



BRUSSELS À JOUR

The Market Definition Notice is coming to Town – 3rd Advent

Markus Roehrig and Laura Stoicescu report on the latest developments from the European capital of competition law.

The third instalment of our Advent special looks at the new Market Definition Notice, a revamp of the old and tried 1997 provisions. Perhaps more eagerly awaited than Santa, the draft was put forward by the Commission just in time for the stockings-stuffing time of the year. In today's issue, we discuss some of the innovations that the draft brings.

The draft Market Definition Notice has been in the making for two years. When the Commission commenced the work on the new draft, the feelings of antitrust practitioners and policy makers were running high in the wake of the *Siemens/Alstom* case, with some promoting the idea that the EU's competition laws should play a role in protecting "European champions" and that the Commission should take more of a global perspective on competition and market definition. The draft Market Definition Notice indeed offers more guidance on geographic market definition, including the conditions under which markets might be defined globally. However, unsurprisingly (and rightly so), market definition in the draft continues to be based on economic considerations. Other areas that the new draft sheds more light on include digital and innovative-intensive markets. Beginning November 2022, the Commission published the draft update to the Notice, which is now open for feedback until 13 January 2023.

Growth Pains

Given its "old age", practitioners found it increasingly difficult to obtain specific guidance in the 1997 Market Definition Notice for some of the pressing issues of our time, especially against the background of the development of multi-sided platforms, such as hotel-booking websites, search engines and online marketplaces, where the traditionally primary assessment element for demand substitution, prices, has taken a significant hit. Instead, zero monetary prices became a crucial factor. Additionally, time-tested instruments like the SSNIP-test showed their limitations when applied to these markets and also the shortcomings of their strict interpretation and enforcement.



Being more than a mere “face lift”, the Commission implemented (limited) changes to those parts of the Notice that have proven to have worked well in the past, re-drafted the parts that needed clarification or updating and it added some parts in particular on specific constellations of market definition including in relation to novel issues, such as the digital sector.

The general principles of market definition remain largely the same, though (for good reasons). According to the text, the definition is fact-based, it comprises the product and the geographic dimensions and the outcome of the assessment might differ depending on parameters of competition, the undertakings and the time period. Going forward, the draft also confirms that the Commission may leave the market definition open and it introduces the idea that in certain cases, temporal considerations may also be relevant when defining the relevant product and geographic market (for example, seasonality, peak / off-peak times).

Overall, the new draft Market Definition Notice offers an updated and useful framework for practitioners, including additional guidance and more practical examples.

A Quest for the Relevant Product Market

The new draft reacts to the rise of non-price competition in the digital economy and calls for the analysis of various parameters of competition including a product’s price, but also **non-price elements** such as innovation and sustainability. In particular, the Commission will not rely solely on the SSNIP test but, in the context of zero monetary price products and innovative markets, may apply the standard of the *Google Android* case, i.e. whether and to what extent customers would switch away from the undertaking’s product in response to a small but significant non-transitory decrease of quality. The Draft Notice also clarifies that – while there is no obligation on the Commission to use a quantitative test – the SSNIP test can generally be applied at the prevailing market price and its argument cannot be simply dismissed with reference to the “cellophane fallacy” without assessing it in its specific context.

Regarding **supply-side substitution**, the new draft provides guidance also regarding the timeliness of such substitution. More precisely, the draft states that the condition for the market to be broadened from this point of view is that all suppliers be able to switch production between products in the range of related products (with insignificant additional sunk costs), have the incentive to do so when prices and demand change and can market them effectively in the short term. The notion of “short term” is explained as being the period of time allowing the producer to market the product to the customer in a timeframe that is not significantly longer than the timeframe the customer needs for switching to the other product(s) in the candidate market. This will be assessed on a case-by-case basis.

The new draft also implements the Commission’s take-away from the assessment of the market for metallic coated steel of the *Tata Steel/ThyssenKrupp* case of 2019.¹ In this respect, the draft notes that when only some of the suppliers are able to switch their production, it will not include the product range in the same relevant market.

¹ Case M.8713, *Tata Steel/ThyssenKrupp/JV*.



However, in the competitive assessment, the Commission will take into consideration the constraint exercised by the few suppliers who are able to switch production. In forward-looking assessments, the possibility that those few suppliers are likely to expand their sales of the relevant products in the future will also be taken into consideration.

When defining the relevant market, the Commission may also carry out a **forward-looking assessment** to take into account expected structural market transitions which affect the general dynamics of supply and demand – such as impending technological or regulatory changes. However, the evidentiary standard remains high. The structural transition needs to take effect with sufficient probability within the time period that is relevant for Commission’s competitive assessment, in order for it to influence the market definition.

Go Big or Go Home – Geographic Market Definition

The relevant geographic market continues to be defined by the area in which the undertakings involved supply or demand relevant products and in which the conditions of competition are **sufficiently homogeneous**. In the wake of the *Siemens/Alstom* case in 2019,² some antitrust policy makers, particularly at the Member State level, had been advocating that the Commission’s merger enforcement should take into account European companies’ competitiveness in a globalizing economy and that the relevant geographic market should more often be defined as being global to reflect competition from China and elsewhere (the “European champions” argument). While the new draft offers more guidance on geographic market definition, it remains firmly rooted in economic theory (rightly so). Over time, the Commission has developed other tools to ensure a level playing field for European and non-European companies competing in the EU such as, most notably, its foreign direct investments and foreign subsidies packages.

In the new draft the Commission explicitly recognises that geographic markets can range from a local to a global dimension. The Draft Notice focuses on distance (in terms of travel or delivery) as the main factor to differentiate the market geographically. The Commission is likely to define **global geographic markets** when customers around the world have access to the same suppliers on similar terms, regardless of the customers’ location, due to the lack of trade barriers and costs. And, as an indirect response to the “European champions” debate, the new draft underlines the fact that the term “market” in EU competition law is different from the use of the term “market” in other contexts, in particular in business contexts. For instance, undertakings may say that they are active in a global market where they consider that they compete globally for revenues against undertakings from all continents. However, that does not mean that the products of all globally active undertakings are substitutable for customers in the EEA or that customers face sufficiently homogeneous conditions of competition globally, which is the relevant perspective for the Commission’s market definition.

In response to calls to consider the competitive restraints caused by **imports**, the Commission commits to analyse demand substitution patterns – such as switching to imports. But to define the relevant geographic market, the key criterion remains the

² Case M.8677, *Siemens/Alstom*.



sufficient homogeneity of the conditions of competition. The Commission will therefore consider two areas as part of the same geographic market particularly when customers in both areas consider mostly the same suppliers as alternatives and can readily switch volumes between them. In circumstances characterized by significant imports but absent sufficiently homogeneous conditions of competition, the Commission generally will not extend the relevant geographic market to include areas of origin of imports but take into account the competitive restraint from imports at later stages of the competitive assessment, i.e. in the calculation of market shares and the assessment of a restriction of competition.

The draft Notice offers helpful guidance also in cases where markets are local, particularly where markets are typically being defined based on the notion of **catchment areas**. Preferably, these should be drawn around individual customer locations but, given that this will often not be feasible, the Commission will work with catchment areas around individual supplier locations. Typically, the Commission will consider catchment areas covering 80% of sales or customers as a starting point. However, relevant catchment areas may also be defined based on a coverage of 70-90% of sales or customers.

The Proof is in the (Christmas) Pudding – Gathering the Relevant Evidence

The new draft Notice provides a consolidated overview of the evidence that the Commission will consider when defining the relevant market, including extra descriptions of case practice and of quantitative techniques and their limitations.

For example, the new draft expands on the gathering and evaluation of the evidence, aspects previously spread across different sections. According to the document, while there is no rigid hierarchy in terms of sources of information and types of evidence used, the following types of evidence will generally be considered for purposes of **product market** definition:

- Product characteristics, prices, intended use and general customer preferences, including the underlying reasons as to why customers would substitute one product for another;
- Evidence of past substitution such as, e.g., in case of exogenous events or shocks; where sufficient data is available, this could also include quantitative analyses (e.g., diversion ratios between products, an implementation of the SSNIP test);
- Evidence of hypothetical substitution from RFIs, provided responses are sufficiently reliable, complete and accurate; and
- Industry views on competitive constraints and evidence on barriers and costs of switching demand and/or supply.



And in case of **geographic** market definition:

- Identity of available suppliers, market shares and prices in various regions;
- Customer preferences and purchasing behaviour;
- Barriers and costs associated with supplying customers in different areas;
- Transport costs, catchment areas and other distance related factors; and
- Trade flows and shipping patterns.

Special Guidelines for Special Circumstances

The Draft Notice gives additional guidance for very specific types of markets, reflecting the digitalization of the economy and the Commission's shift in enforcement focus. This includes market definition in the presence of significant R&D investments, multi-sided platforms and digital ecosystems.

In **innovation-intensive markets** with frequent and significant investments in research and development, innovation is a key parameter of competition. The Commission may factor in all potential outcomes of the uncertain R&D processes in a forward-looking assessment for the purpose of market definition. Especially, pipeline products – which are not yet available to customers, but sufficiently far along the R&D process – and their projected substitutability may play a role in determining the relevant product and geographic market. The draft makes the difference between pipeline products which are related to a specific existing or new product market and the R&D processes not closely related to any specific product, but related to earlier stages of research, which may serve multiple purposes (or not), with a longer-term perspective. In order to identify the boundaries of the latter types of markets, the draft suggests considering factors such as the nature and scope of the innovation efforts, the objectives of the different lines of research, the specialisation of the different teams involved or the results of the undertaking's past innovation efforts.

In the presence of **multi-sided platforms**, the Commission may define a relevant product market for the platform as a whole, encompassing all (or multiple) user groups or it may define separate relevant product markets for the products offered on each side of the platform, allowing for either a holistic or a more isolated competitive assessment. Depending on the facts of the case, it may be more appropriate to define separate markets where there are significant differences in the substitution possibilities on the different sides of the platform. The new draft also flags the presence of indirect network effects and provides examples of indicative elements to assess substitution possibilities on the different sides of the platform, such as product differentiation, homing decisions, etc.

The new draft also looks into the so-called **after-markets** – where, in certain circumstances, the consumption of a durable product (primary product) leads to the consumption of another connected product (secondary product). According to the new draft, as far as after-markets are concerned, there is the possibility of defining either (i) a system market comprising both the primary and the secondary product,



(ii) multiple markets, namely a market for the primary product and separate markets for the secondary products associated with each brand of the primary product, or (iii) even dual markets, namely the market for the primary product on the one hand and the market for the secondary product on the other hand. The draft provides guidance on the scenarios where each of the three market configurations are most likely. For example, the definition of a system market may be more appropriate the more likely it is that customers take the whole-life costs into account when purchasing the primary product. Concerning **bundles**, the draft hints at the possibility of considering them as a separate relevant product market. The draft looks at after-markets and bundles, by considering a primary core product and a secondary (digital) product whose consumption is connected to the primary product by tech links or interoperability.

Regarding **digital ecosystems**, the new draft states that in certain circumstances they can be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability. When considering digital ecosystems, the Commission may thus apply similar principles to the ones applied to after markets to define the relevant product market(s).

And while you are dreaming of the perfect final Market Definition Notice (we already are), don't forget to come back next Monday for our last December instalment, discussing the Digital Markets Act.

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