

In practice, the market definition process often leans heavily on evidence from the party or parties involved, such as internal documents, as well as on views solicited from interested parties (e.g. competitors, suppliers and customers). This is a necessary part of the process. However, any selective focus on one source of information risks creating a cognitive bias. Similarly, any selective focus of individual statements or submissions, be it by employees in internal documents or by third parties, will lead to a biased outcome. Sources of evidence have to be properly interrogated and cross-checked against other sources and types of evidence.

There is room for the market definition notice to make this clear, in three aspects. First, it could be made clear that the internal documents must not be assessed selectively. For example, the Commission should form a view on how a company's employees see a market based on a comprehensive analysis of all relevant documents, also where they may show that there was no uniform view. Second, internal documents always need to be put into context, and balanced with other evidence. The market definition exercise should indeed rely on other evidence and sources so as to confirm the robustness of the analysis. Third, that there is a need to obtain, insofar as possible, equivalent evidence from third parties. The market definition should as such be based on evidence from different kinds, and not on cherry-picked evidence submitted by interested third parties.

VI. Market shares (Section III.6: Calculation of Market Shares)

The calculation and use of market shares remains a critical part of EU competition policy. It is used for determining whether transactions give rise to affected markets under the EU Merger Regulation, for whether agreements fall within the *de minimis* criteria or benefit from the safe harbour of the vertical block exemption as well as for a variety of presumptions set out in the Commission's guidance and the Court of Justice's jurisprudence.

The existing guidelines focus on *'*sales*'* to calculate and use value and volume market shares as well as acknowledging the relevance of, *inter alia*, capacity and reserves as *'*useful information*'*.[54] There is

[54] Market definition notice, para. 54.

however a number of areas where an updated market definition notice could provide greater clarity, as discussed in further detail below.

A. Metrics in digital markets

In the first instance, the Commission could usefully clarify the approach to other types of metrics, particularly those which have become more relevant in the context of the digital economy.

The Commission has increasingly made use of a wider array of metrics as potential proxies for assessing market power. For example, in *Apple / Shazam* the Commission used the number of daily and monthly active users (the "DAU" and the "MAU") to conduct a market reconstruction for music recognition apps.[55] These metrics are particularly useful where alternatives are not available because digital services are often offered for free (in *Apple / Shazam*, the service derived its revenues from offering advertising services to its app user base).[56] There may be other relevant metrics, such as clicks or consumer time spent in an ecosystem.

While there are no grounds to be overly prescriptive in the appropriate metrics (which may inevitably evolve over time), the revised market definition notice could usefully provide guidance on the weight placed on different metrics where, for example, revenues are not available or are not relevant (in the case of zero price markets).

B. Metrics in "innovation markets"

The Commission has taken different approaches in assessing the innovative strength of the merging parties (R&D spend and FTEs in GE / Alstom, patent shares weighted by citations in Dow / Dupont). It would therefore be helpful if the Commission could provide some indications of the metrics that it would use to measure market shares in innovation markets.

C. Metrics in "bid markets"

The market definition notice already acknowledges that the number of players in bid markets might be an appropriate metric to calculate shares in bidding markets. However the Commission has not always given importance to the presence of bid markets. While there are precedents where the Commission has relied on the bidding nature of the markets to discount the competitive significance of high shares,[57] in other cases the Commission and the General Court have disregarded the bidding nature of the markets due to "persistently high" market shares.[58]

Against this background, it would be helpful if the new market definition notice could codify the existing case law and provide further guidance on the circumstances in which the Commission will rely on the bidding nature of the markets.

D. Captive demand

The market definition notice could usefully clarify the circumstances in which captive sales are relevant for calculating market shares in "merchant" markets.

Since the introduction of the market definition notice, the Commission and the Courts of Justice have assessed whether intra-group captive sales of intermediate products should be included in the relevant merchant market.[59] Indeed, production for captive use is not available to buyers on the merchant market.

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55 European Commission, decision in case M.8788 of 6 September 2018, Apple / Shazam.

56 European Commission, decision in case M.8788 of 6 September 2018, Apple / Shazam.

57 *See* e.g. RWE/Essent Case M.5467 of 23 June 2009, Oracle/PeopleSoft Case M.3216 of 26 October 2004, WPP/TNS Case M.5232 of 23 September 2008.

58 *See* General Electric Company vs. Commission, Case T-210/01 at para. 139 et seq.

59 See for instance, case COMP/M.1693, *Alcoa/Reynolds*, 3 May 2000; Case IV/M.134, *Mannesmann/Boge*, 23 September 1991, para 11; Case T-221/95, *Endemol Entertainment Holding BV v Commission* EU:T:1999:85; Case COMP/M.6808*, Pai Partners/Industrial Parts Holding*, Commission decision of 11 February 2013, para 23.

As a consequence, there is a presumption that captive use production (captive sales) should be excluded from the relevant product market.[60] The Commission has recently applied the merchant market rule in *Vodafone / Telecom Italia / INWIT JV* where it agreed with the notifying parties that market shares based on total number of passive infrastructure sites would be "unsuitable", as these would have encompassed the captive supply for Vodafone's and Telecom Italia's integrated mobile telecommunications networks.[61]

Under the merchant market rule, there is an inherent assumption that the supplier will not divert captive use production in reaction to a price increase, and will thus not exert a competitive constraint on the newly created entity post-transaction.[62] Yet this may not always be true. In particular, with respect to fast-moving markets, such as those depicted in *TomTom / TeleAtlas*[63] or *Google / DoubleClick*[64], there is an inherent difficulty in applying the principles and assumptions underlying the merchant market rule. Those markets are indeed characterised by virtually no limits on capacity and low variable costs, which renders the application of the rule extremely uncertain.[65] In those cases, a thorough case-by-case assessment based on clear principles is essential.

Clarifying the application of the merchant market rule would provide legal certainty for market participants in a range of intermediate industries where such issues are common including infrastructure and mining, as well as fast moving digital markets.

Linklaters LLP – 9 October 2020[66]

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[60] G. Goeteyn and S. Ashall, EU Merger Control: The Relevance of Captive Sales for the Purpose of Market Definition and Competition Assessment, *JCommissionLP*, 2015, Vol. 6, No. 8, pp. 568-569.

[61] Case M.9674 *Vodafone Italia / Telecom Italia / INWIT JV.*

[62] G. Goeteyn and S. Ashall, EU Merger Control: The Relevance of Captive Sales for the Purpose of Market Definition and Competition Assessment, *JCommissionLP*, 2015, Vol. 6, No. 8, p. 571.

[63] Case COMP/M.4854, TomTom/TeleAtlas, 14 May 2008, paras. 172-173.

[64] Case COMP/M.4731, Google/DoubleClick, 11 March 2008, paras. 176-178.

[65] G. Goeteyn and S. Ashall, EU Merger Control: The Relevance of Captive Sales for the Purpose of Market Definition and Competition Assessment, *JCommissionLP*, 2015, Vol. 6, No. 8, pp. 580.

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