

## Summary of the stakeholder consultation to the Evaluation of the Market Definition Notice

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

### Introduction

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

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

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

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

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

<sup>2</sup> [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en).

As part of its impact assessment, the Commission asked stakeholders to express their views on the five evaluation criteria through an online questionnaire.

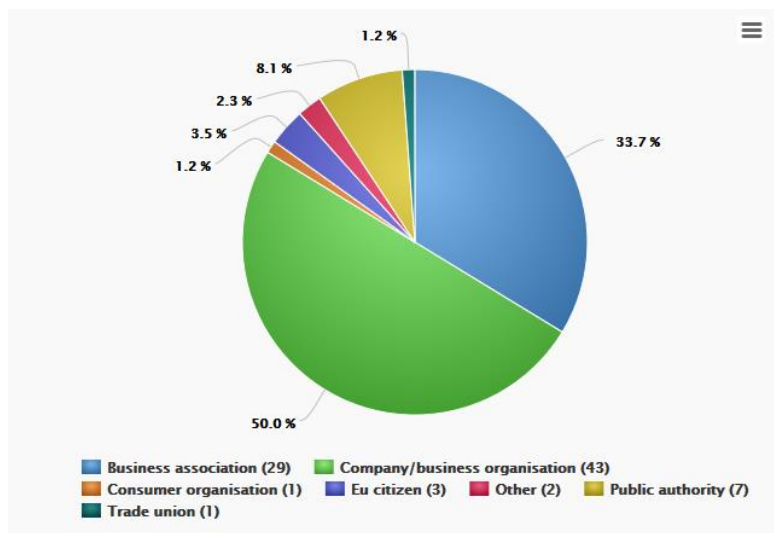
The Commission received 86 contributions to the public consultation submitted through the online questionnaire. The Commission also received 13 additional submissions in the context of the public consultation, mainly by businesses and business associations (ca. 70%), which largely echoed the issues raised in the replies to the online questionnaire.

This summary is based only on contributions to the public consultation submitted through the online questionnaire. The input has been analysed using a data analysis tool,<sup>3</sup> complemented by manual analysis.

To ensure the consistent application of categories, the Commission amended the self-declared categorization of a limited number of the respondents, in agreement with those respondents. Due to a technical failure of the uploading option provided in the online questionnaire, the Commission also uploaded manually the attachments that some participants had declared to be missing from their reply.

### Profile of respondents to the online questionnaire

In terms of categories of respondents to the public consultation, the large majority of the respondents are businesses or business associations (that is 72 respondents, of which 43 are businesses and 29 business associations, corresponding to 84% of all respondents). Other respondents include public bodies<sup>4</sup> (7 respondents, or 8%) as well as representatives of the civil society including EU citizens (3 respondents, or 3.5%), a consumer organisation (1 respondent, or 1%), a trade union (1 respondent, or 1%) and others (2 respondents, or 2%).

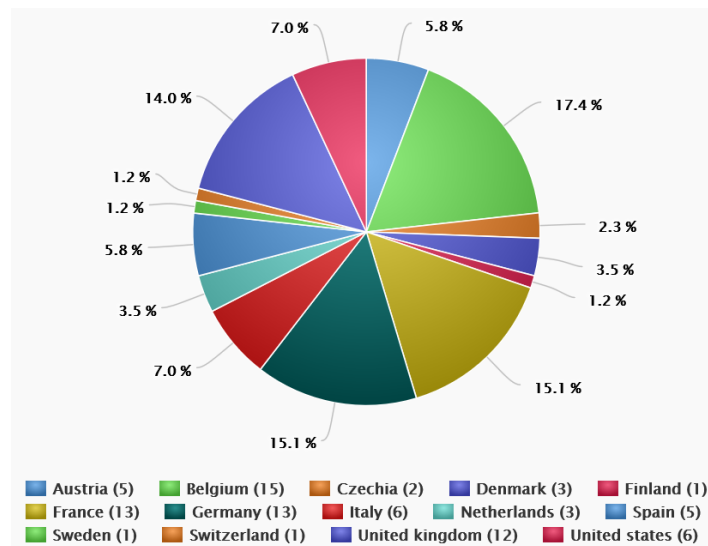


<sup>3</sup> The tool used is Doris Public Consultation Dashboard, an internal Commission tool for analysing and visualising replies to public consultations. It relies on open-source libraries using machine-learning techniques and allows for the automatic creation of charts for closed questions, the extraction of keywords and named entities from free-text answers as well as the filtering of replies, sentiment analysis and clustering.

<sup>4</sup> The figure includes both public bodies as well as organisations of public broadcasters.

In terms of size of respondents, almost 60% (corresponding to 51 respondents) indicated that they are a large organisation (i.e., more than 250 employees); 12% (corresponding to 10 respondents) stated that they are medium size (i.e., between 50 and 249 employees); 14% (corresponding to 12 respondents) indicated that they are a small organisation (i.e., from 10 to 49 employees); and 12% (corresponding to 10 respondents) stated that they are micro size (i.e., between 0 and 9 employees)<sup>5</sup>.

As to the geographical distribution of responses, the large majority of respondents are from an EU Member State (67 respondents). 12 respondents are from the UK and 6 are from the US.



## Contributions to the online questionnaire

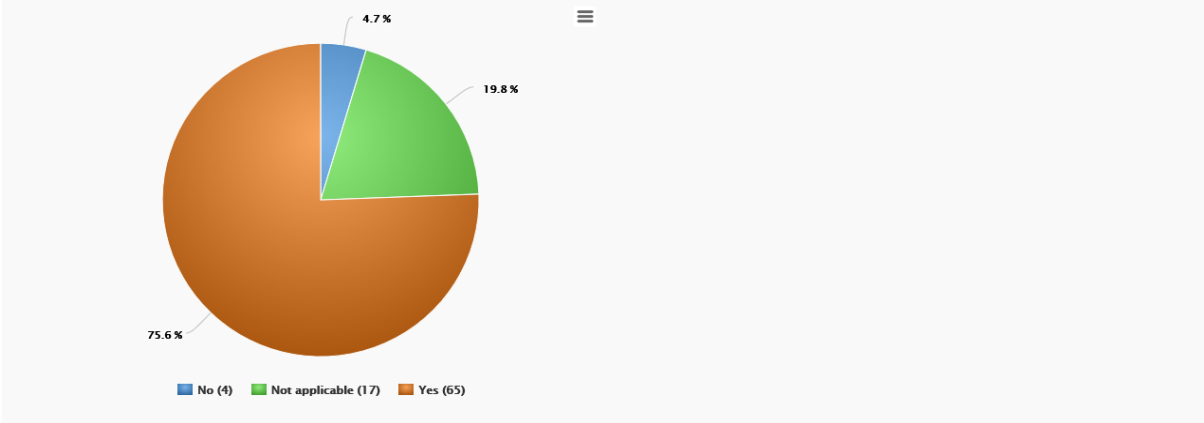
This summary illustrates the general views expressed by stakeholders on whether the current Notice pursues relevant objectives, whether it pursues them effectively, efficiently and coherently, and whether it provides EU added value. The purpose of this summary is to outline the main points raised by stakeholders without regard to the number of contributions addressing a particular point or whether a particular point of view is shared by all respondents. Therefore, in the following, reference is made generically to “respondents”. However, for issues on which respondents expressed diverging views, both sides of the argument are presented.

### 1. General Questions on the Notice

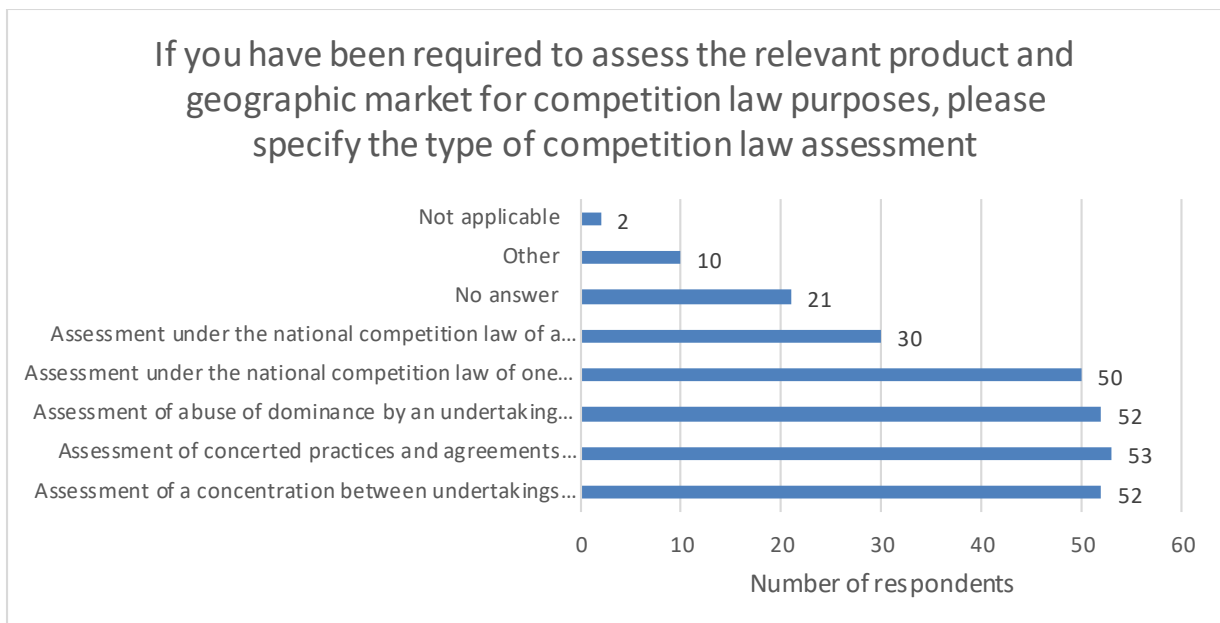
Respondents to the open public consultation seem overall familiar with the Notice and over 75% of them have assessed relevant product and geographic markets over the past five years.

<sup>5</sup> The question requested respondents to indicate the size of their organisation in terms of the number of employees. The Commission observes that the number of employees that for example a business association has is not necessarily indicative of the number of people employed by the businesses that are members of such association.

11. In the last five years, have you or your company / (business) organisation been required to assess the relevant product and geographic market for competition law purposes?



Regarding the type of situations where relevant markets had to be assessed, respondents pointed towards merger and antitrust questions under EU competition law, as well as towards assessment under the national competition laws in the EEA. Respondents also assessed relevant markets regarding questions of competition law for jurisdictions outside the EEA, but to a lesser extent.

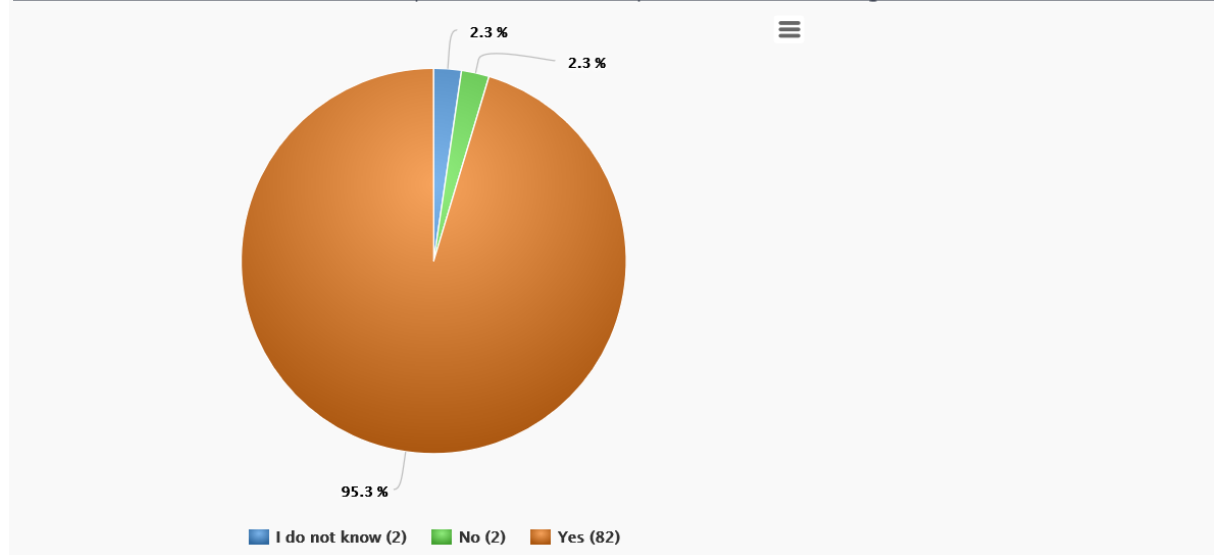


A number of respondents, mainly active in the telecommunications and energy sectors, also indicated that they use the Notice when assessing the legal framework in regulated sectors. Others indicated using the Notice for State aid analysis; in the context of general competition law compliance matters; in civil proceedings to assess whether undertakings are competitors, e.g. in relation to tort of unfair competition or breach of confidentiality; and for proceedings outside the EU.

Concerning the frequency of use, more than half of the respondents (47) indicated a frequent consultation of the Notice several times per year while around a quarter of the respondents (22) indicated an occasional consultation of the Notice once or twice per year. Only 14 respondents indicated that they never (1) or only rarely (13) consult the Notice.

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

II.1. Is there still a need for a Notice to provide correct, comprehensive and clear guidance on market definition?



There was near consensus among respondents that there is still a need for a Notice to provide correct, comprehensive and clear guidance on market definition. The respondents indicated that the Notice helps companies in assessing the compliance of their activities with competition rules and improves the predictability of competition authorities' assessments, thereby contributing to legal certainty and to a reliable business environment. At the same time, several respondents noted that the Notice needs to be updated to reflect developments in the case law, as well as technological and economic developments that have changed the way certain markets function. The two business associations that replied negatively to this question also indicated that guidance through a market definition notice is necessary to improve legal certainty, but stressed that an update of the Notice is required.

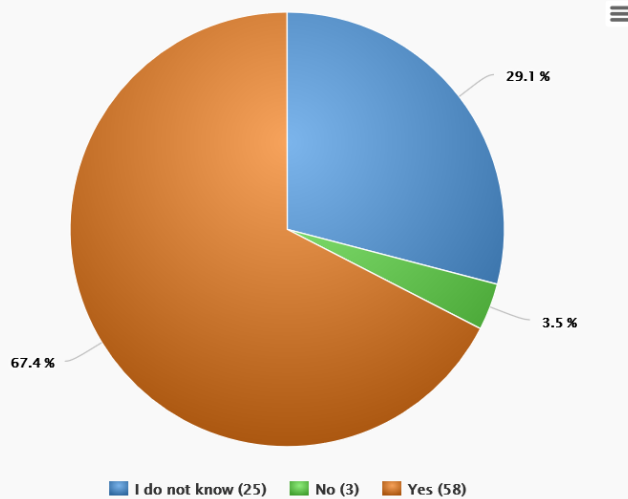
## 3. Effectiveness (Does the Notice meet its objectives?)

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

The majority of respondents considered that there are points of continuity that have not changed since 1997 and that should continue guiding the principles of the Market Definition Notice going forward.

### 3.1.1. Points of continuity

III.8. Do you consider that there are any major points of continuity (for example legal, economic, political, methodological, or technological) that have not changed since 1997 and that you consider should continue guiding the principles of the Market Definition Notice going forward?



The following points were explicitly highlighted by respondents as specific points of continuity:

- Some respondents indicated that, while some points need to be updated or further clarified, most or all core concepts mentioned in the Notice are still relevant.
- Several respondents mentioned the role of market definition as a framework for the competitive assessment and the importance of the Notice in providing guidance and transparency as principles that remain relevant for the future.
- The relevance of the product and geographic dimensions of the relevant market and the definitions set out in paragraphs 7-9 of the Notice were also noted by some respondents.
- The basic principles of market definition, in particular the relevance of the three sources of competitive constraints, were mentioned most often as points that should be maintained. In this context, multiple respondents underlined that the conceptual framework of the hypothetical monopolist test should continue to guide the assessment of demand side substitution (even though further guidance on how to apply it to markets where price is not the only parameter of competition should be provided). As regards supply-side substitution and potential competition, some respondents emphasised that the importance assigned in the current Notice to these two sources of constraints is correct and should be maintained.
- Respondents also mentioned various aspects of the process and type of evidence relied on in defining relevant markets. Several respondents mentioned the importance of relying on robust evidence, and noted that the availability and relevance of different types of evidence differs between cases; an updated Notice should therefore maintain that there is no rigid hierarchy of sources of information. As regards specific sources of evidence mentioned in the Notice, one business respondent stressed that product characteristics are insufficient to assess substitutability, another stressed the importance of considering actual/past substitution where such evidence exists, and some others mentioned the

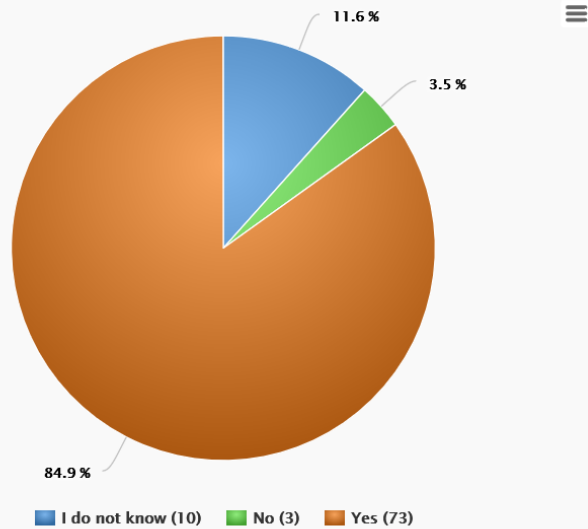
relevance of quantitative tests. As regards evidence used in geographic market definition, some respondents stressed the importance of trade flows.

- Finally, some respondents noted that market shares are still relevant as an indicator of market power, in particular in traditional markets. One respondent also noted that where chains of substitution exist these should continue to be considered in the definition of relevant product and geographic markets.

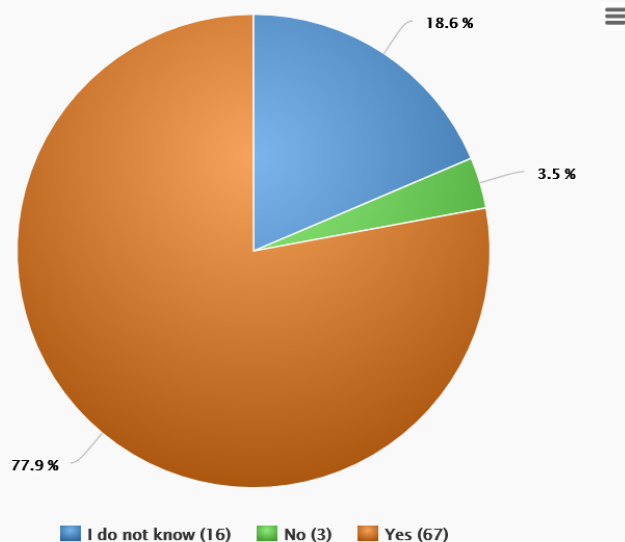
### 3.1.2. Major trends and developments

While there is agreement that many of the principles expressed in the Market Definition Notice do not need to be changed, most respondents consider at the same time that there are major trends and developments that have affected the application of the Notice and need to be reflected in updated guidance.

III.10. Do you consider that there are major trends and developments (for example legal, economic, political, methodological, or technological) that have affected the application of the Notice but are currently not reflected in it?



III.12. Is there any area for which the Notice currently does not provide any guidance but which would be desirable?



Nearly all respondents who expressed a view on this question, including all stakeholder categories (business community, public bodies and civil society), identified digitalisation as a trend that has affected the way markets work and should be reflected in the Notice. Various aspects of digitalisation were highlighted in the responses:

- Many respondents indicated that multi-sided platforms are now a prevalent business model in the digital sphere, yet they remain complex to analyse, with no clear consensus in the economic literature or competition authorities' case practice about how market definition should be carried out in such circumstances. Stakeholders would therefore welcome guidance from the Commission in this area, in particular on the question of whether multiple relevant markets (one for each side of the platform) or a single market (encompassing all sides of the platform) should be defined, on how the indirect network effects between different sides of a platform should be assessed as well as on whether (and how) the SSNIP test can be applied to multi-sided platforms. Only a fraction of those stakeholders took a specific position on those questions however.
- Another relevant development mentioned in many responses was the existence of "digital ecosystems", understood to refer to situations whereby a digital multi-sided platform offers a variety of complementary products and services in addition to its "core" products. Some respondents noted that certain mergers and types of conduct could be assessed more appropriately if the relationships within such "ecosystems" are taken into account, and asked for guidance on whether and how this should be considered at the market definition stage.
- Many respondents also stressed that online services increasingly compete with traditional ones; according to the respondents, this is in particular the case in the retail sector, where online retailers and marketplaces represent a competitive constraint on brick-and-mortar shops, but it is also seen in other areas, e.g. the audiovisual sector where online streaming platforms compete with television providers. Respondents submitted that such developments should be taken into account in the assessment of both the product and geographic dimension of the relevant market.
- Some stakeholders noted that within the digital sphere itself, products that have different characteristics or are based on different underlying technology (e.g. computers and smartphones) compete with each other; these respondents suggested that the assessment of demand substitution should therefore be based on the functional interchangeability of products rather than their price or characteristics. Going beyond questions of market definition, some respondents also submitted that where different distribution channels or technologies are ultimately considered to belong to different relevant markets, they still exert a competitive constraint on one another, and the Notice should clarify that such constraints from imperfect substitutions should be taken into account in the competitive assessment.
- Many respondents noted that price is not the main parameter of competition between digital services (which are often offered "for free", i.e. at a zero monetary price) and called for guidance on how to assess demand substitution in such cases. Respondents indicated that alternatives to the SSNIP test have been developed, such as a small but significant non-transitory decrease in quality (SSNDQ) or small but significant non-transitory increase in cost (SSNIC), and it would be helpful to explain in the Notice how such tools can be applied. In this



context, it was also noted that consumers often pay for such services with their data, which should be taken into account in carrying out such tests.

- As regards data, multiple respondents also stressed its role as a key input in the development of digital products. Respondents claimed that access to data (and data-processing capabilities) enables large digital players to quickly expand into new markets, and submitted that this aspect should be taken into account in the assessment of supply side substitution and – going beyond market definition – in the assessment of potential competition. The significance of potential competition, which the Commission does not assess as part of market definition but in later stages of the assessment, was also mentioned by some large digital companies who stressed that in technology-driven markets new entrants can grow very fast and upend established players.
- Several respondents noted the relevance of network effects, economies of scale and scope, lock-in effects or single-homing practices in delineating relevant markets and – going beyond market definition – in the assessment of market power, and suggested these features of digital markets should be discussed in the Notice. It was also mentioned in the same context that market shares do not represent the most appropriate indicator of market power in digital markets, but to the extent they are relevant, guidance on metrics suitable for zero-priced products would be appreciated.
- Some stakeholders suggested giving less emphasis to market definition in digital markets, where market definition can be particularly complex, instead focusing more attention on the theories of harm.

Some of the issues raised in relation to digital markets were mentioned as relevant for other innovation-driven markets as well, the rise of which was noted by several respondents as a significant development that has affected the application of the Notice. In particular, some respondents mentioned that guidance should be provided on when markets should be defined around key inputs such as innovation capabilities, and that competition from innovative players outside the product market is a significant constraint that should be considered in market definition.

A third significant trend identified in some of the public consultation responses was globalisation. Those respondents noted that the current Notice only considers regional, national or EEA markets, whereas in many markets competition nowadays takes place on a global scale. Some respondents further mentioned that globalisation has lowered barriers to entry, which makes competition from players not currently present in Europe a significant competitive constraint that should be taken into account at the market definition stage. In this context, it was also mentioned by some business representatives that in assessing such constraints the subsidies from which potential entrants benefit in their home countries should be taken into account.

Furthermore, respondents brought up the topic of supply side substitutability and potential competition in different contexts: while some submitted that they should both be given larger weight, and particularly that potential competition should be taken into account at the stage of market definition, other stakeholders only pointed out that the current Notice provides rather limited guidance on these two concepts and should be updated to clarify the distinction between them, in particular in the context of dynamic markets.

Other issues mentioned in the responses to the consultation, albeit less frequently, were the following:

- Technological convergence was also mentioned in relation to other sectors than digital: some respondents in the transport and energy sectors mentioned that whereas different transport modes and energy sources respectively were not traditionally seen as substitutes, they are now increasingly used interchangeably by consumers, either on a stand-alone basis or as part of bundles; some respondents also mentioned that sectoral regulations should be considered in the Notice.
- Some respondents asked for more guidance on the conditions under which different customer categories could constitute distinct relevant markets. In this context, it was noted that this issue appears increasingly relevant in the digital sector, where personalised pricing is more and more common.
- As regards evidence used in the definition of the relevant product market, some respondents noted that more weight should be given to economic analysis and the more sophisticated quantitative techniques developed since 1997 relative to qualitative factors. Some also suggested that consumer surveys (provided they are rigorously carried out to rule out bias) are a relevant source of evidence that should be used more often. Internal documents were also mentioned as a source of evidence often used in practice but not mentioned in the current Notice, although some business respondents cautioned against the risk of misinterpreting them.
- As regards evidence used in the definition of the relevant geographic market, some respondents mentioned the use of territorial supply restrictions as relevant barriers to trade, and some others noted that guidance on the application of isochrones and catchment areas would be useful.
- Some respondents mentioned that the assessment of aftermarkets should be clarified, including to reflect developments in the case law.
- Some indicated that additional guidance on the treatment of differentiated products and chains of substitution would be welcome.
- Some respondents mentioned that considerations related to other policy goals, in particular environmental, social, and industrial policies, should be integrated in the application of competition policy, including when it comes to the definition of the relevant market.

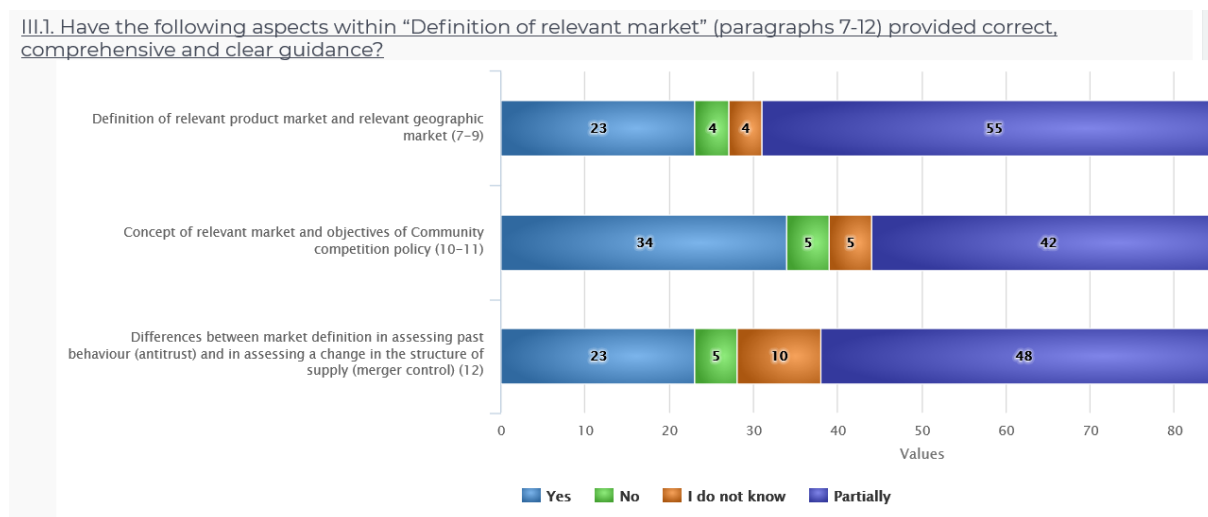
Beyond substantive matters, some respondents suggested that the Notice should be more detailed, provide more examples, and be better structured (i.e. it should explain the steps undertaken in a market definition exercise).

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

In its public consultation questionnaire, the Commission asked for feedback on whether each of the sections of the Market Definition Notice had provided correct, comprehensive and clear guidance. The feedback on those sections is set out in the sections 3.2.1 to 3.2.7 respectively.

### 3.2.1. Definition of relevant market Q III.1

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards the definition of the relevant market (paragraphs 7-12 of the Notice), there was mixed feedback from the respondents. Overall, around one third of the respondents who expressed a view indicated that the Notice provides correct, comprehensive and clear guidance as regards the definition of the relevant market, while the remaining respondents disagreed.



- Definition of the relevant product market and geographic market (paragraphs 7-9): Respondents commented in particular on product market definition. Several respondents submitted that the Notice fails to take account of modern digitised markets, and respondents referred to phenomena such as platforms and multi-sided markets, services offered for a zero monetary price, “ecosystem” concepts as well as the role of data. Some respondents explained that product market definition should be more dynamic while others highlighted for example the demarcation between ‘online’ and ‘traditional’ sales channels or made observations on product substitutability. In addition, some respondents pointed to specificities in particular sectors of the economy including for example telecommunications, media and pharmaceuticals. A trade union criticised that the Notice fails to take account of the labour markets.

With respect to geographic market definition, some respondents explained that the Notice failed to adequately reflect globalisation or to appropriately capture the geographic dimension of digitised markets. As regards globalisation, comments mostly came from businesses or business associations. One respondent for example explained that global competition with third countries plays an increasing role and that strengthening the competitiveness of European companies compared to third countries requires the Notice to be adapted. The respondent nonetheless continued that the interests of consumers in the functioning of competition should not be ignored. However, not all respondents agreed that the Notice would fail to reflect changing market realities and some also warned against undue changes in defining the relevant geographic market. For example, a business association representing both large companies and SMEs explained that they saw no apparent need for major changes of the method or perspectives when assessing the impact of global competition, also noting that the assessment needs to be fact-based and should not

rely on uncertain predictions of the future. That respondent nonetheless suggested that the parameters of global competition could be clarified, taking into account for example developments on global markets as well as investment and merger patterns.

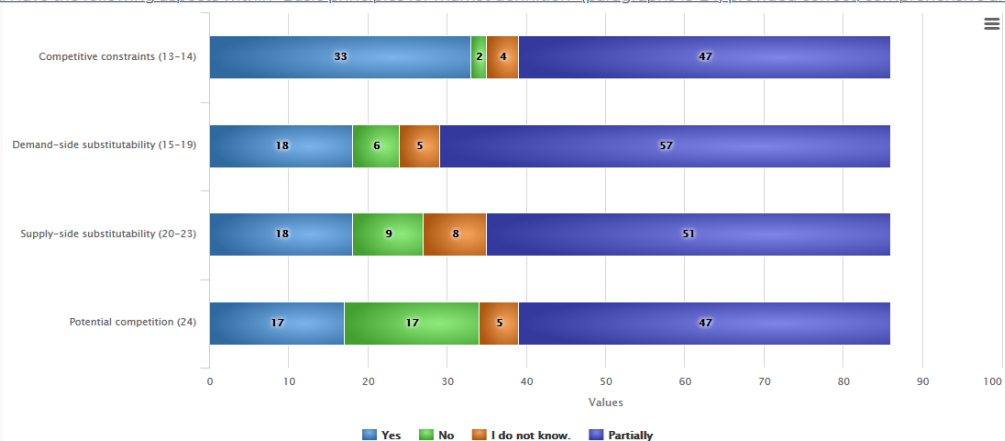
A few respondents also brought up the question of the temporal dimension of relevant markets. Respondents referred to the temporal dimension in the context of market shares as well as in the context of substitutability changing at different times (e.g. between peak and off-peak demand) or of other cyclical variations in the markets.

- Concept of relevant market and objectives of Community competition policy (paragraphs 10-11): Some respondents observed that the paragraphs need to be updated to reflect the updated legal test – significant impediment to effective competition – introduced in the recast Merger Regulation 139/2004. Other comments explained for example that while contextualisation was useful, the current Notice oversimplifies the purposes of merger control or that the paragraphs could be discarded if not made more detailed. It was also submitted that paragraph 10 should not presume that market shares are the primary source for identifying a dominant position and that the paragraph should clarify when other factors should be taken into account. Further clarity was also seen necessary on the concept of a substantial part of the internal market. Some respondents overall questioned the need to always define a relevant market, this also applying to merger cases where, according to a respondent, more emphasis should be put on assessing closeness and identifying anti-competitive strategies.
- Difference between market definition in antitrust or merger control (paragraph 12): Some respondents submitted that the paragraph was not adequately clear or that it even introduces legal uncertainty. For example, respondents called for more clarity on the differences in the approach between (backward-looking) antitrust and (forward-looking) merger cases. Going beyond core issues of market definition, this included for example the question on the time-horizon for the forward-looking approach in merger cases on which some respondents commented that a more dynamic approach should be taken overall to reflect market realities. Further, some respondents observed that the paragraph only uses the geographic market as an example where differences between antitrust and merger cases could appear, omitting product market definition, which was found incorrect or confusing. In the context of a dynamic or forward-looking market definition, some respondents also explained that the Notice fails to take account of the features of modern digitised or media markets or the developments in technology.

### **3.2.2. Basic principles for market definition Q III.2**

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards the basic principles of market definition (paragraphs 13-24 of the Notice), there was mixed feedback from the respondents. Overall, around one third of the respondents who expressed a view indicated that the Notice provides correct, comprehensive and clear guidance as regards the basic principles for market definition, while the remaining respondents disagreed.

III.2. Have the following aspects within “Basic principles for market definition” (paragraphs 13-24) provided correct, comprehensive and clear guidance?



- Competitive constraints (paragraphs 13-14): The respondents recognise the sources of competitive constraints cited in paragraphs 13-14 to still be the main sources of competitive constraints. However, many respondents take the view that there is a need to adapt them to accommodate changes in traditional industries and in digital markets and that current markets need a dynamic market definition which takes into account all competitive constraints both for product and geographic scope.
- Demand-side substitutability (paragraphs 15-19): Many of the respondents who expressed a view indicated that the guidance provided by the Notice as regards demand-side substitutability could be improved.

Most respondents mentioned the SSNIP test in this respect and made a number of points. First, some respondents consider that the profitability of a hypothetical SSNIP should take into account any feedback effects in multi-sided markets that result from the reaction of users on the other side of the market. Second, respondents submit that the SSNIP should be adapted to address non-price parameters, in particular in two-sided or multi-sided markets where firms frequently provide products or services “for free” on one side of the market. Accordingly, other models than the SSNIP tests should be developed and mentioned in an updated notice, such as models based on time spent, user attention, parameters of quality (SSNDQ) or costs (SSNIC). Third, respondents submit that the SSNIP test seems to be unsuitable when it comes to assessing bidding markets where the competition is rather for the market than in the market.

Other issues raised include the request for guidance on whether to define multiple relevant markets (one for each side of the platform) or a single market (encompassing all sides of the platform) in platform markets; the submission that the Notices should take into account the substitutability between branded and retailer brand products as they are often qualitatively similar in the respondent’s view; and the view that the Notice should provide guidance on how to include network effects in market definition assessments.

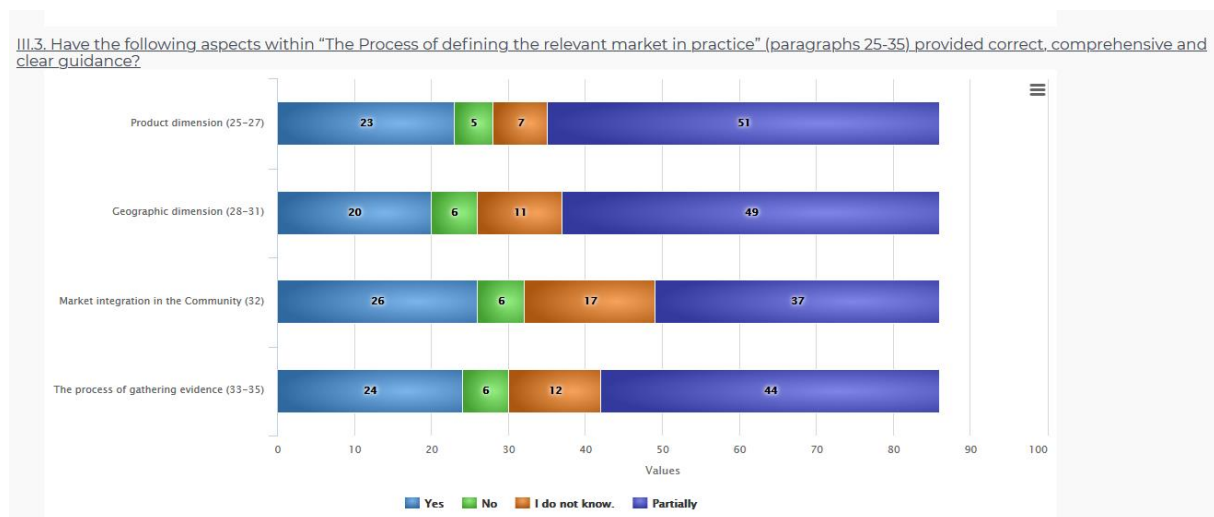
- Supply-side substitutability (paragraph 20-23): Some respondents submit that the explanations of supply-side substitutability in the Notice could benefit from further clarifications. For instance, a business association notes that more examples and references to the case law would be helpful to clarify some terms that are open for interpretation, such as in particular “short term” and “significant additional costs or risks” in paragraph 20. Other

respondents suggest changes to the framework and consider that supply-side substitutability needs to be considered to the same extent as demand-side substitutability and that the current focus on demand-side substitutability does not allow important elements to be taken into account, such as significant innovation and technological developments. Some respondents also raise the issue of the timeframe for the market definition assessment, claiming that a market investigation focusing on short-term effects would no longer be suitable as it fails to take into account dynamic developments based on a medium-term forecast.

- **Potential competition (paragraph 24):** Several respondents criticise that potential competition is only touched upon briefly in the Notice while more detailed guidance is contained in the Commission’s guidance on the competitive assessment. They claim that potential competition should be discussed more in detail in a revised Notice given the rapidly changing market realities, in particular because of technological developments. Furthermore, some respondents point to the specificities of digital markets and submit that the constraints imposed by successful digital platforms in adjacent markets should be taken into account and that the boundaries between supply-side substitutability and potential competition may be more blurred in digital contexts.

### 3.2.3. The Process of defining the relevant market in practice Q. III.3

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards the process of defining the relevant market in practice (paragraphs 25-35 of the Notice), there was mixed feedback from the respondents. Overall, around one third of the respondents who expressed a view indicated that the Notice provides correct, comprehensive and clear guidance as regards the process of defining the relevant market in practice.



- **Product dimension (paragraphs 25-27):** As regards the product dimension, many business associations state that the paragraphs on product dimension currently provide flexibility for a case-by-case analysis, which in turn allows for a full understanding of the market that is required to appropriately define a market. However, they claim that the product dimension should not only take into account substitute products but also complementary products and imperfect substitutes. Furthermore, some respondents argue that while there is no need to determine a rigid hierarchy, it would be appropriate to recognize that evidence of a actual

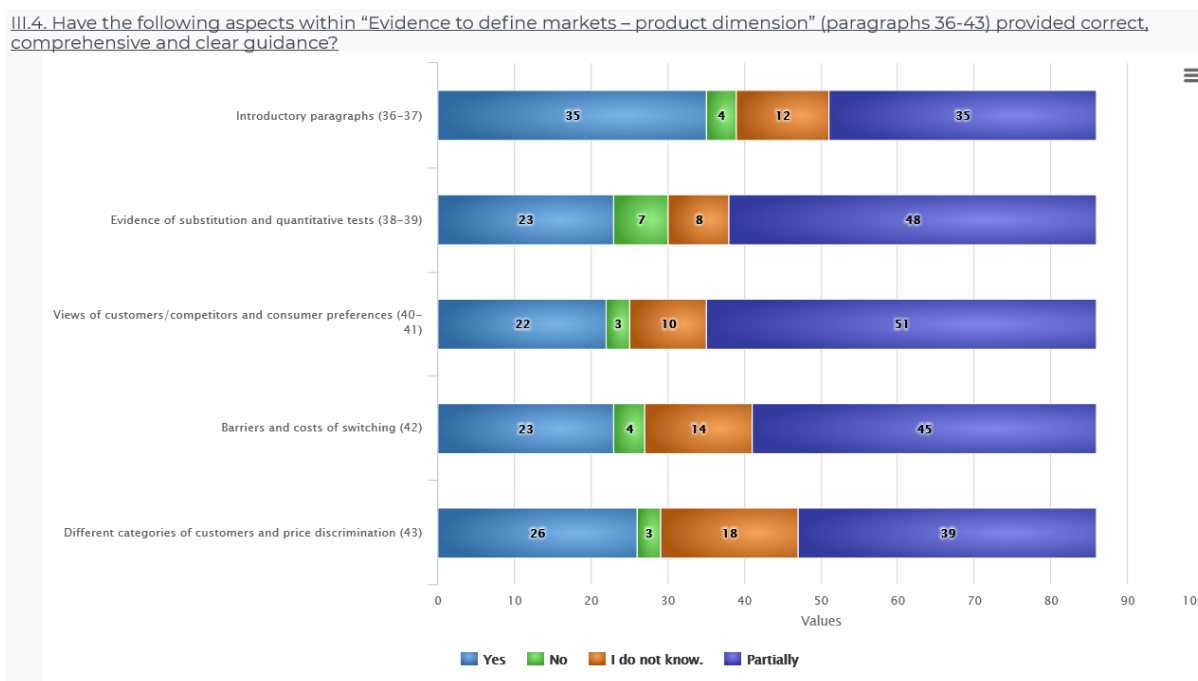
market behaviour typically has greater weight than evidence prepared specifically for an investigation. Moreover, many respondents consider that the provision of services “for free” should be taken into account in this section of the Notice. Some respondents also underline the need for the Notice to include examples or case studies, in line with the illustrative approach taken in other Commission guidelines.

- Geographic dimension (paragraphs 28-31): Most respondents consider the geographic markets listed in this section of the Notice (national, EU-wide or EEA-wide) to be incomplete as they do not include global markets. Furthermore, some respondents take the view that, while borders may be hard to define, new elements often point to markets wider than the EEA, such as (i) the existence of digital markets (i.e. on-line retail and wholesale and global digital marketplaces that compete with brick-and-mortar players), and (ii) the entry of international players along with increasing trends for regional and world-wide sourcing. Additionally, some respondents state that the Commission should take into account that companies located in third countries might receive subsidies that European companies do not receive. Moreover, a business association suggested that the revised Notice should take into account that many service markets have been liberalized at Member State level, and that therefore companies are able to compete not only within national borders. Other respondents submitted that it would be important for the Commission to keep in mind the barriers to sourcing from other member states in the EU as well as the commercial segmentation of the single market by multinational brand suppliers through territorial supply constraints (which, according to the respondent, can explain why retailers and wholesalers buy locally, even though the geographical scope of sourcing markets is increasingly large and might actually be European for certain products).
- Market integration in the Community (paragraph 32): As regards market integration, the feedback of the respondents is similar to the feedback given for geographic markets above. More specifically, many respondents submitted that the concept of market integration is nowadays even more key than before due to digitalisation and globalisation. As explained above, they submit that the geographic markets tend to be wider than before (leading to global and cross-sectorial markets) and that this should be taken into account by the Commission when defining the relevant markets.
- The process of gathering evidence (paragraphs 33-35): Many respondents take the view that a large number of requests for information (RFIs) create an unnecessary administrative burden both for the Commission and for the addressees and they propose fewer and more targeted RFIs. In addition, many respondents take the view that the Commission should not rely too much on the data submitted by the parties to define the market but should carry out its own assessment. Furthermore, the Commission should adopt an approach that is open to empirical evidence, taking into account the views of suppliers, customers and relevant industry associations. Most respondents, however, agree that there cannot be a strict hierarchy of empirical evidence. A business association points out that internal documents are not necessarily good evidence of market definition in their view as undertakings usually have limited information on their competitors’ conduct. Another would welcome a commitment by the Commission in a revised Notice that it will provide adequate reasons for relying on some but not all evidence (particularly where there is inconsistent evidence). Additionally, another business association notes that the discussion on various pieces of evidence and how these are gathered (paragraphs 33 to 52) is helpful, but that this could be

complemented in a revised notice by references to case-law which the Commission considers to be particularly helpful examples of the use of such evidence.

### 3.2.4. Evidence to define markets – product dimension Q III.4

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards the evidence to define the relevant product market (paragraphs 36-43 of the Notice), there was mixed feedback from the respondents. Overall, a round one-third of the respondents who expressed a view indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence for defining markets in their product dimension, while the remaining respondents disagreed.



- Introductory paragraphs (paragraphs 36-37): Some respondents expressed the opinion that previous decisions (from the Commission, other NCAs and regulators) should be the starting point of the assessment. Others argue instead that given the market dynamics the Commission should have the burden of proving that the market definitions in those decisions are still valid. Some respondents indicated the relevance of including references to examples and previous cases in the Notice. One business association asked for guidance on the value of different types of evidence in case of a contradiction and another about the weight given to different types of evidence. Businesses and business associations explained that the notice should not put so much emphasis on product characteristics and intended use. According to some businesses and business associations, the Commission should focus more on potential competition and external constraints (e.g. from traditional sectors on digital markets and vice versa). One business association explained that in digital markets competitive pressure can be exerted by complementary and non-substitute products. Many respondents indicated that, given the recent market dynamics and the growing importance of multisided platforms (where the monetary price is often set at zero on one of the sides), the Commission should also focus on other variables than price. Examples mentioned were quality, data, and consumer preferences among others. Several respondents added that functional interchangeability between products can become more relevant.

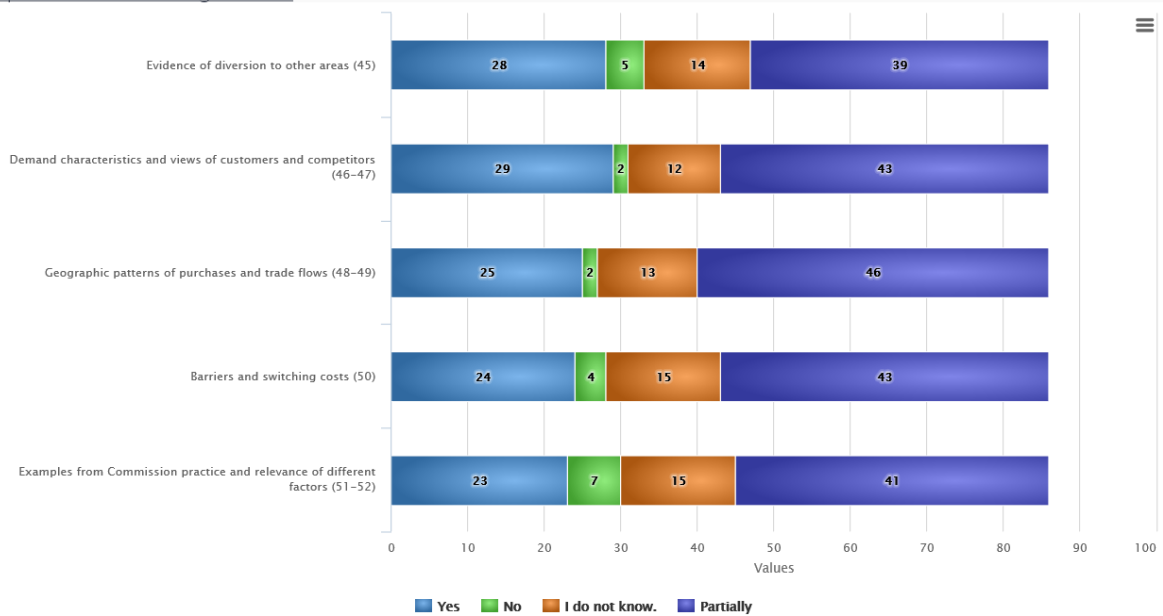


- Evidence of substitution and quantitative tests (38-39): Several respondents explained that evidence on past shocks and switching patterns is less relevant in dynamic markets. In these cases the assessment should be more forward looking. Respondents indicated that new quantitative techniques have been developed and detailed guidance on their application is necessary. One respondent mentioned that references to the *Best practices for the submission of economic evidence and data collection* could be useful. Several respondents argued that more attention should be given to the supply side of the market.
- Views of customers/competitors and consumer preferences (40-41): Respondents indicated that consumers' and competitors' views should be always supported with other evidence as they may often be subject to bias. Internal documents are important but should be reviewed in a fair and objective manner. Several respondents stressed the growing importance of the use of surveys and the need for more guidance on how to run those surveys. One business association mentioned that requests for information should be more tailored to the respective addressee and less burdensome and that interviews are a better source of information. Other sources of information indicated are studies, expert reports, trade associations and industry experts.
- Barriers and costs of switching (42): Respondents indicated several other sources of barriers to entry and switching costs that are becoming relevant in the context of digitalisation, namely the use of data (portability), interoperability, privacy, networks effects, "ecosystems", multi-homing, product differentiation and diminishing returns.
- Different categories of customers and price discrimination (43): Respondents indicated that the emerging practice of personalised pricing should be considered, including the possibility to identify a distinct market for each customer. A business association explained that features such as e-commerce and platforms should be taken into account when assessing the possibility of different categories of customers because of price discrimination. A respondent indicated also that "big data" allow to better discern differences in customers' willingness to pay and that more products are being sold in formats that limit possibilities for trade and arbitrage.

### **3.2.5. Evidence for defining markets – geographic dimension Q III.5**

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards the evidence to define the relevant geographic market (paragraphs 44-52 of the Notice), there was mixed feedback from the respondents. Overall, around one-third of the respondents who expressed a view indicated that the Notice provides correct, comprehensive and clear guidance as regards the evidence for defining markets in their geographic dimension, while the remaining respondents disagreed.

III.5. Have the following aspects within “Evidence for defining markets – geographic dimension” (paragraphs 44-52) provided correct, comprehensive and clear guidance?



When looking at different stakeholder groups, two-thirds of the respondents from the business community and the civil society disagree that the Notice provides correct, comprehensive and clear guidance as regards the evidence to define the relevant geographic market while roughly two-thirds of the responding public authorities agree.

- Evidence of diversion to other areas (45): Some respondents operating in the digital, media and telecoms industries noted that the guidance on types of evidence for diversion to other areas should be updated to include evidence not related to prices or physical trade flows. Others noted that past evidence of diversion, although useful, may not be enough and more forward-looking evidence should be considered. Some respondents pointed out that, while evidence of diversion may be an indication of a wider geographic market, the opposite is not necessarily true: customers may have chosen local suppliers but that in itself is not indicative of customer behaviour in response to a reason to divert. One respondent argued that care should be taken in the next text of the Notice to distinguish between supply substitution that takes longer than one year (to be assessed as potential market entry) and the Hypothetical Monopolist Test that relies on a much shorter time-frame and so belongs in the market definition exercise. Finally, one respondent from the civil society noted that the evidence of geographic diversion in the labour market does not necessarily coincide with the evidence of diversion in a relevant product or service market since the geographic market for a product may be broad while the labour market may be narrower, or vice versa.
- Demand characteristics and views of customers and competitors (46-47): Several respondents from the business community noted that demand characteristics like language and culture may not be as relevant in determining the geographic scope of a relevant market as in the past, in particular as regards digital markets or markets where digitalization has changed the way competition works. One respondent added that, in addition to obtaining views of customers and competitors, the views of trade associations, industry experts and independent third parties, i.e. scholars or economists, may also be sought when necessary in individual cases. Another respondent noted that paragraph 46 should be updated to incorporate the open or closed nature of certain third-country markets (administrative

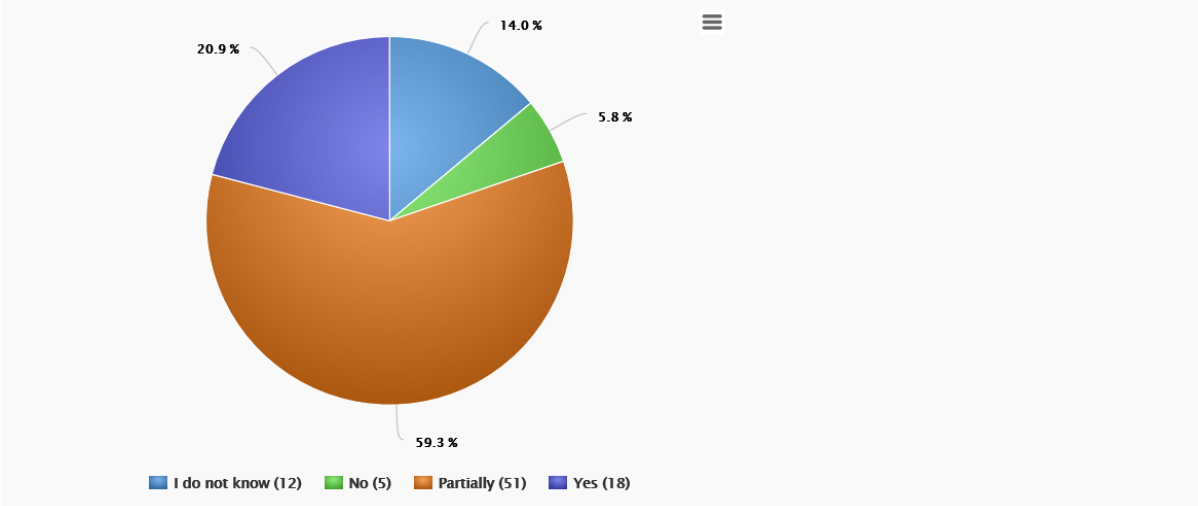
difficulties, standards, public procurement, etc.) creating competitive imbalances in the accessibility of these markets.

- Geographic patterns of purchases and trade flows (48-49): Many respondents both from the business community and the civil society referred to the fact that the world is more international than 23 years ago to suggest that the Notice should be updated to take account of globalisation trends of the past two decades. Among those respondents, several respondents from the business community recognized, however, that the fundamental aspects of the Notice still apply and that there is no need to alter the methodology by which markets are defined in order to assess the impact of global competition. One respondent, in particular, argued that allowing anticompetitive mergers in order to create European Champions was not desirable. Several other respondents operating in the digital, media and telecoms industries noted that the Notice should caution against focusing too much on transport costs, diversion of orders and trade flows given the growing importance of digital services and the dynamic nature of digital markets. Respondents also noted that the Notice should provide guidance on an analytical framework for the definition of local markets on the basis of catchment areas drawn around suppliers or customers. One respondent, in particular, argued that paragraph 48 of the Notice may need further clarification about whether the geographic market can be different in different stages of a transaction (where, for instance, bidding for a concession could happen on a national basis, while the concession won could be granted at a regional level) and which stage of a transaction should be examined in defining the geographic market.
- Barriers and switching costs (50): Several respondents pointed to the growing importance of online purchases and digital services to argue that the focus of the Notice on transport costs and tariffs should be updated to account for the ability of companies to compete globally. They further argued that switching barriers in relation to digital services like consumer privacy, data protection and Territorial Supply Constraints (TSCs) should be taken in consideration in an updated Notice. Some respondents noted that the issue of barriers to entry in an updated Notice should account for the impact of foreign subsidies or European regulatory constraints in the competitiveness of European companies, in order to ensure a global level-playing field.
- Examples from Commission practice and relevance of different factors (51-52): Several respondents argued that it would be helpful if the updated Notice included a list of examples modelled on the Commission practice and case law.

### **3.2.6. Calculation of market share Q III.6**

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards market shares calculation (paragraphs 53-55 of the Notice) there was mixed feedback from the respondents. Overall, around one-quarter of the respondents who expressed a view indicated that the Notice provides correct, comprehensive and clear guidance as regards market share calculation, while the remaining respondents disagreed.

III.6. Have paragraphs 53 to 55 on the “Calculation of market share” provided correct, comprehensive and clear guidance?



Among those respondents disagreeing, most explained that guidance is needed in relation to the calculation of market shares in digital markets, in particular as regards zero price services and multi-sided platforms. Respondents suggested several alternative metrics, namely number of subscribers/users/visitors, volume of use, time spent, amount of data provided, clicks, number of visits, or single homing users. Several respondents also indicated that static market shares are not a good indicator in dynamic markets, in particular where innovation has a strong role. This is because a temporary high market share does not correspond to high market power in their view. One business argued that instead of sales, the Commission could assess marketing expenditure, technology investments, innovation and investments in customer service. Also other market specificities were mentioned that should impact the type of metrics used. For instance, some respondents indicated that in the case of bidding markets or more general in case of infrequent purchases, a longer period could be considered. Other respondents indicated that more guidance was needed in the case of captive sales or vertically integrated companies and “ecosystems”. One business asked for more clarity on how to deal with the suppliers included in the market via supply-side substitution and on the role of market shares in the case of differentiated products. Going beyond the technicalities of market share calculations and therefore the scope of the market definition notice, some businesses and business associations also explained that market share calculation does not take into account competitive constraints from outside the market and from potential competition, and thus do not adequately reflect market power.

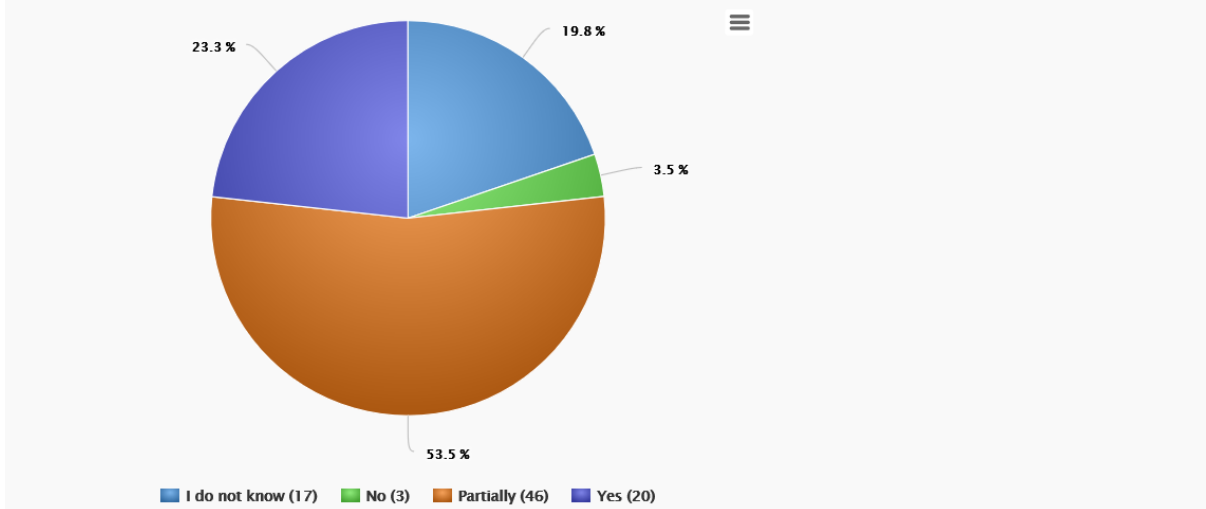
More generally, one public authority and one representative of the civil society asked for more examples of market share calculation. One business association argued that market reconstruction should only be done in exceptional circumstances and that the Commission should give the results due weight depending on the rigorousness of the process to collect the input data from market participants.

### 3.2.7. Additional considerations Q III.7

Regarding the question whether the Notice provides correct, comprehensive and clear guidance as regards additional considerations (paragraphs 56-58 of the Notice), there was mixed feedback from the respondents. Overall, more than one-quarter of the respondents who expressed a view indicated

that the Notice provides correct, comprehensive and clear guidance as regards additional considerations, while the remaining respondents disagreed.

III.7. Have paragraphs 56 to 58 on the “Additional considerations” provided correct, comprehensive and clear guidance?

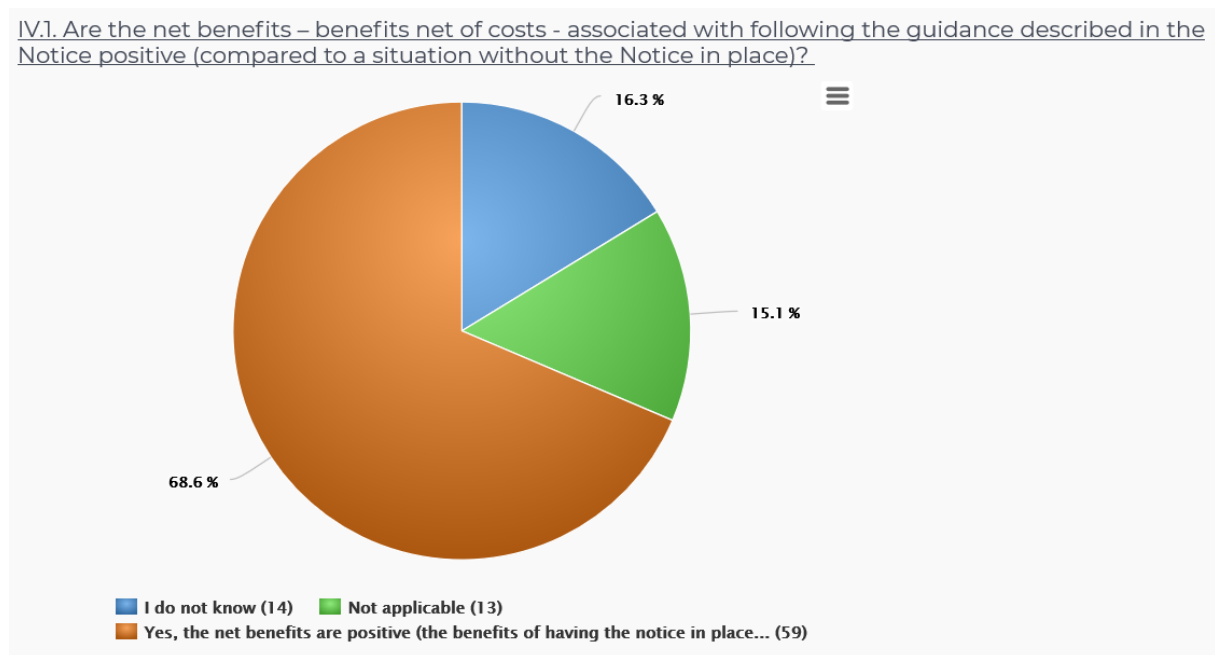


Most of the respondents indicated that the Notice should include guidance on digital markets, namely in relation to multi-sided markets, “ecosystems” and services offered at a zero monetary price. In particular, some respondents argued that guidance on when to define a single market or several markets for each side of a platform is necessary. Also more emphasis on non-price variables is necessary as well as on the importance of network effects and the role of data.

Some respondents also mentioned the need for more specific guidance on innovative and dynamic markets. Respondents also mention the following specificities: bundle markets and markets characterised by the presence of complementary products, bidding markets, captive sales and own brands. In relation to chains of substitution, some respondents asked for more detailed guidance. One trade union argued that labour market aspects should be taken into account for the purpose of market definition.

Some respondents indicated that the paragraph on aftermarket should be updated in light of recent judgments. Some respondents submitted that more explanations should be provided about the digitalisation of aftermarket (including the importance of data) and the emergence of “ecosystems”. One business association indicated that the Notice should clearly set out the additional factors that are needed to conclude that a separate secondary market exists and the circumstances in which a customer can be considered locked in with the primary product. Another business association indicated that the Notice should explain the specific situations in which the primary market primarily determines the competitive scope of the secondary market. Another business association added that the Notice should refer to the possibility of cases where a manufacturer has the technical and/or commercial ability to foreclose the aftermarket for its independent competitors, and thus can restrict demand substitution artificially.

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



All respondents who expressed a view on this question considered that the net benefits associated with following the guidance described in the Notice are positive (compared to a situation without the Notice in place). In other words, the respondents find that the benefits of the Notice exceed the costs thereof.

Although they were not able to quantify its net benefits, respondents stated that the Notice improves legal certainty thereby helping companies to reduce costs, including: (i) costs associated with external legal assistance (as at least a part of the assessment can be carried out in-house), (ii) costs of competition law infringements stemming from an incorrect assessment of their market position: these include legal fees and fines as well as negative effects of making investments or adopting a commercial strategy that later needs to be changed, and (iii) opportunity costs. One respondent also noted that without the Notice, the Commission's own investigations could take longer or be inconsistent with each other, which would increase companies' costs of self-assessment and of cooperating in such investigations. In the same vein, another respondent stressed the importance of the Commission adhering to its own Notice for the benefits to be maximised.

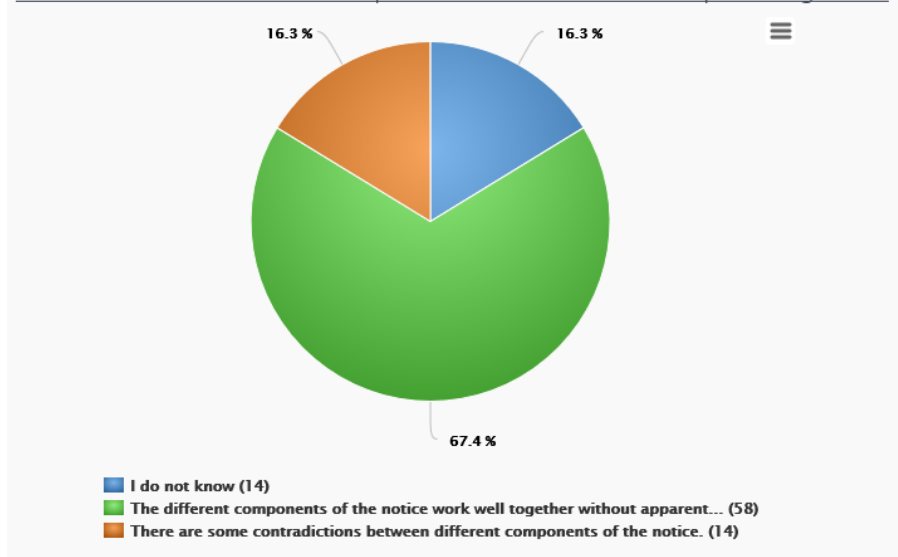
#### 5. Coherence (Is the Notice internally coherent? Does the Notice complement other actions or are there contradictions?)

Respondents are in consensus or express a strong agreement as regards the coherence of the Market Definition Notice.

##### 5.1. Internal coherence of the Notice

Most respondents expressing a view on the internal coherence of the Notice indicated that the different components of the Notice work well together without apparent contradictions, while a fifth indicated that there exist contradictions between its different components.

#### V.1. How well do the different components set out in the Notice operate together?



Of these respondents disagreeing with the internal coherence of the Notice, several pointed out that despite identifying “three main sources of constraints” (para. 2), the Notice puts the emphasis on the demand-side, while seemingly putting supply-side and potential competition at a different level and only dealing with them at later stages in the Notice (paras. 20 and 24 respectively). Some respondents flagged the need to rethink whether the Notice is coherent in relation to digital markets.

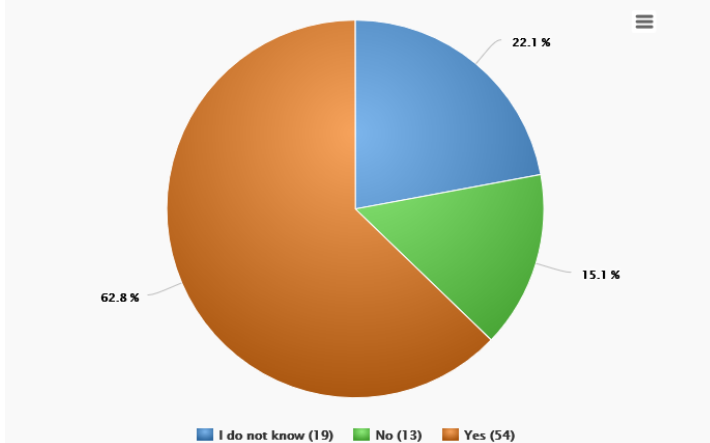
One respondent indicated that the Notice should acknowledge the differences between the objectives and aims of antitrust and mergers and that these objectives should be taken into account when defining markets. Some respondents added that the non-decisive role of market definition and market shares should be clarified: one respondent indicated that the passage in paragraph 4 “the definition of the relevant market often has a decisive influence on the assessment of a case”, does not seem to be coherent with paragraph 27, indicating that sometimes a precise market definition is not necessary. Going beyond issues of market definition, another respondent requested a more important role for buyer power – and not of market shares only. One respondent also flagged that the “additional considerations” section does not fit well with the rest of the Notice.

Respondents agreeing with the internal coherence of the Notice generally indicated that the Notice was coherent, with some of them highlighting that the reason for this was the fact that the Notice was drafted in broad terms. Some respondents agreeing with the coherence also requested the Commission to give less importance to the role of market definition and to make explicit that market definition helps to frame the analysis but is not decisive for the outcome of the case. Another respondent suggested moving the current paragraph 25 of the Notice to the section of Evidence (i.e. paragraphs 35 et seq. of the Notice) and moving paragraph 43 of the Notice (re different categories of customers and price discrimination) to the last section on “Additional considerations”.

## 5.2. Coherence with antitrust instruments

Around four-fifths of the respondents expressing a view agreed that the Notice was coherent with other instruments that provide guidance on the interpretation of the EU antitrust rules based on Articles 101 and 102 TFEU.

V.2. Is the Notice coherent with other instruments that provide guidance on the interpretation of the EU antitrust rules (based on Articles 101 and 102 TFEU)?



One respondent suggested harmonising the distinction between actual and potential competitors laid down in Article 1 of Regulation (EC) No 330/2010 – the Vertical Block Exemption Regulation, currently under review – with that of paragraph 20 of the Notice, which refers to the same concepts in order to assess supply-side substitution. A potential way to solve the issue, according to the respondent, would be to include a section of definitions of terms including undertaking, competitor, current competitor, potential competitor, market, wholesale, retail, upstream, downstream market. Also in relation to the VBER, the same respondent questioned whether market shares should be solely calculated on the basis of the market on which the goods are sold or whether also the markets where the goods are purchased. The same respondent argued for making market definition compulsory even for Art. 101 TFEU decisions by object in order to “construct a single case-law practice”. Another respondent also argued in favour of making market definition a necessary first (compulsory) step, especially because “there is the tendency, by certain national competition authority, to restrict the scope of the relevant market to the perimeter in which an infringement has been allegedly realized (for instance, in case of a 101 TFEU investigation)”. One respondent also suggested cross-referring to the best practices for the submission of economic evidence and data collection. Another respondent did not see the need for having market definition guidance also in the Horizontal Guidelines. Finally, one respondent claimed that the Notice’s exclusion of potential competition which the Commission addresses in its competitive assessment seemed to be in contradiction with points 12 of the Communication on 102 enforcement priorities and with paragraph 46 of the Horizontal Merger Guidelines, both of which seemed to have a more forward-looking point of view for market definition according to the respondent. One respondent suggested not forgetting the case-law of the Court of Justice, dating back to the Völk and Ziegler case, which uses the assessment of market power to define a relevant restriction within the meaning of Article 101 (1) TFEU.

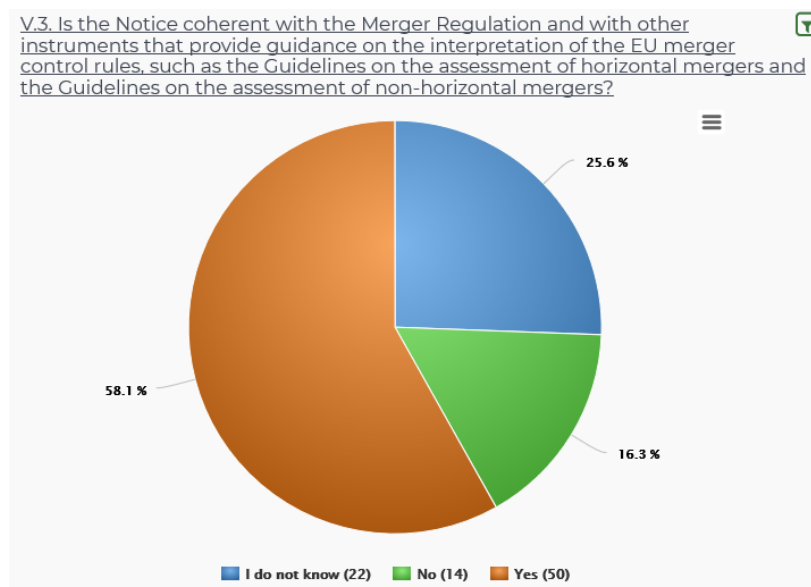
Going beyond market definition issues, several respondents highlighted their concerns regarding the need to update antitrust guidelines to the changes brought about by the digitisation of the economy but also with the ongoing reviews of the horizontal and vertical guidelines. Two of these respondents indicated that these changes, including the ongoing debate surrounding the Digital Markets Act, were necessary in order to ensure consistency and to increase the competitiveness of their industry vis-à-vis gatekeeper platforms. One of these respondents also flagged the following instruments as being potential candidates for adaptation: the Article 102 Enforcement Priorities Guidelines, the Horizontal and Vertical Guidelines, the Horizontal Merger Guidelines (in particular on innovation effects) and Non-Horizontal Merger Guidelines (in particular on conglomerate effects).



Two other respondents advocated for a Notice containing clearer indications on the process of market definition for each type of relevant cases as is done in paragraphs 86 to 92 of the Vertical guidelines. On top of the need to harmonise the Notice with the Digital Markets Act, another respondent found it necessary to also harmonise the Notice to take better account of labour law. Another respondent suggested not focusing the Notice excessively on price parameters in order to bring it in line with other instruments (e.g. Horizontal and Non-Horizontal Merger Guidelines, Guidance on Article 102 TFEU) mentioning non-price parameters and also with the developments in digital markets.

### 5.3. Coherence with merger instruments

Around four-fifths of the respondents that expressed a view agreed that the Notice was coherent with the Merger Regulation and with other instruments that provide guidance on the interpretation of the EU merger control rules, such as the Guidelines on the assessment of horizontal mergers and the Guidelines on the assessment of non-horizontal mergers.



Respondents flagging incoherencies focused their comments on the four following topics:

1. The need to change the dominance test appearing in the Notice to adapt it to the significant impediment to effective competition test;
2. The need to update Section 6 of the Form CO in order to reflect paragraph 27 of the Notice which provides examples of situations where the market definition may be left open. In the opinion of these respondents, this could alleviate the burden on third parties contributing to market investigations;
3. The need to better reflect global competition: going beyond issues of market definition, some respondents submitted that the Notice should take better account of potential competition. One business association suggested the Notice to focus more on global competition from non-European companies, over a longer timeline and taking greater account of efficiency considerations. Another business respondent concurred, referring to points 8, 15 and 23 of the Horizontal Merger Guidelines in this regard.

4. The need to adapt the Notice to take into account digitisation: some respondents argued for an adaptation of the Notice to the relevant elements of digitisation, including non-price elements. One of them indicated that the Horizontal and Non-horizontal merger guidelines underline the relevance of quality, variety and innovation of products for the determination of “market power” and thereby relativise the price dimension of competition (paragraphs 8 and 10) in a clearer manner.

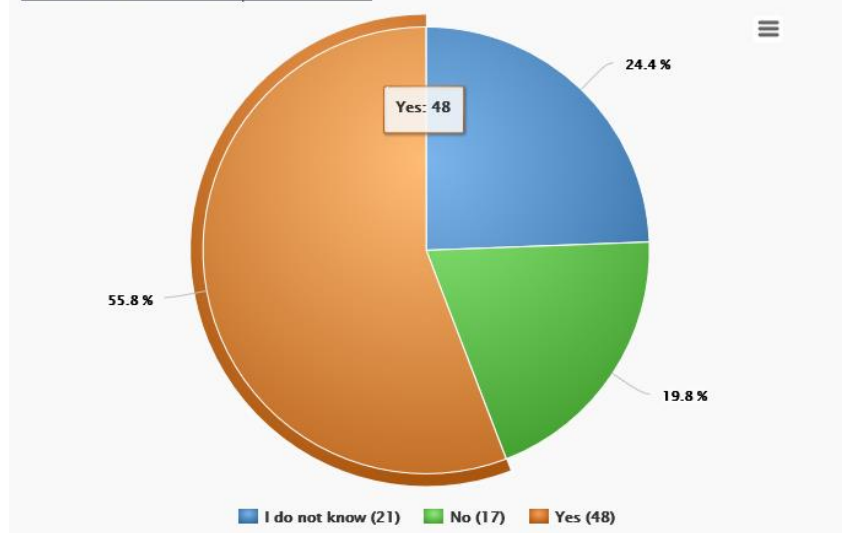
An individual respondent also argued for better justifications regarding the differences in market definition in merger and antitrust cases and proposed to set up a database with all the market definitions adopted by the Commission by sector of activity.

Some of those respondents indicating that the Notice was coherent, also made further comments: going beyond issues of market definition, one association of large businesses indicated that the 2-year time horizon in the analysis which the Commission adapts according to the characteristics and dynamics of the market (paragraph 74 of the Horizontal Merger Guidelines) should be extended in general. Another respondent indicated that a greater differentiation between market definition in antitrust and merger control could be envisaged.

#### 5.4. Coherence with the CJEU’s case-law

Among respondents expressing a view, around three out of four of respondents indicated that the Notice was coherent with the case law of the General Court and the Court of Justice of the European Union.

V.4. Is the Notice coherent with the case law of the General Court and the Court of Justice of the European Union?



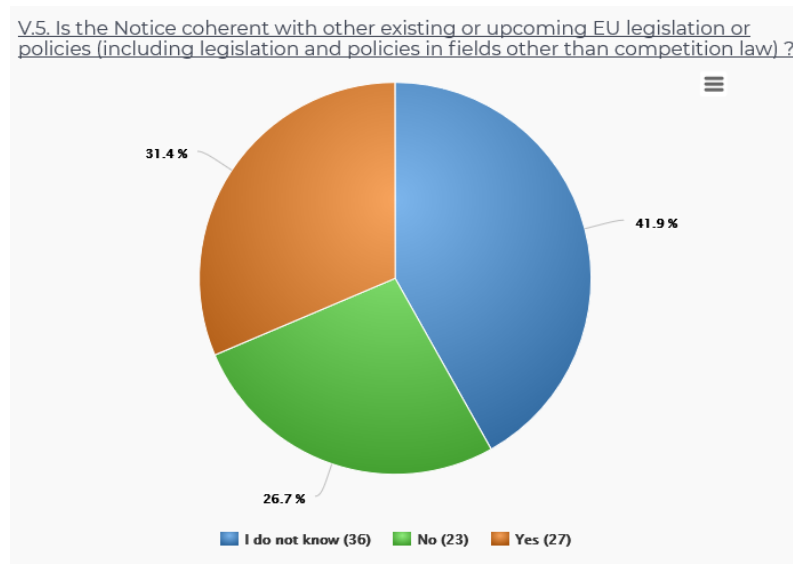
In their replies, respondents highlighted the importance of quoting judgments – and also decisions – since the adoption of the Notice in 1997, while also recalling the role of market definition and the discretion that the Commission enjoys in defining markets. Specific judgments mentioned by the respondents included the following:

- Case T-125/97 Coca-Cola v Commission
- Case T-203/01, Michelin II
- Case C-67/13 P, Groupement des Cartes Bancaires
- Case T-370/17, KPN BV v European Commission

- Case T 79/12, Cisco Systems, Inc. and Messagenet SpA v European Commission
- Case C-439/11 P, Ziegler SA v European Commission
- Case T-380/17, HeidelbergCement AG and Schwenk Zement KG v. Commission
- Case C-307/18, Generics (UK) Ltd and others v CMA
- Case T-691/14, Servier v Commission
- Case T 111/08, MasterCard, Inc. and Others v European Commission
- Case C-382/12 P MasterCard Inc. and Others v European Commission
- Case T-427/08, Confédération Européenne des Associations d'Horlogers-Réparateurs (CEAHR)
- Case T-201/04, Microsoft v Commission
- Case C-228/18, Budapest Bank
- Case T-461/07, Visa Europe Ltd and Visa International Service v European Commission
- Case T 399/16, CK Telecoms UK Investments
- Case C 522/13, Navantia
- Case T-160/16, Groningen Seaports and Others v Commission
- Case C-8/08, T-Mobile Netherlands and Others

### 5.5. Coherence with EU policies:

The views on the coherence of the Notice with existing or upcoming EU legislation or policies (including legislation and policies in fields other than competition law) were more divergent than on other coherence topics. In this respect, first, almost half of the respondents did not express a view; and, second, of those expressing a view, a round half agreed on the existence of such coherence.



Several respondents noted the importance of keeping coherence between the Notice and the Commission’s work regarding the Digital Markets Act and the Digital Services Act. There was, however, no single position regarding how both initiatives should interact. Some respondents – mainly active in the telecommunications sector – highlighted the need for further work in the regulatory field, and one considered that competition law and the Notice should remain as the main tool to tackle gatekeeping platforms. Two respondents explicitly recommended that the Commission evaluate whether the identified issues can be addressed by adapting the Notice, or alternatively the guidelines on the vertical and horizontal agreements, to the new digital environment, before

introducing new tools. Respondents generally agreed on the importance of ensuring consistency between all reviews of competition law currently ongoing (Market Definition Notice, as well as the Block Exemptions Regulation for horizontal, vertical and motor vehicles agreements) or about to be launched (Technology Transfer Block Exemption Regulation).

The telecommunications regulatory framework – European Electronic Communications Code – was also flagged as another field where coherence with the Notice was required. One respondent indicated that the analysis of markets under competition law does not have to be and should not be the same as on pre-defined regulatory markets, as they both serve different purposes.

Some respondents also called for ensuring coherence with the recently-published White Paper on foreign subsidies, in order to jointly contribute to the achievement of the common objective of taking greater account of third-country subsidised competition.

Finally, some respondents brought up the topic of sustainability. Two of these respondents indicated that the additional costs that European companies face when complying with environmental measures should be taken into account in merger assessments but also for antitrust compliance when it comes to cooperation agreements.

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

### **6.1. Has the Notice at EU level had added value in the assessment of relevant product and geographic market in the application of EU competition law (including application by national competition authorities)?**

Nearly all (75) of the respondents who expressed a view indicated that the Notice at EU level had added value in the assessment of relevant product and geographic market in the application of EU competition law, with only one respondent disagreeing.

In their replies, respondents noted that the Notice has contributed to legal certainty, by providing guidance at the EU level on the assessment of relevant product and geographic markets for the purposes of EU competition law and merger control rules. A general view was that this Notice at EU level allowed the development of a common analytical framework for both enforcement authorities and companies to self-assess their behaviours and projected mergers, although several respondents referred back to their suggestions for updating the Notice to account for market developments.

One particular respondent, a major business, noted that guidance at EU level is essential to ensure a consistent enforcement and a level playing field in the EU's single market. An SME respondent pointed out that the Notice added value in the sense of an introduction to the way competition agencies work and to understand the approach to a competition case.

### **6.2. Has the Notice helped in aligning the definition of the relevant markets by the national competition authorities of the EU member states and the European Commission?**

Nearly all respondents expressing a view (61) agreed that the Notice at EU level had helped in aligning the definition of the relevant markets by the NCAs and the European Commission. Some respondents (7) disagreed. Three respondents, in particular, consider that market definitions are not always aligned across Member States or, sometimes with the European Commission, which can lead

to legal uncertainty. Another considers that the Notice still has too much of a theoretical economic approach that is not sufficiently precise and easy to understand by businesses.

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