

**Delphi**

# **Revised Market Definition Notice adopted by the Commission**

A new way of defining markets in competition law cases?



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### Introduction and background

On 8 February 2024, the European Commission (the “**Commission**”) adopted a revised Market Definition Notice (the “**Notice**”).

Defining a relevant market is a necessary step when assessing the market power of an undertaking in merger control and antitrust cases. Defining the scope of the relevant product and geographical markets provides competition authorities with an analytical framework for competition analysis and enables them to identify relevant competitors and customers as well as to assess undertakings’ market power. However, market definition is no exact science, and the relevant parameters of competition may differ widely between different markets.

The Commission adopted the original market definition notice in 1997. Since then, enormous changes have taken place to the way markets function – in particular with the rise of two-sided or multi-sided markets (such as e.g. digital platforms). In light of these changes, the Notice was adopted to provide certain updates and clarifications to bring the Notice in line with new market realities and the developments of the past decades.

While the Notice is much more extensive than the old market definition notice, it does not signal a change to the way the Commission’s approach to defining the

relevant market. Neither does it signal greater intervention in certain types of markets, such as innovation-intensive markets or digital markets. Instead, it should be viewed as an explanation of the approach used by the Commission in light of the market developments and case law developments of the past two decades. The Notice aims to enhance legal certainty and predictability as well as to improve procedural efficiency for the Commission and the national competition authorities.

Below, we have summarised the key updates to the Notice.

### ***Greater emphasis on non-price parameters***

The Notice recognises that non-price parameters can be relevant for defining the market, in cases where customers consider them in their purchasing decisions. Such non-price parameters can include, *inter alia*, innovation, sustainability, resource efficiency, durability, reliability of supply, quality and the image conveyed of the security and privacy protection afforded by products and services.

### ***Clarifications on dynamic and forward-looking assessments***

Markets are seldom static and often change over time. Structural market transitions can affect the definition of the relevant product market, for example where

there is sufficient probability that new types of products are about to emerge on the market, or the relevant geographic market, for example where there are impending technological changes or impending changes in the regulatory framework. In such cases, it may not be relevant to define the market based on its current structure, as the structure of the market may change in the near future. The Notice clarifies that the Commission may take into account expected transitions in the structure of a market when the case calls for a forward-looking assessment. Such structural transitions differ from considerations relating to market entry by potential competitors in that they affect the general dynamics of supply and demand in a market and therefore the general reactions to changes in relative supply conditions.

### ***Guidance in relation to market definition in digital markets***

The past two decades have seen the rise of digital markets, multi-sided platforms and digital ecosystems (for example digital marketplaces or products built around a mobile operating system). Multi-sided platforms support interactions between different groups of users, creating a situation where the demand from one group of users has an influence on the demand from the other groups. For example, social media platforms allow advertisers to more easily reach their target audiences among the social media platform’s user base.

The Notice clarifies that when assessing multi-sided platforms, the Commission may choose to define a relevant product market for the products offered by a platform as a whole or it may define separate product markets for the products offered on each side of the platform. When assessing whether to define the product market as a whole or as separate product markets, the Commission has to consider factors such as whether the undertaking’s offering differs for each user group, the degree of product differentiation on each side, behavioural factors such as the homing decisions of each user group and the nature of the platform. The Commission also has to take into account, where relevant, the indirect network effects between user groups on different sides of the platform when defining the relevant markets.

In cases where multi-sided platforms supply a product to a user group with no charge at all, non-price parameters are particularly important for the Commission’s assessment. Relevant factors in such cases include product functionalities, intended use, evidence of past or hypothetical substitution as well as barriers or costs of switching.

### ***Guidance in relation to market definition on innovation-intensive markets***

The Notice clarifies that in innovation-intensive markets, frequent and significant R&D is taken into account not only in the competitive assessment but may also be relevant for the market definition. In these cases, the Commission may factor in various potential outcomes of R&D processes in its assessment as the outcome of innovation efforts can be uncertain. The Notice focuses on:

- R&D into so-called pipeline products (i.e. products that are being developed but are not yet available to consumers); and
- Early-stage R&D.

While pipeline products may not yet be available to customers, there may be sufficient visibility on the R&D process to establish with which other product(s) the pipeline product is likely to be substitutable. In its assessment the Commission may conclude that such a pipeline product belongs to an existing relevant product market or to a new product market. The intended use of the pipeline product and its projected substitutability with other products play a particular role in defining the relevant market.

When R&D efforts are still in their early stages it may be difficult to determine what products the R&D efforts will result in, particularly when the R&D efforts may serve multiple purposes and feed into various products. In such cases, it may be difficult to identify a relevant product market. However, it may still be relevant to define the boundaries within which an undertaking carrying out such R&D efforts competes. The Notice mentions factors such as the nature and scope of the innovation efforts, the objective of the different lines of research, the specialisation of the different teams involved or the results of the undertaking’s past innovation efforts as

relevant factors to be considered in the definition of the relevant market. As noted above, the Commission may factor in various potential outcomes of R&D processes in its assessment, given that the outcome of the innovation efforts in terms of final products can be uncertain.

In regard to definition of the geographic market, the Commission notes that the geographic dimension of the relevant market may need to reflect the geographic dimension of the underlying R&D effort as well as other geographic specificities.

#### ***Additional guidance on the geographic market definition***

The Notice provides additional guidance on how to define the geographic dimension of the relevant market – including on the conditions to define markets as global, European Economic Area (“EEA”) wide, national or local, as well as on how to take into account imports when defining the relevant geographic market.

The Notice reflects the increasingly interconnected and globalised nature of commercial exchanges typical of certain markets (such as IT services). The Notice clarifies that markets are likely to be global when customers around the world have access to the same suppliers on similar terms regardless of the customers’ location. Further, the Commission explains that markets may be defined as global, with the exclusion of specific areas, if certain countries are excluded due to high entry barriers or other obstacles to global sourcing by customers.

The Notice provides explanations on when and how certain factors may be used as evidence in the Commission’s assessment of the scope of the geographic market. The factors described in the Notice include market shares, prices, customer preferences, customer purchasing behaviours, switching costs and other barriers to supplying customers in different areas, transport costs as well as trade flows.

Further, the Notice includes explanations on how to treat actual or future imports in the Commission’s assessment. The Notice clarifies that the possibility of switching to imports in a given geographic area does not necessarily extend the geographic area to include that from which the goods are exported. Differences in culture, language, lifestyle, demographics or socio-economic background

among customers can lead to narrower geographic market definitions. The Commission will, however, continue to fully consider any constraints faced from imports in its competitive assessment.

#### ***Overview of the various sources of evidence and their probative value for market definition analyses***

The Commission uses various sources of evidence to define markets and may rely on both qualitative and quantitative information. The Notice provides an extensive overview of the various sources of evidence and their probative value for market definition analyses. It should be noted that the Commission may, *inter alia*, rely on publicly available information as well as on information gathered from individual undertakings or from public authorities. The Commission declares that it adopts an open approach to empirical evidence and does not apply a rigid hierarchy of different sources of information or types of evidence.

The Notice states that evidence used by the Commission to define markets should be reliable. This is likely to be the case where the evidence comes from public authorities or is supported by multiple sources, including by market participants with conflicting interests. The Notice also addresses the challenges relating to evidence in the case of forward-looking assessments and where market definition is based on changes in competitive dynamics. In such instances, expected changes must be supported by reliable evidence that demonstrates, with a sufficient level of likelihood, that they will materialise.

The Notice clarifies that evidence carries a higher probative value if it can be established that the evidence could not have been influenced by the Commission’s investigation, such as evidence pre-dating discussions of a concentration or conduct and evidence pre-dating an investigation. If independent and reliable sources are not available, the Commission assesses which evidence carries a higher probative value, taking into account the sources of the information, as well as the context of how and when the information was generated or provided to the Commission.

In addition to requesting internal documents from relevant entities and addressing written requests for information to market participants, the Commission may also rely on

public information, market or industry reports, financial analyst reports, market statistics or economic studies, as well as on ad hoc surveys conducted for the purpose of the investigation. When relying on surveys, the Notice states that the surveys must be designed carefully in order to elicit meaningful replies from the population of interest.

#### ***Clarifications regarding quantitative techniques used by the Commission when defining a market***

The small but significant and non-transitory increase in price (“SSNIP”) test is used by the Commission to determine what products can be viewed as potential substitutes by the consumer, thus enabling the Commission to determine the boundaries of the market. The Notice clarifies that the SSNIP test serves primarily as a conceptual framework for the interpretation of available evidence. While the Commission may rely on the principles of the SSNIP test in its assessment of the relevant market, there is no obligation on the Commission to apply the SSNIP test empirically, and other types of evidence are equally valid to inform the market definition.

As the SSNIP test is based on changes in price, its application is difficult when undertakings compete on parameters other than price, such as quality or innovation. It can also not be used in the context of zero monetary price products, as is the case in many digital markets. In such cases the Commission may apply the ‘small but significant non-transitory decrease in quality’ (“SSNDQ”) test which focuses on the qualitative characteristics of the relevant products and services rather than on price. The SSNDQ test is applied as a conceptual framework for a qualitative assessment of demand substitution. In the Notice, the Commission recognises that the test is subject to several difficulties, including in relation to the quantification of quality.