



Brussels, 12.7.2021
SWD(2021) 200 final

COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE EVALUATION

of the

**Commission Notice on the definition of relevant market for the purposes of Community
competition law of 9 December 1997**

{SEC(2021) 295 final} - {SWD(2021) 199 final}

Background and objectives

The EU antitrust and merger rules protect and foster competition in the internal market, to the benefit of consumers, by prohibiting anti-competitive agreements and the abuse of a dominant position. They also grant the Commission the power to prohibit concentrations that would lead to a significant impediment to effective competition. Enforcement of the EU competition rules contributes to an integrated internal market, balanced economic growth and a highly competitive social market economy for the sustainable development of Europe.

Market definition is a tool the Commission uses in its enforcement of those rules to identify the boundaries of competition between companies. The Commission uses market definition in particular in cases where the assessment of market power is relevant for the competitive assessment. Market definition enables the Commission to identify the competitive constraints that may influence the economic behaviour of the companies and to calculate market shares, which provide a preliminary indication of market power. Market definition is only a first step, however, and the Commission will only decide on whether or not competition concerns arise after having carried out the full competitive assessment.

Market definition is based on evidence and it relies on established economic principles. The Commission is bound by the facts of the case. Judicial review by the EU courts ensures that the Commission follows these principles. Furthermore, market definition is primarily customer-centric, as it as a starting point assesses which alternative products or services are available to the customer to satisfy the same need. As a consequence, the concept of relevant market in antitrust and merger enforcement is different from the definitions of markets used in other contexts.

The Commission published its *Notice on the relevant market for the purposes of Community competition law* ('the Notice') in 1997. The Notice has remained unchanged since then. The Notice aims to increase the transparency of the Commission's policy and decision-making in EU antitrust and merger enforcement, and to help businesses better anticipate the possibility that the Commission may raise competition concerns in an individual case. To that end, the Notice aims to provide correct, comprehensive and clear guidance on the Commission's approach to market definition in EU competition law.

The purpose of the evaluation was to assess the functioning of the Notice and in particular to assess whether it may require updating. Since the Notice's publication in 1997, there have been market developments and evolutions in best practices in market definition, derived from EU case-law, the Commission's case practice, the practice of other competition authorities and from academic research. The evaluation is part of a broader Commission effort to make sure that EU competition policy and rules are fit for the modern economy.

Main findings

Overall, the evidence gathered in the evaluation suggests that the Notice is a very useful instrument that remains generally relevant. It facilitates competition enforcement and compliance in the EU by providing transparency on an important first step in many of the Commission's competition assessments and by allowing companies to better anticipate whether the Commission may raise competition concerns. However, the evaluation results

suggest as well that there are areas where the Notice may not fully reflect developments in the Commission's approach, and latest developments in EU case-law.

Relevance. The need to facilitate competition enforcement and compliance in the internal market, to the benefit of consumers, remains pertinent today as one of the goals of the Union, one that has been reflected in the EU Treaties since the EU's inception. The evaluation results indicate that the objective of providing transparency through correct, comprehensive and clear guidance on the Commission's approach to market definition is still a very relevant part of meeting those needs. In some respects, it is even more important today than in 1997.

Effectiveness. The evaluation results indicate that the Notice is effective in providing guidance and transparency to stakeholders in many respects, but not necessarily in all.

First, on key issues, the Notice continues to provide correct, comprehensive and clear guidance on market definition. It achieves this in particular by adequately summarising best practices in market definition, as derived from EU case-law, from the Commission's case practice, from the practice of other leading competition authorities and from academic research. The role of market definition and its basic principles have remained largely unchanged since 1997 and have been confirmed in large part in judgments of the EU Courts. The Commission's market definitions continue to be guided by definition of product and geographic markets on the basis of demand-side and supply-side substitutability, relying on short-term and effective constraints in that assessment, taking into account price and non-price parameters, and carrying out the review using a broad evidence base. This extends to considerations on competitive pressure from imports and potential competition, including the distinction between the market definition phase (where potential competition is not considered) and the competitive assessment phase (where potential competition is considered and where import competition will also be considered even if it did not result in a wider market definition).

Second, the evaluation results suggest that there are areas where the Notice might not be fully up to date, including evolutions set out in EU case-law. The Commission has refined its approach to market definition in line with the theories of harm investigated, the prevailing market conditions and the sophistication of available tools. Such areas include the use and purpose of the SSNIP (small significant non-transitory increase in price) test in different market constellations, the assessment of market definitions in rapidly evolving markets, asymmetric constraints, the assessment of geographic markets in conditions of globalisation and import competition, quantitative techniques, the calculation of market shares, and non-price competition, including innovation.

Third, the evaluation results indicate that while the principles of market definition remain unchanged, their application in digital contexts can lead to additional complexities that may

not be fully addressed in the Notice. These include defining markets for multi-sided platforms, in particular where services are supplied at zero monetary price, defining markets for ‘ecosystems’ or for data, and assessing online vs offline competition. Digitisation may also lead to new barriers to entry and switching costs. Reasons for this include the role of data (portability), interoperability, privacy questions, networks effects and single-/multi-homing. In addition, digitisation may increase the need to reflect non-price considerations in substitution assessments. However, the evaluation results also show that not all of the market definition issues arising as a result of digitisation have been settled into best practices, but rather that practices are likely to evolve further in the future.

Efficiency. The evaluation results suggest that there are no costs associated with the Notice, as compared to a scenario where no guidance were provided. On the contrary, the Notice generates benefits not only for the Commission’s work but also for the stakeholders using it. Without the Notice, companies would have to dedicate additional resources to researching a body of Commission decisions, court judgments and literature on market definition to determine how the Commission would likely define the relevant market(s) and what elements it would take into account. Nevertheless, the evaluation results indicate that the benefits for both stakeholders and the Commission could increase if the Notice was updated in certain specific points.

Coherence. The evaluation results suggest that the Notice’s different components operate well together and that they are generally in line with other competition law guidance, case-law and other EU policies. Nevertheless, the results of the evaluation indicate that the Notice does not reflect certain clarifications stemming from the judgments of the EU Courts and that it has not been updated by reference to the merger control standard of ‘significant impediment to effective competition’ introduced by the 2004 EU Merger Regulation.

EU added value. The evaluation suggests that the Notice has added value by helping ensure a consistent approach to EU competition rules among the national competition authorities and the Commission. The evaluation results also indicate that the added value could be higher if the Notice were easier to use, for instance and where appropriate, if it included examples or references to the case-law underlying its statements or provided guidance on market definition issues in national and regional markets which are often relevant for NCAs.

Follow-up

It follows from the above that there is a continued need for a Notice to provide guidance on the Commission’s approach to market definition. However, the results also show that there are areas where the Notice might not be fully up to date in light of evolutions in the EU Courts’ case law, refinements to the Commission’s case practice and that of other competition authorities, and latest findings of academic research.