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The Draft Revised Market Definition Notice: The European Commission Brings the Relevant Market Further into the 21st century

Magali Eben (University of Glasgow) · Thursday, January 26th, 2023

In November 2022, the European Commission [published its draft revision of the Market Definition Notice](#). This is the first time the Notice was revised since its adoption in 1997. The draft revised Notice on Market Definition is an impressive piece of work, which makes clear strides in updating the Market Definition Notice for the future.

Market definition is often considered routine (and to some even boring) and yet it remains a source of controversy and debate. Many things have changed between 1997 and now, and some of these developments have challenged the role or the process of market definition. The debate about the relevance of market definition is well-known (with the most famous articles published in the US by [Kaplow](#), [Markovits](#), and [Werden](#)) and had taken on renewed vigour in the context of digital markets. Even when it became clear that market definition was here to stay, the focus shifted to solving the methodological and procedural challenges of defining markets in the context of digital markets, innovation, and globalisation. Scholars and practitioners alike have tried to chart the way ahead for market definition in digital markets, and by revising the Notice, the Commission takes steps to update its practice in light of these developments.

In revising the Notice, the Commission takes into account the results of its own evaluation (including a review of practices and concerns of National Competition Authorities) as well as of [public consultation responses on its roadmap](#). It updates the Notice by including, inter alia, more discussion on the principles of market definition and its purpose, guidance on geographic market definition in the context of globalisation, updates in light of digital markets and innovation-intensive industries, and guidance on quantitative techniques and evidence for market definition. In this entry, I reflect on the Notice's updates on the role of market definition and on market definition in innovative and digital markets.

The role of market definition

The draft revised Notice improves upon the 1997 Notice by expanding on the role of market definition. I have previously argued that market definition's utility goes beyond the calculation of market shares, allowing for the identification of competitive constraints which are relevant to assessing the feasibility of the conduct and anti-competitive effects in light of the theory of harm

(the ‘purposive’ approach). I argue that this view of the utility of market definition can be supported by jurisprudence, and by the practice and guidance of the European Commission.

Nonetheless, some scholarship still criticises market definition in light only of the market power rationale, without having due regard for the functional nature of the market. The European Commission bears some responsibility for this, as its guidance and indeed decisional practice have insufficiently emphasised the broader utility of the concept. Thus, in 2020, I urged the European Commission to be more explicit and more expansive in a revised notice. I suggested that the European Commission should more explicitly articulate the purpose of market definition: an analytical tool to structure and understand the facts in light of the question it is trying to resolve.

It is, therefore, great that the draft revised Notice is indeed more explicit about the multi-faceted role of market definition. Both the content and the structure of the Notice indicate that the role of market definition goes beyond the identification of market power. The Notice not only includes a section entitled ‘Role of market definition’, but also contains multiple paragraphs that can be read as references to the purposive nature of market definition (see, inter alia, paras 11, 24, 46, 48, 93).

The Notice recognises that market definition is a tool for structuring and facilitating the competitive assessment. It still, understandably, puts market power at the centre of the exercise, referring to it as the “*most notabl[e]*” use of market definition (paragraph 7) and even dropping the ‘inter alia’ wording which was present in the 1997 Notice (Paragraph 2 of the 1997 Notice included the following wording: “*It is from this perspective that the market definition makes it possible inter alia to calculate market shares ...*”). This implied that market definition had other functions beyond just the calculation of market shares to establish market power). However, the Notice refers more broadly to the use of market definition as a tool to draw the boundaries of competition and an analytical tool for the competitive assessment.

These are the first steps to more explicitly recognising the ‘purposive’ nature of market definition. The Commission has, perhaps unsurprisingly, not gone as far as my research would have suggested. It does not explicitly link the process of defining markets to the alleged conduct or theory of harm in a case. However, some of the paragraphs in the draft revised Notice could be read as possible signposts on the road to such acceptance.

In particular, the Notice recognises that market definition is linked to the objectives of the specific legal instrument (see paragraph 8). If market definition is indeed ‘*closely related to the objectives*’ of the different competition law instruments (para 8), there is likely to be some variation in the market definition exercise depending on the legal basis and conduct. And yet, the Notice seems to articulate the opposite: that the relevant market will generally *not* vary based on the objectives of the specific provision (and, thus, the manner in which it is used).

Paragraph 8 sets out why and when market definition is used (or not used) under Article 102 TFEU, the EUMR, and Article 101 TFEU. However, the paragraph does not explicitly state whether this different use may be the cause of variations in market definition processes or outcomes. In fact, paragraph 11 notes, that “*the outcome of market definition in a given case is usually **unaffected** by whether it takes place in the context of merger control or antitrust enforcement*” (own emphasis).

The story does not end there, however, as the supplementary comment in footnote 20 notes that “*in some cases, market definition may lead to different results depending on the type of analysis*

carried out”, particularly if the focus is on changes in market power or current or past market power/competition (repeated in footnote 48).

This raises the question of whether there is a link between the objectives of competition law (provisions) and the way markets are defined, and whether market definition may vary in its process or outcomes because of the different ways it is used under each instrument. Further clarification on whether the different objectives may impact the relevant market would increase the clarity and completeness of the practice of the European Commission.

This, then, begs the further question of whether the alleged conduct and theory of harm have an impact on the relevant market. The Notice does not explicitly tell us whether the alleged conduct and theory of harm are relevant to the market definition process. The Notice already accepts that the relevant market may vary depending on the specificities of the case (paragraph 46), including because the parameters of competition differ (paragraph 15). It makes sense that the parameters of competition influence the relevant market. The Notice goes a little further, by noting, still sensibly, that the competitive constraints on prices may be different from those on investments in product improvements. Although it never reflects on whether the alleged conduct and theory of harm are relevant to market definition, it can be argued that which competitive constraints matter in a case will depend on the alleged conduct and theory of harm. If different conduct and theories of harm influence which constraints to focus on, and markets differ depending on the type of constraints, then it seems there is a link between the conduct and theory of harm in a case and its market definition. It might be worth discussing this more explicitly in the Notice.

Competitive constraints, digital markets, and forward-looking market definition

Parameters of competition

The Notice puts greater emphasis on non-price elements, such as innovation and the availability and quality of goods and services. It acknowledges, rightly, that there are other parameters, aside from price, which may be relevant to market definition and can be incorporated into the assessment of demand substitution.

It is promising that the European Commission puts forward a more expansive understanding of parameters of competition, bringing the Notice into the 21st century. Including these non-price parameters in the Notice is the first step on a long journey to the future. It is particularly encouraging that the Notice not only mentions ‘quality’ generally but provides a more granular list of elements which may be parameters of quality: durability, sustainability, value, variety of uses, image of security and privacy (paragraph 12).

Although this is definitely a helpful list, it is by no means clear how these factors ought to be considered in the analysis: how should they be defined and what weight should be attributed to them (by themselves or in comparison with each other)? Although this lack of comprehensiveness limits the practical guidance of these paragraphs, it is not wholly surprising, given the limited experience to date and the factual nature of these questions.

The Notice acknowledges the difficulties in operationalising non-price parameters in a revised SSNIP test, such as the SSNDQ test. It does not attempt to set out exactly how the inclusion of

quality and other non-price parameters would work in practice. This is a sensible approach, as there will likely be further practical developments and research in the near future. If the Notice is meant to provide correct, comprehensive and clear guidance ([as set out in 2020 by the Commission](#)) on the approach adopted by the European Commission, then it should not include guidance on tools the Commission does not intend to use or provide too confusing an explanation. However, the Commission should keep track of the development of new tools and approaches. If it intends to adopt (or does adopt) these in its decisional practice, it should incorporate them in the Notice, to ensure it complies with certainty and transparency objectives.

Forward-looking and structural changes in supply and demand

The Notice includes clarifications regarding the forward-looking application of market definition, especially in markets that are expected to undergo structural transitions, such as technological or regulatory changes. This is a positive development, as the importance of these issues to practice has increased in recent years and is likely to continue doing so.

Paragraph 55 explicitly notes that in rapidly evolving industries, the Commission may take into account expected changes in substitution possibilities resulting from the change of competitive dynamics.

The Notice also seems to recognise that there is a distinction between the satisfaction of the same want (same demand) and shifts in production to satisfy new or significantly altered wants. It reflects both on changes which take place ‘in’ the market and those which might render the market obsolete.

According to the Notice, the Commission can take into account expected transitions in the structure of the market as a forward-looking assessment (paragraph 16). The wording here could be clearer: the Notice refers to transitions expected in the ‘short-term or medium-term’, but does not provide guidance on what this would mean in practice. This could be further clarified in the Notice or in other guidance or decisional practice.

It is encouraging that the Notice includes a reference to the issue of ‘product migration’. This is a concept of particular interest to me, as a potential means of conceptualising changes in substitution in situations of ‘competition for the market’. In paragraph 52, the Notice states that product migration is not informative of demand substitution: “*By contrast, evidence of customers shifting away from a product as a result of factors unrelated to changes in relative supply conditions are less informative for demand substitution as such shifts may rather reflect product migration, namely changes in consumption patterns and preferences over time*”. I consider that product migration may, however, be relevant to a forward-looking assessment.

As such, it may be beneficial to consider more explicitly whether and how product migration may be incorporated into the assessment, and indeed for what purposes (how would it affect the identification of boundaries and participants of competition, findings of market power, and analysis of harm). This is something I refer to [in my PhD thesis](#) and intend to develop in subsequent work.

The Notice is also explicit in the possibility of defining markets for future products or around innovation efforts. In doing so, the Notice also reflects on the continuum between future product markets and innovation markets or innovation spaces. Both of these inclusions in the Notice are

very welcome. The Notice uses wording which is more cautious, and some would argue more accurate, than that of ‘innovation markets’. It distinguishes new ‘markets’ for pipeline products from “*the boundaries within which undertakings compete in (...) innovation efforts*” (without reference to the word ‘market’) (see paragraphs 90-91).

The information provided in the Notice is useful and supported by reference to decisional practice. It could have provided more detail on the tools and processes to identify relevant pipeline products and innovation efforts. However, there is likely to be further development in this area, and the guidance set out in the Notice is sufficiently broad to remain applicable.

Digital markets and ecosystems

In order to address the challenges raised by digital products and businesses, we need to consider the meaning of the underlying concepts of market definition (products, price, competitive constraints). [1] Thus, [I put forward](#), a revised Notice ought to define these concepts, before explaining how these concepts translate into a digital context. The Notice does not do so explicitly. However, in addition to expanding parameters of competition (see above), it takes on board developments in scholarship and practice to reflect on the ‘hottest’ topic in market definition: the ecosystem.

The Notice does not break the mould, but explicitly links the definition of markets for ecosystems to aftermarkets and bundles. This is a sensible approach, as it aligns with existing practice and scholarship. As with the non-price parameters above, it is justifiable to limit content in the Notice to the actual decisional practice or scholarship on which there is consensus.

However, the Commission should keep track of the development of new tools and approaches. A lot of work is being done on market definition for digital markets, including ecosystems. Scholarship and practice are likely to move on in the years ahead. If the Commission intends to stay abreast of these developments and indeed adopt them in its own practice, it will have to incorporate them in the Notice to achieve certainty and transparency objectives. This will require more frequent updates: it will not be enough to revise the Notice every two decades...

Conclusion

There is a lot to be commended in the new Notice. It reflects more explicitly on the role and relevance of market definition. It also incorporates developments from practice and scholarship into its guidance, while leaving open unresolved questions. This is a sensible approach, as long as the Commission intends to revise the Notice more frequently in the years ahead.

The Notice is a very important tool to enhance transparency – [and thus objectivity in the context of market definition](#). However, the Notice is not the only tool in the European Commission’s arsenal. It could also increase transparency in actual decisional practice, by publishing more detailed information on the steps undertaken to reach a conclusion on the antitrust market in a particular case. Having more frequent updates of the Notice would be welcome, for example, to incorporate further developments on quality-competition and ecosystems, but more transparency in its decisional practice would also be useful. This would not only increase transparency for

undertakings, important to legal certainty, but also to national competition authorities, aiding in contributing to coherence and consistency across the Union.

Overall, the Notice represents an impressive and welcome development. The Commission should take this as the starting point for further engagement with scholarship – which is developing more tools and approaches relevant particularly to the digital economy – as well as a chance to provide more ongoing guidance and dialogue.

[1] M. Eben, *Addressing the Main Hurdles of Product Market Definition for Online Services: Products, Price, and Dynamic Competition* (2019) PhD thesis at University of Leeds and subject of book in progress.

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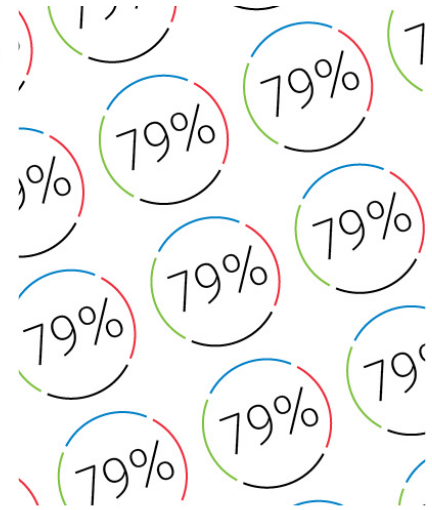
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