



COMPETITION & ANTITRUST LAW

The Revised Market Definition Notice: Reconciling Predictability and Flexibility

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The Revised Market Definition Notice: Reconciling Predictability and Flexibility

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On 8 February 2024, the European Commission (“EC”) adopted its highly anticipated [revised Market Definition Notice](#) (the “**revised Notice**”), which constitutes the first revision of the 1997 Market Definition Notice. The revised Notice crystallizes the EC’s contemporary approach to market definition, confirming the existing decisional practice of the EC and the case law of the EU courts with respect to dynamic and innovative markets, while also taking into consideration latest societal and technological changes. It is expected that national competition authorities will start applying the criteria of this revised Notice.

In particular, the revised Notice offers **more extensive and up-to-date guidance** on the appropriate approach to market definition, touching upon various key issues, such as:

- ❖ the updated general principles pertaining to market definition;
- ❖ the focus on non-price elements, such as innovation, quality, reliability of supply and sustainability; and
- ❖ the application of general market definition concepts in the context of digital and other innovation-intensive markets, markets undergoing structural transitions (e.g. technological or regulatory changes), multi-sided markets, ecosystems and geographic market /definition in global, EEA-wide, national and local markets; and
- ❖ the sources of evidence for the definition of relevant markets and their probative value.

I. Relevance of market definition in competition law

Market definition plays a pivotal role in the enforcement of competition law, being the primary analytical tool to identify and define the boundaries of competition between firms. The process involves the definition of the product and geographic market, as a means to identify the competitive constraint faced by the market players involved. In this regard, **market definition is a crucial intermediate step in merger review and many antitrust cases**, conveying significant information for the purposes of assessing market power. As such, market definition is not an end in itself; it is simply a step in the process of determining whether a firm, or a group of firms, possess (or, in the case of mergers, will possess) market power.

II. Product market definition

The revised Notice retains that undertakings are subject to three main sources of competitive constraints: demand substitution; supply substitution; and potential competition.

Demand substitution

Addressing the challenges arising from non-price competition, *i.e.* when undertakings compete on parameters other than price, such as quality or the level of innovation, the revised Notice offers more guidance on the assessment of non-price competitive parameters when defining the relevant market. Such non-price parameters of competition include innovation as well as quality

aspects of products and services, such as their sustainability, resource efficiency, durability, the value and variety of uses offered, the possibility to integrate the product with others, the image conveyed or the security and privacy protection afforded, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs.

With respect to the role of the Small but significant and non-transitory increase in price (“SSNIP”) test in the relevant products market definition, the revised Notice clarifies that while the EC may rely on the principles of the SSNIP test in its assessment of the relevant market, **there is no obligation to apply the SSNIP test empirically, and other types of evidence are equally valid to inform the market definition.**

However, **in case of non-price competition, the EC acknowledges that the application of the SSNIP test is difficult**, in particular in the context of zero monetary price products and highly innovative industries. In such cases, the EC has relied on the qualitative characteristics of the relevant products or services and has applied the principles of the Small but Significant Decrease in Quality (“SSNDQ”) test to assess switching behaviour of customers in such circumstances.

Supply substitution

The revised Notice provides more guidance on situations where supply substitution, i.e. substitutability of products from the perspective of suppliers can be relevant. More specifically, it points out that **supply substitution can be relevant for market definition where suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products.** In such cases, supply substitution can be used to broaden a market definition on the basis of the existence of necessary conditions mentioned in the revised Notice.

Situations of sufficiently strong supply substitution may typically arise when undertakings market a range of qualities or grades of a particular product.

III. Geographic market definition: addressing global competition

Addressing stakeholders’ relevant feedback in the context of the review process, **the revised Notice provides guidance with respect to defining broader geographical markets**, depending on conditions of competition (para 38). Importantly, it is clarified that markets are likely to be global in scope, in particular when customers around the world *“have access to the same suppliers on similar terms regardless of the customers’ location”* (para 69), citing a number of precedents across several sectors (e.g. IT services, civil aerospace equipment), where the EC had concluded that the scope of the markets was likely global.

Furthermore, the EC provides in-depth guidance on the factors deemed crucial when defining geographic markets, such as market shares, prices, customer preferences, purchasing behaviour, switching costs and other barriers set to supplying customers in different areas, transport costs and trade flows.

With respect to imports, it is specified that the existence of imports or the possibility of switching to imports in a given geographic area does not necessarily include the area from which the goods are exported, as customers located in different areas may be subject to different conditions of competition.

Finally, the revised Notice highlights that structural transitions that may affect specific markets can be considered when defining the relevant market, including the ones pertaining to globalisation.

IV. Gathering and evaluating evidence

The revised Notice provides expanded guidance on possible appropriate sources of evidence to be

used to define the relevant market. It is clarified that the EC may rely on both qualitative and quantitative information and that certain types of evidence may be decisive in one case, but of limited or no importance in other cases involving a different industry, a different product or different circumstances. **Thus, the EC does not apply a rigid hierarchy of different sources of information or types of evidence but adopts an open approach to empirical evidence.**

The revised Notice contains also detailed guidance on the probative value of the possible sources of evidence. In that regard, **evidence used by the EC to define markets should be reliable.** This may be the case where the evidence stems from public authorities or supported by multiple sources (such as market participants with conflicting interests).

A higher probative value is attributed to evidence if it can be established that the evidence could not have been influenced by the EC's investigation, such as evidence pre-dating discussions of a concentration or conduct, as well as the EC's inspections. On the contrary, if independent and reliable sources are not available, the EC assesses which evidence carries a higher probative value, considering *inter alia* the sources of the information.

In the case of forward-looking assessment and when market definition is based on changes in competitive dynamics within the time period considered, the revised Notice specifies that such changes must be supported by reliable evidence showing with a sufficient level of likelihood that the expected changes will indeed materialise.

The EC may also collect evidence from industry participants and may commission surveys of an indicative sample of customers or suppliers. The EC may also contact relevant trade or customer associations, undertakings active in upstream or related markets, and other key stakeholders, including local, national, or international government authorities and agencies or non-governmental organisations.

V. Market definition in specific circumstances

The revised Notice delves into market definition intricacies tailored to different industries, sectors or market types; nonetheless, the general principles of product and geographic market definition laid out in the revised Notice are applicable in these circumstances as well. More specifically, the revised Notice provides guidance to navigate market definition complexities when it comes to innovation-intensive sectors and digital markets.

Market definition in the presence of significant differentiation

In cases of significant differentiation for the same range of products, the EC may opt for either a detailed approach, identifying different relevant markets within a spectrum of different products, or a relatively broader definition that encompasses differentiated products.

Differentiation can occur either at the product level, where attributes like design, brand image, or technical specifications influence consumer choice, or at the geographic level, where the location of the individual customer and supplier matters for the consumer's choice.

Market definition in the presence of discrimination between customers or customer groups

In the presence of discrimination between customers or customer groups where the latter are offered varying conditions of supply, such as different prices or quality levels for the same product, for reasons unrelated to cost, the EC may identify a distinct group of customers for the relevant product market constituting a narrower, distinct market.

The revised Notice emphasises three (3) cumulative conditions to be met indicating the existence of distinct customer groups: (i) the ability to identify clearly to which group an individual customer belongs to at the moment of

selling the relevant product to the customer, (ii) trade among customers or arbitrage by third parties is unlikely, and (iii) long-lasting discrimination. Additionally, discrimination based on customer location can influence how geographic markets are defined.

Market definition in the presence of significant R&D

Considering that investigating potential effects on competition in innovation is a focus area for the EC, the inclusion of a specific section in the Notice relating to market definition in the presence of significant research & development (“R&D”) comes as no surprise. The Notice underscores that the unique characteristics of such industries, where companies invest heavily in R&D to innovate, may be relevant for market definition. Since the outcomes of these efforts can be uncertain, the EC takes into account various potential outcomes in its assessment.

In this vein, the EC refers to the prominent example of the so-called “pipeline products”, where these products are not yet available to customers, but there may be sufficient visibility on their R&D process to establish with which other product(s) the pipeline product is likely to be substitutable. The intended use and substitutability of these pipeline products play a key role in defining the relevant market.

Market definition in the presence of multi-sided platforms

In the realm of multi-sided platforms, *i.e.* platforms which facilitate interaction between two different groups of users, **the EC might define a relevant product market for the products offered by a platform as a whole, encompassing all user groups, or it may define separate (although interrelated) relevant product markets for the products offered on each side of the platform.**

Separate markets may be identified where there are significant differences in the substitution

possibilities on the different sides of the platform, taking into account various factors, such as 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 itself.

In such cases, where zero monetary prices may be an integral part of multi-sided platforms’ business strategy, non-price parameters, such as product functionalities, intended use and evidence of hypothetical substitutions, are relevant for the assessment of substitutions. In such cases, the application of the SSNIP test may be challenging, and thus, alternative to the SSNIP test methods may be considered, like assessing the switching behaviour of customers of the zero-price product in response to a small but significant non-transitory decrease of quality (the “SSNDQ test”).

Market definition in the presence of aftermarkets, bundles and (digital) ecosystems

In aftermarkets, where the consumption of a durable product (“primary product”) leads to the consumption of another connected product (“secondary product”), the EC considers the competitive constraints from both markets.

The revised Notice suggests three possible ways to define the relevant markets for primary and secondary products, namely: (i) as a system market including both the primary and the secondary product, (ii) as 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) as dual markets, with a market for the primary product and a market for the secondary product. In this regard, the revised Notice provides detailed guidance on the relevant circumstances for deciding which of the aforementioned approaches is appropriate to take.

As far as the digital ecosystems are concerned, the revised Notice highlights that digital ecosystem, can, in certain circumstances, be seen

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 defining relevant markets for digital ecosystems, similar principles to those applied at traditional aftermarkets may be applied.** In cases where the secondary (digital) products are offered as a bundle, the possibility of that bundle constituting a relevant market on its own may also be assessed.

All in all, since not all (digital) ecosystems fit an aftermarket or bundle market approach, the EC considers other factors, such as network effects, switching costs and homing decisions, for the purpose of defining the relevant product market(s).

VI. Market shares

Akin to the 1997 Notice, the revised Notice includes a dedicated section on the calculation of market shares since the latter reflects the relative position of suppliers on the market, and as such can be very useful in assessing market power.

Whereas market shares are typically based on sales or purchases, the EC indicates that, depending on the specific products or industry in question, other metrics can provide complementary or more useful information to determine market shares, such as capacity, production volumes, number of suppliers and R&D expenditure.

The revised Notice also reiterates that market shares can provide useful information to assess market power, but they are not the sole indicator of an undertaking's market power; other factors such as barriers to entry or expansion, as well as product differentiation and the degree of substitutability, may also be relevant, depending on the specific facts of the case.

VII. Final remarks

The adoption of the revised Notice is undoubtedly a landmark event since its original

issuance 27 years ago. The significant revisions as compared to the 1997 Notice reflect the profound transformations that have reshaped the markets over the last few decades, with a particular focus on the digital revolution. In this vein, it is worth emphasizing the recognition of aspects beyond price, such as quality, innovation, supply reliability, and (environmental) sustainability — concepts well-established in the latest decisional practice and case law, and notably absent in the 1997 Notice.

The revised Notice **helpfully systematizes and consolidates** the principles arising from relevant cases in which the EC has been called upon to define the market, **thereby enhancing legal certainty and predictability.** That said, in line with the case law requiring that the relevant market must always be defined in any particular case by reference to the facts prevailing at the time (see case T-125/97 *Coca-Cola v Commission*, para 82), the revised Notice **leaves sufficient leeway and flexibility** over how to conduct market definition analysis to ensure that markets are defined based on the facts of the specific case.

Given that, as a rule, the Greek decisional practice is aligned with the EU case law, taking into account all the relevant EU soft law instruments, **Greek competition authorities are expected to apply the criteria of the revised Notice.** As such, the revised Notice will basically be **the primary yardstick for the Greek competition law approach to market definition analysis**, and thus companies (especially in the digital sector and research-intensive industries) and their advisers must now carefully review it and assess its implications, in particular when constructing arguments on market definition for contemplated mergers and antitrust compliance.

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