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**COMMISSION STAFF WORKING DOCUMENT**

**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) 200 final}

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## Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
CJEU	Court of Justice of the European Union, also referred to as ‘the Court’ and, together with the General Court, ‘the EU Courts
Commission	European Commission
Council Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the Functioning of the European Union, OJ L 1, 4.3.2003, p. 1
DG Competition	Directorate-General for Competition of the European Commission
Digital Markets Act	Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, COM/2020/842 final
ECN	European Competition Network
EEA	European Economic Area
EEA Agreement	Agreement on the European Economic Area
EFTA	European Free Trade Association
EU	European Union
EUR	Euro
GDP	Gross domestic product
Horizontal Block Exemption Regulations	Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335, 18.12.2010, p. 36 (‘Commission Regulation No 2017/2010’); and Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335, 18.12.2010, p. 43 (‘Commission Regulation No 1218/2010’).

Horizontal Cooperation Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011, p. 1
Horizontal Merger Guidelines	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31, 5.2.2004, p.5
ICN	International Competition Network
Merger Regulation	Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L24, 28.1.2004, p. 1), also referred to as the ‘EU Merger Regulation’
NCA	National competition authority in the EEA
Non-Horizontal Merger Guidelines	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18.10.2008, p. 6
Notice	Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5), also referred to as the ‘the Notice’
OECD	Organisation for Economic Co-operation and Development
R&D	Research and development
SSNDQ	Small but significant non-transitory decrease in quality
SSNIC	Small but significant non-transitory increase in cost
SSNIP	Small but significant non-transitory increase in price
Summary of the NCA consultation	Summary of the replies received to the NCA consultation carried out during the evaluation
Summary of the public consultation	Summary of the replies received to the open public consultation carried out during the evaluation
Support study	External evaluation support study on the review of the Market Definition Notice by a consortium led by VVA Brussels, which includes Grimaldi Studio Legale, LE Europe, Österreichisches Institut für Wirtschaftsforschung and WIK-Consult
Technology Transfer Guidelines	Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer

	agreements, OJ C 89, 28.3.2014, p. 3
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America
Vertical Block Exemption Regulation and its accompanying Guidelines	Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L 102, 23.4.2010, p.1 and Commission notice - Guidelines on Vertical Restraints, SEC/2010/0411 final

## 1. INTRODUCTION

The European Union ('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 European Commission ('Commission') the power to prohibit mergers that would lead to a significant impediment to effective competition. The rules are set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU') and in the EU Merger Regulation<sup>1</sup>, as well as in their accompanying regulations, guidelines and notices.

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. It enables the Commission to identify the competitive constraints that may limit the economic behaviour of investigated companies and to calculate market shares which provide a preliminary indication of companies' market power.

Market definition is a well-established concept in competition law and is used widely by competition authorities internationally<sup>2</sup>. The common starting point for competition authorities in market definition is the customer; this means assessing which alternatives the customer has available to satisfy the same need. In that sense, market definition goes to the core of competition assessments by analysing the customers' ability to switch from one product/area to another in order to preserve choice and by making it possible to identify and measure companies' market power.

In 1997, the Commission published its *Notice on the relevant market for the purposes of Community competition law* ('the Notice')<sup>3</sup>. The Notice has remained unchanged since then. Its purpose was to increase the transparency of Commission policy and decision-making in the area of competition law by rendering public the procedures the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision on market definition<sup>4</sup>.

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<sup>1</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L24, 28.1.2004, page 1 ('EU Merger Regulation' or 'Merger Regulation').

<sup>2</sup> Market definition is used as a starting point for the assessment carried out by all competition authorities in the European Economic Area ('EEA') and, among others, the non-EEA authorities included in the support study (i.e. Australia, Brazil, Canada, Japan, South Korea, the United Kingdom ('the UK') and the United States of America ('the US')). See External evaluation support study on the review of the Market Definition Notice ('support study').

<sup>3</sup> OJ C 372, 9.12.1997, pp. 5-13.

<sup>4</sup> Paragraph 4 of the Notice.

## 1.1. Purpose of the evaluation

The purpose of the evaluation is to assess the evidence gathered on the functioning of the Notice, which will serve as a basis for the Commission to decide whether it should repeal it, leave it unchanged or revise it.

The evaluation of the Notice is part of a broader Commission effort to make sure that EU competition policy and rules are fit for the modern economy<sup>5</sup>. The Notice has remained unchanged for more than 23 years, although the issues arising in market definition and the techniques used to address them have evolved. Since 1997, the Commission has gained significant experience in using market definition in its competition law assessments by adopting a large number of decisions containing a market definition analysis. Furthermore, the EU Courts have interpreted the competition rules with respect to market definition in their judgments. Similarly, there have been decisions and judgments adopted by the national competition authorities of the EU Member States ('NCAs') and courts in the Member States that could inform the Commission's approach. Moreover, academic research since 1997 has analysed approaches to market definition and contributed to discussions about the market definition tool and its application in practice, as have international forums such as the Organisation for Economic Co-operation and Development ('OECD') and the International Competition Network ('ICN').

In accordance with the principles underlying Commission's Better Regulation Guidelines,<sup>6</sup> the evaluation examines whether:

- the objectives of the Notice continue to be appropriate (relevance);
- the Notice has met its objectives during the period of its application (effectiveness);
- the net benefits associated with the guidance described in the Notice have been positive (efficiency);
- the different components set out in the Notice operate well together and the Notice is consistent with other antitrust and merger guidance, the EU Courts' case-law and other EU policies (coherence); and
- the Notice, as soft law at EU level, has provided added value (EU added value).

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<sup>5</sup> [Mission letter of Executive Vice-President Vestager of 1 December 2019](#). The relevant initiatives include, but are not limited to, the reviews of the [Vertical](#), [Horizontal](#), [Motor Vehicle](#) and [Consortia](#) Block Exemption Regulations relating to the application of Article 101 TFEU and the [Evaluation of procedural and jurisdictional aspects of EU merger control](#) and its follow-up projects, namely the [Guidance on Article 22 referrals](#) as well as the [impact assessment on the revision of certain procedural aspects of EU merger control](#). They also include new initiatives such as the [proposal for a Regulation for a Digital Markets Act](#) and a potential [new instrument to address distortions caused by foreign subsidies in the internal market](#).

<sup>6</sup> Commission staff working document, [Better Regulation Guidelines](#), Brussels, 7 July 2017, SWD (2017) 350.



## **1.2. Scope of the evaluation**

The substantive scope of the evaluation includes the Notice in its entirety. The geographic scope extends to all EU Member States because the EU competition rules under Articles 101 and 102 TFEU and of the Merger Regulation are directly applicable in all EU Member States. EU competition rules – including the Notice – are also applicable in the three European Free Trade Association (‘EFTA’) States (Iceland, Liechtenstein and Norway).

The Notice is binding on the Commission. The Notice does not bind NCAs or national courts, but they may take it into account when defining the relevant market in national competition proceedings. Against this background, the evaluation of the Notice includes analysis not only of the Commission’s decisional practice but also of the NCAs, as well as relevant national court case law, including that of the three EFTA States.

The temporal scope of the evaluation includes the 23 years since the publication of the Notice in December 1997 with a focus on the last 10 years of EU antitrust and merger enforcement as those are the most informative in assessing whether the Notice provides up-to-date guidance.

## **2. BACKGROUND TO THE INTERVENTION**

The following sections provide an overview of the EU competition policy framework (Section 2.1) and of the role of market definition within it (Section 2.2), a description of the Notice and its intervention logic (Section 2.3), a short overview of the most important market developments and evolution in competition assessments since 1997 relevant for market definition (Section 2.4) and a presentation of the evaluation baseline (Section 2.5).

### **2.1. The competition policy framework<sup>7</sup>**

The purpose of the EU antitrust and merger rules enshrined in the TFEU, secondary EU law and soft law is to prevent distortions of competition in the EU to the detriment of consumers, thereby contributing to an integrated internal market, balanced economic growth and a highly competitive social market economy for the sustainable development of Europe<sup>8</sup>.

- a) Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade

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<sup>7</sup> In addition to antitrust and merger control, the third instrument of competition policy is state aid review pursuant to Articles 107-109 TFEU and the related regulations, notices and guidelines. As set out in footnote 1 of the Notice, the focus of assessment in state aid cases is the aid recipient and the industry/sector concerned, rather than the identification of competitive constraints faced by the aid recipient. Due to the limited relevance of market definition for most state aid assessments, those aspects will not be discussed further in this staff working document. That notwithstanding, when consideration of market power and therefore of the relevant market is raised in any particular case, elements of the approach outlined in the Notice might serve as a basis for the assessment of state aid cases as well.

<sup>8</sup> Cf. Article 3(3) of the Treaty on European Union and Article 3(1)(b) TFEU.

between Member States and which have as their object or effect the prevention, restriction or distortion of competition. As an exception to this rule, Article 101(3) TFEU sets out that the prohibition contained in Article 101(1) TFEU may be declared inapplicable to agreements that are on balance efficiency-enhancing. The Commission has adopted various block exemption regulations defining categories of agreements that the Commission regards as normally satisfying the conditions laid down in Article 101(3) TFEU<sup>9</sup>.

- b) Article 102 TFEU prohibits firms that hold a dominant position on a given market from abusing that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.
- c) The EU Merger Regulation imposes a notification obligation on the merging parties for concentrations with an EU dimension and grants the Commission exclusive jurisdiction to review them. Under the EU Merger Regulation's substantive test, the Commission assesses whether the concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

## **2.2. The role of market definition in antitrust and merger enforcement**

Market definition is used both in the Commission's antitrust enforcement pursuant to Articles 101 and 102 TFEU and in the Commission's merger control enforcement under the EU Merger Regulation.

The concept of relevant market is used to identify and define the boundaries of competition between firms. The main purpose is to identify the competitive constraints that the undertakings involved face by identifying their actual competitors that are capable of constraining their behaviour. Furthermore, market definition makes it possible to have a reference point for measuring market power. In particular, it makes it possible to calculate the market shares of the undertakings involved – as well as of other market participants – which provides a preliminary indication of their market power.

There are a number of principles of market definition that are useful to underline to provide context to the evaluation of the Notice.

First, market definition is based on evidence and 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.

Second, according to the EU Courts' case law, the definition of the relevant market involves defining both the product market and the geographic market<sup>10</sup>. The relevant

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<sup>9</sup> Full list available here: <https://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

<sup>10</sup> Judgment of 14 February 1978, *United Brands Company and United Brands Continental BV v Commission*, Case 27/76, EU:C:1978:22, paragraph 10 ('Case 27/76, *United Brands v Commission*'). While not using similarly formulated language, the Court had already some years earlier explained that

product market comprises all products or services regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, prices and intended use<sup>11</sup>. The relevant geographic market comprises the area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from other areas because the conditions of competition are appreciably different in those areas<sup>12</sup>. That definition of the geographic market is also codified, inter alia, in Article 9(7) of the EU Merger Regulation.

Third, market definition is a tool that the Commission uses in most, but not all competition assessments. The necessity of defining markets is a pre-condition for assessing dominance under Article 102 TFEU as well as an essential part of the EU merger control regime. It can also be relevant for the assessment of certain infringements under Article 101 TFEU. According to the EU Courts, the definition of the relevant market is, as a general rule, a prerequisite for any assessment of whether the undertaking concerned holds a dominant position. This is because it defines the boundaries within which an assessment must be made as to whether that undertaking is able to behave to an appreciable extent independently of its competitors, customers and consumers<sup>13</sup>. Similarly, as regards merger control, the EU Courts have found that 'according to settled case-law, a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition'<sup>14</sup>. Furthermore, the EU Courts have held that there is an obligation on the Commission to define the market in a decision applying Article 101 TFEU where it is impossible, without such a definition, to

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a market definition was necessary to assess dominance and alluded to such market definition consisting of a product and geographic market, see Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, Case 6/72, EU:C:1973:22, paragraphs 29–35 ('Case 6/72, *Continental Can v Commission*').

<sup>11</sup> This was confirmed, for instance, in the judgment of 27 January 2021, *KPN v Commission*, T-691/18, EU:T:2021:43 ('T-691/18, *KPN v Commission*'), paragraph 67. In one of its earlier judgments, in Case 27/76, *United Brand v Commission*, paragraph 12, the Court of Justice of the European Union ('CJEU') stated: 'As far as the product market is concerned it is first of all necessary to ascertain whether, as the applicant maintains, bananas are an integral part of the fresh fruit market, because they are reasonably interchangeable by consumers with other kinds of fresh fruit [...] or whether the relevant market consists solely of the banana market which includes both branded bananas and unlabelled bananas and is a market sufficiently homogenous and distinct from the market of other fresh fruit.'

<sup>12</sup> This was confirmed, for instance, in the judgment of 5 October 2020, *HeidelbergCement AG and Schwenk Zement KG v Commission*, T-380/17, EU:T:2020:471 ('T-380/17, *HeidelbergCement and Schwenk Zement v Commission*'), paragraph 294. In one of its earlier judgments in Case 27/76, *United Brands v Commission*, paragraph 11, the CJEU stated: 'The opportunities for competition under Article 86 of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.'

<sup>13</sup> Judgment of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission*, Case 322/81, EU:C:1983:313 ('Case 322/81, *Michelin v Commission*'), paragraph 37.

<sup>14</sup> Judgment of 28 May 2020, *CK Telecoms UK Investments Ltd v Commission*, T-399/16, EU:T:2020:217, paragraph 144; judgment of 7 June 2013, *Spar Österreichische Warenhandels v Commission*, T-405/08, EU:T:2013:306, paragraph 116; and judgment of 31 March 1998, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, C-68/94 and C-30/95, EU:C:1998:148, paragraph 143.

determine whether the behaviour at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the internal market<sup>15</sup>. In practice, market definition plays less of a role in cases under Article 101 TFEU where the behaviour at issue has as its object the prevention, restriction or distortion of competition, such as in cartel cases, in respect of which the EU Courts have ruled that it is not necessary for the Commission to define the relevant market<sup>16</sup>.

Fourth, where the Commission uses market definition, it is only a first step in the assessment. Market definition is the starting point, but the Commission will only decide on whether or not competition concerns arise after having carried out the full competitive assessment. It is only in the competitive assessment that the Commission compares the capabilities of the different competitors in detail and, importantly, assesses the presence of anti-competitive conduct or the likely effects of a merger. Market definition therefore does not preclude the outcome of the competitive assessment.

For instance, to assess whether a merger would lead to competition concerns in situations where the activities of the two merging parties overlap, the Commission will usually first define the relevant markets for those overlapping activities. Then, in a second step, the Commission will carry out the competitive assessment, including by establishing:

- what the market structure will be after the merger in terms of number and strength of the available suppliers;
- whether the merging parties have been competing closely before the merger;
- whether customers have possibilities to switch supplier;

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<sup>15</sup> Judgment of 21 February 1995, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v Commission*, T-29/92, EU:T:1995:34, paragraph 74; judgment of 28 February 2002, *Atlantic Container Line AB and Others v Commission*, T-395/94, EU:T:2002:49, paragraph 83; judgment of 6 July 2000, *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230; judgment of 15 March 2000, *Cimenteries CBR and Others v Commission*, T-25/95, EU:T:2000:77, paragraph 833; judgment of 28 February 2002, *Compagnie générale maritime and Others v Commission*, T-86/95, EU:T:2002:50, paragraph 116; judgment of 19 March 2003, *CMA CGM and Others v Commission*, T-213/00, EU:T:2003:76, paragraph 206; judgment of 16 December 2003, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v Commission*, T-5/00, EU:T:2003:342, paragraph 123; judgment of 25 October 2005, *Groupe Danone v Commission*, T-38/02, EU:T:2005:367, paragraph 99; judgment of 6 December 2005, *Brouwerij Haacht NV v Commission*, T-48/02, EU:T:2005:436, paragraph 58; judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich AG and Others v Commission*, T-259/02, EU:T:2006:396, paragraph 172; judgment of 12 September 2007, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission*, T-30/05, EU:T:2007:267, paragraph 86; judgment of 16 June 2011, *Ziegler SA v Commission*, T-199/08, EU:T:2011:285, paragraph 45; judgment of 16 June 2011, *Gosselin Group NV v Commission*, T-208/08, EU:T:2011:287, paragraph 91; judgment of 16 September 2013, *Zucchetti Rubinetteria v Commission*, T-396/10, EU:T:2013:446, paragraph 28; judgment of 27 February 2014, *InnoLux Corp. v Commission*, T-91/11, EU:T:2014:92, paragraph 129; judgment of 11 December 2003, *Adriatica di Navigazione SpA v Commission*, T-61/99, EU:T:2003:335, paragraph 27; judgment of 24 May 2012, *MasterCard and Others v Commission*, T-111/08, EU:T:2012:260, paragraph 171; judgment of 28 June 2016, *Portugal Telecom SGPS, SA v Commission*, T- 208/13, EU:T:2016:368, paragraph 175; judgment of 28 June 2016, *Telefónica, SA v Commission*, T-216/13, EU:T:2016:369, paragraph 213.

<sup>16</sup> Judgment of 28 June 2016, *Telefónica, SA v Commission*, T-216/13, EU:T:2016:369, paragraph 214.

- whether competitors are likely to increase supply if prices increase;
- whether the merged undertaking could hinder expansion by competitors;
- whether the merger would eliminate an important competitive force;
- whether market entry is expected; and
- whether customers have buyer power.

Similarly, to assess whether an undertaking has abused its dominant market position, the Commission will usually first define the relevant market, then assess whether the company under investigation holds a dominant position on that market, whether there has been an abuse of that dominant position and whether there is an objective justification for the conduct.

Fifth, market definition is primarily customer-centric by assessing which alternative products or services are available to the customer to satisfy the same need.<sup>17</sup> This follows from the purpose of the competition rules, which is to protect competition to the benefit of customers and ultimately of EU consumers in general. As a consequence, the concept of the relevant market in antitrust and merger enforcement is different from the definitions of markets used in other contexts. For example, global companies may consider that they compete globally for revenues against companies from all continents. That does not mean, however, that all those global companies offer products or services to customers in the EEA, which is the relevant perspective for the Commission's antitrust and merger enforcement.

Sixth, the Commission carries out its competition assessments taking into account all competitive constraints. Market definition results in distinguishing between competitive constraints from within and from outside the market, depending on how immediate the constraints are in determining whether customers can switch to alternative products or services. However, the Commission also takes out-of-market constraints into account in the competitive assessment. For instance, two geographic areas A and B may be found to constitute different geographic markets for the sale of a certain product or service because the conditions of competition in those areas are appreciably different. When assessing whether a company holds market power in market A, the Commission will take into account all sales made in market A, including by imports such as from market B, and will also assess whether suppliers from other areas can expand their sales in market A by expanding total output or by reorienting sales from other areas, including from market B. In other words, while sales in market A constitute in-market constraints and sales in market B constitute out-of-market constraints, both are taken into account in the competitive assessment when assessing market power in market A.

Seventh, market definition is driven by market realities. As a consequence, it differs from sector to sector and also often differs at the different levels of the supply chain. For instance, the Commission has defined the market for the supply of cocoa beans – the raw

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<sup>17</sup> This is without prejudice to supply-side substitution that may be taken into account when defining markets, where its effects are equivalent to demand substitution in terms of immediacy and effectiveness. See paragraphs 13 and 20 of the Notice.

material for chocolate production – as EEA-wide or global. In contrast, the supply of industrial chocolate to producers of confectionery has been defined as regional within the EEA, while the sale of chocolate confectionery to retailers has been defined as national due to the importance of national brands among other factors<sup>18</sup>. The different market realities in various sectors can be further illustrated by the fact that, historically, the Commission has defined a global market as one of the plausible markets in only 1 out of 10 merger cases with affected markets in consumer goods. By contrast, in the automobile sector, that share almost doubles, while in the IT sector it constitutes nearly 50%<sup>19</sup>.

Eighth, market definition is specific to the particular issue in dispute and the assessment carried out. A company may compete with other companies at different levels and/or based on different variables. For example, if the Commission analyses innovation effects in a merger case, the market definition may differ from a situation where the Commission analyses price effects in an antitrust case in the same industry or with respect to the same economic activity.

Ninth, the Commission looks at the facts and the evidence in each case afresh and defines the relevant markets accordingly. This means that market definitions may evolve over time: if the market dynamics change, the market definitions will also change. If for instance, there are more consumers today who take purchasing decisions based on whether products are sustainable or not, the market definition may reflect a potential definition of markets for sustainable products on the one hand and conventional products on the other hand<sup>20</sup>.

Tenth, the tools used by the Commission to define markets may equally evolve over time in line with the availability of evidence, such as data or internal company documents, and in line with developments in techniques to analyse the substitution possibilities available to customers.

### 2.3. The Notice and its intervention logic

The Notice provides guidance on how the Commission applies the concept of relevant product and geographic market in its enforcement of EU antitrust and merger law. It codifies the Commission's past practice as well as guidance provided by the EU Courts, based on established economic and legal principles.

After setting out the elements underlying the definition of the relevant product and geographic market as established by the EU Courts, the Notice explains that there are two types of competitive constraints to be considered at the market definition stage. First, the most immediate and effective disciplinary force on suppliers is **demand-side substitution**, where the customers are in a position to switch easily to available substitute products or services or to suppliers located elsewhere. Second, **supply-side substitution**

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<sup>18</sup> M. 7510 – *Olam/ADM Cocoa Business*, M.7408 – *Cargill/ADM Chocolate Business* and M.5644 – *Kraft Foods/Cadbury*.

<sup>19</sup> Covering merger decisions for the period 1992-2015.

<sup>20</sup> Examples for such assessments can be found in M.8829 – *Total Produce/Dole Food Company*, M.7220 – *Chiquita Brands International/Fyffes* and M.7510 – *Olam/ADM Cocoa Business*.

may be taken into account if its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy because most suppliers are able to switch their sales to the relevant products or areas and market them in the short term without incurring significant additional costs or risk. In contrast, less effective or less immediate supply-side constraints are taken into account at the assessment stage of the competition analysis, for example in the context of potential competition.

The Notice goes on to describe the evidence the Commission relies on to define the relevant product and geographic market (Section III of the Notice), explain how the Commission calculates market shares (Section IV) and address certain selected constellations that raise specific market definition issues (Section V).

Almost all elements of market definition set out in the Notice apply to both antitrust and merger assessments, with a few technical exceptions; this argues in favour of a common Notice for both instruments. The alternative of integrating market definition guidance in each of the antitrust and merger guidelines would instead result in repetition of guidance and could reduce its broader value in terms of applications beyond competition law, as explained in Section 3. In addition, it is worth recalling that there is not just one single set of guidelines within each of the instruments. For example, in mergers there are horizontal and non-horizontal guidelines, and in antitrust there are guidelines on Article 101(3) and on Article 102 TFEU, as well as guidelines accompanying the different rules applicable to vertical and horizontal agreements. This poses the question of whether to: (i) include market definition guidance in each of these (creating duplications and leading to potentially conflicting interpretations given the different timelines of review applicable to the different documents); or (ii) have a separate document for guidance on market definition for mergers and another one for antitrust (thus remaining separate from the guidelines on the substantive assessment).

As set out in paragraphs 4 and 5 of the Notice, the Notice has **the general objectives<sup>21</sup> of increasing the transparency of the Commission's policy and decision-making in EU antitrust and merger enforcement<sup>22</sup> and of helping businesses to better anticipate the possibility that the Commission may raise competition concerns** in an individual case<sup>23</sup>. That is relevant, in particular, since the Commission uses market shares as a first

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<sup>21</sup> See also [XXVIIth Report on Competition Policy \(1997\)](#), paragraph 44: 'To improve the transparency of its competition policy, both for business and the legal community, the Commission adopted, on 15 October 1997, a notice on the relevant market for the purposes of Community competition law and in particular of Regulation No 1726 and Regulation No 4064/89, the Merger Regulation. Such clarification is evidence of the Commission's willingness to increase the predictability of its market analyses for practitioners of Community competition law.'

<sup>22</sup> Paragraph 4 of the Notice: 'By rendering public the procedures which the Commission follows when considering market definition and by indicating the criteria and evidence on which it relies to reach a decision, the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy.'

<sup>23</sup> Paragraph 5 of the Notice: 'Increased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements. It is also intended that companies should be in a better position to

screening tool in certain instances to assess whether competition concerns may arise and to decide on the review process to follow. For example, market share thresholds are one of the elements determining the scope of the block exemption regulations for Article 101 TFEU<sup>24</sup>. Similarly, the Commission uses market share thresholds to identify merger cases deemed from the outset not to raise competition concerns that can therefore be assessed under a simpler review procedure unless there are specific circumstances<sup>25</sup>. The transparency offered by the Notice was therefore expected to allow businesses to: (i) save internal and external resources in relation to competition assessments (see Sections 2.5 and 5.3) because in the absence of the Notice businesses would have to solely rely on previous practice in the form of individual cases, on court guidance and on economic principles, and (ii) minimise the risk of arriving at incorrect conclusions as to the lawfulness of an agreement or practice when self-assessing their market share.

It follows that the Notice has the **specific objective** of **providing correct, comprehensive and clear guidance** on the Commission's approach to market definition in EU antitrust and merger law. Correct guidance adequately reflects the case law of the EU Courts, the best practices applied by the Commission and other leading competition authorities as well as the mainstream findings of high-quality academic research. Comprehensive guidance is materially complete where it summarises all the broad principles applicable to market definition as well as the main specific criteria applicable in the most important case constellations. Clear guidance is easy to understand and follow. According to the Commission's explanations in its annual report of 1998 following the publication of the Notice, 'the Notice is intended to be as empirical as possible and is based on the Commission's previous case law. It tries to set out in coherent, readable fashion the economic principles on which the Commission bases its approach to the definition of relevant markets'<sup>26</sup>.

According to the guidance provided by the EU Courts, the Commission enjoys a certain degree of discretion as to how it shapes the content of the Notice and as regards the level of detail that it includes in it in particular. In striving to meet its objectives of providing correct, comprehensive and clear guidance, the Commission aims to codify robust and tested best practices of market definition. In formulating such guidance, the Commission also faces certain trade-offs and risks. First, providing detailed guidance on specific case constellations means more information available to stakeholders on the specific topics, but also entails a higher risk that the Notice becomes obsolete more quickly and that it becomes lengthy and less user-friendly. Second, only codifying existing Commission

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understand what sort of information the Commission considers relevant for the purposes of market definition.'

<sup>24</sup> The market share thresholds limit the applicability of the safe harbour to agreements between businesses holding a share in the relevant market(s) that does not exceed the thresholds set out in the regulations, cf. Article 4 of the Commission Regulation No 1217/2010; Article 3 of the Commission Regulation No 1218/2010; recital 8 and Article 3 of the Commission Regulation No 330/2010.

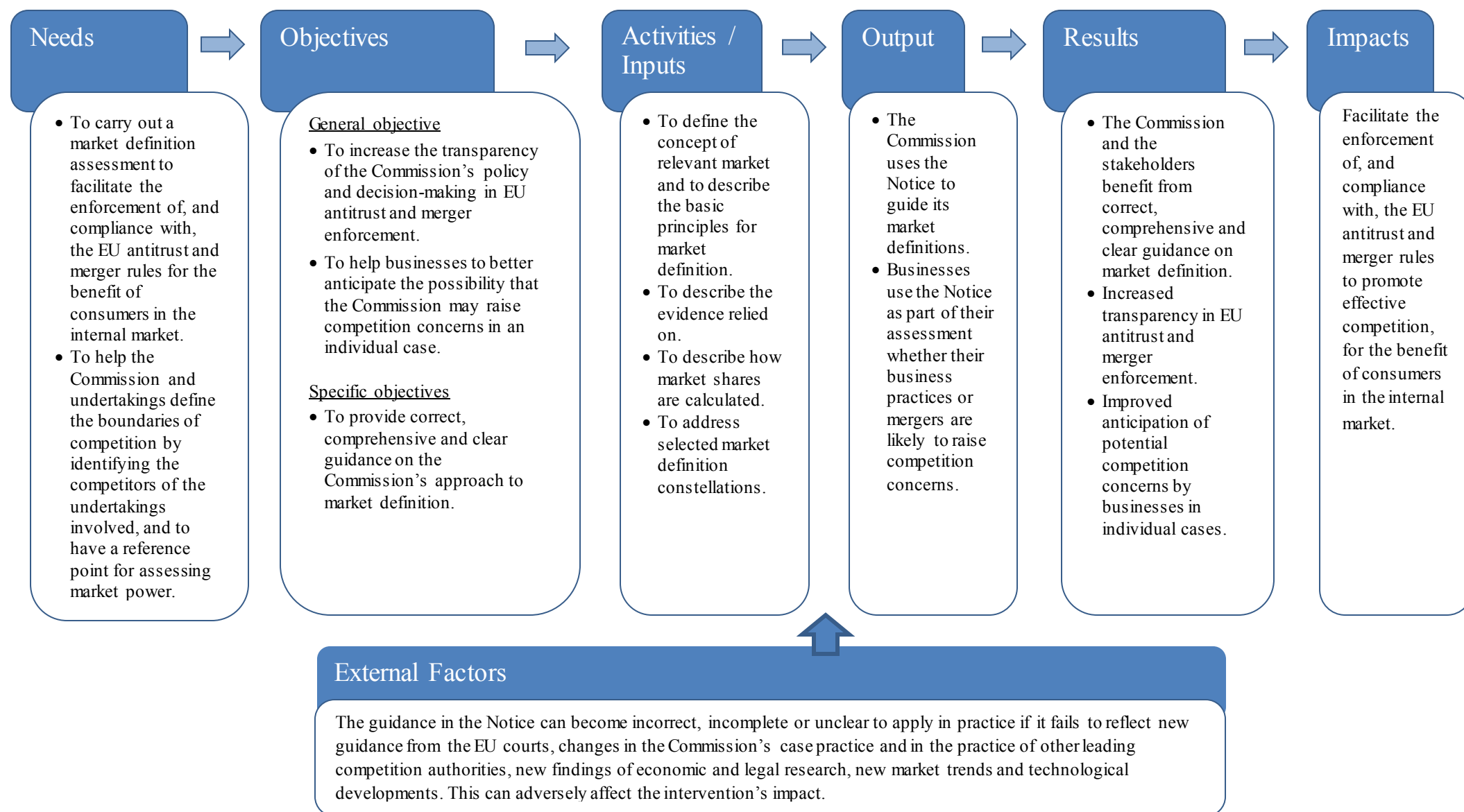
<sup>25</sup> Cf. Points 5 and 6 of the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ 366, 14.12.2013, page 5.

<sup>26</sup> See [XXVIIth Report on Competition Policy \(1997\)](#), paragraph 44.



practice has the advantage of ensuring that the Notice reflects tested approaches, but also entails the risk that it might not be suited for future developments. To best address those risks and trade-offs, as mentioned above the Commission aims to codify in the Notice the most important principles and most relevant case constellations based on the case-law of the EU Courts, the best practices applied by the Commission and other leading competition authorities, and the mainstream findings of high-quality academic research.

Figure 1: Intervention logic for the Market Definition Notice



## 2.4. Market developments and evolutions in competition assessments since 1997

A number of market features and approaches to competition assessments have evolved since 1997. Five of these deserve particular highlighting by way of background to the evaluation.

First, while it is very challenging to estimate the precise share of the digital economy in overall gross domestic product ('GDP'), it is beyond doubt that the role of digital activities has been increasing<sup>27</sup>. Depending on the definition, the digital economy's share reached between 4.5% and 15.5% of global GDP in 2019<sup>28</sup>. In particular, the role of online platforms is constantly increasing due to upward trends in e-commerce of goods and services<sup>29</sup>. This has been strengthened further due to the wide-ranging introduction of lockdowns triggered by the COVID-19 pandemic in 2020, which incentivised consumers to increase further their use of search engines, social media and online entertainment media (e.g. video streaming, multi-player gaming, music and video streaming).

Second, there is a high level of concentration of economic power in digital markets<sup>30</sup> and beyond, which highlights the need for vigilance in competition enforcement. The top seven large platforms account for 69% of the total EUR 6 trillion valuation of the platform economy, as a result of vertical and horizontal integration<sup>31</sup>. Moreover, 5 out of the world's 10 largest companies by market capitalisation are digital conglomerates (i.e. Apple, Microsoft, Amazon, Google and Facebook<sup>32</sup>). Market concentration is a trend not only in digital markets, as documented in particular for the US, but also for the EU, albeit to a more limited extent<sup>33</sup>. For instance, empirical studies suggest that company mark-ups across all sectors increased by 4% to 6% over the period 2001–2014 on average across country, with increases of 20% for the top 10% of firms in the sample<sup>34</sup>.

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<sup>27</sup> See also [Impact Assessment on the Digital Markets Act](#).

<sup>28</sup> UNCTAD (2019), [Digital economy report](#).

<sup>29</sup> For almost 10% of companies, online platform sales exceed 75% of all revenues, <https://platformobservatory.eu/state-of-play/power-over-users/>.

<sup>30</sup> For the purpose of this staff working document, digital markets are markets where products and services are provided by means of or through information society services.

<sup>31</sup> See Expert Group for the Observatory on the Online Platform Economy, [Work stream on Measurement & Economic Indicators](#) (2020). Those platforms have several hundreds of millions of users (both businesses and citizens/consumers) and the total net revenues of some of those platforms (of billions of euros) double and triple in recent years.

<sup>32</sup> Source: Statista.

<sup>33</sup> Bajgar, M., Berlingieri, G., Calligaris, S., Criscuolo, C., and Timmis, J., 'Industry Concentration in Europe and North America', *OECD Productivity Working Paper*, 2019; Grullon, G., Larkin, Y., and Michaely R., 'Are US Industries Becoming More Concentrated?', *Review of Finance*, Volume 23(4), pp. 697–743, 2019; 'Market Concentration' – Note by Jason Furman, *Hearing on Market Concentration*, 7 June 2018; Gutiérrez G., and Philippon, T., *Declining Competition and Investment in the U.S.*, 2017; Gutiérrez G., and Philippon T., *How European Markets Became Free: A Study of Institutional Drift*, 2018.

<sup>34</sup> See Calligaris, S., Criscuolo, C., and Marcolin L., 'Mark-ups in the Digital Era', *OECD Science, Technology and Industry Working Papers* 2018/10, 2018. See also De Loecker, J., and Eeckhout, J.,

Third, the last two decades have seen technological convergence, with the tendency for originally unrelated technologies, products and services to become more closely integrated and even unified as they develop and advance. For example, watches, telephones, television, computers and social media platforms began as separate and mostly unrelated technologies, products and services, but today form interrelated parts of a telecommunication and media industry, sharing common elements of digital electronics and software<sup>35</sup>. Companies are also offering more integrated products (e.g. bundles of quadruple play in telecommunications<sup>36</sup> or ‘ecosystems’<sup>37</sup> built around mobile operating systems which consist of a smartphone, operating system and apps<sup>38</sup>). These developments change the nature of competition in relation to the individual products/services that integrate those clustered offers.

Fourth, there is an increasing societal awareness of innovation-related effects<sup>39</sup>. This may be at the origin of an increasing trend in competition authorities’ decisional practice and soft law. The trend consists in taking into account a spectrum of undertakings’ innovation efforts in order to define relevant markets and assess competitive effects more accurately where innovation plays a significant role<sup>40</sup>. In addition, authorities may find that concerns about a negative impact on innovation are arising in a greater proportion of merger (as well as antitrust) cases as digitisation affects a widening range of markets<sup>41</sup>.

Fifth, economic integration of the countries of the world and within the EU has increased over the past decades. Trade data show that the proportion of external trade in the EU-27 economy has almost doubled over the past 15 years<sup>42</sup>. Also, mergers notified to the Commission are increasingly of a cross-border nature<sup>43</sup>. That said, these trends affect economic activities in different sectors and at different levels of the supply chain in different ways. Several types of markets and industries<sup>44</sup> have not been significantly

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*The Rise of Market Power and the Macroeconomic Implications*, 2017. For the top 10% of the firms in the sample, the growth in mark-ups over the period 2001-2014 amounted to 20%.

<sup>35</sup> OECD (2016), [Digital convergence and beyond](#).

<sup>36</sup> OECD (2015), [Triple and Quadruple Play Bundles of Communication Services](#).

<sup>37</sup> Ecosystems are typically characterised by a primary core product and several secondary products whose complementarity is due to technological links or interoperability between products.

<sup>38</sup> Crémer, J., de Montjoye, Y., and Schweitzer H., ‘Competition Policy for the Digital Era’, *Report for the European Commission*, 2019.

<sup>39</sup> OECD (2018), [Oslo Manual 2018, Guidelines for collecting, reporting and using data on innovation](#).

<sup>40</sup> See Section 4 of the support study.

<sup>41</sup> OECD (2018), [Considering non-price effects in merger control—Background note by the Secretariat](#).

<sup>42</sup> See [DG Trade Statistical Guide 2020](#) and [DG Trade Statistical Pocket Guide 2013](#). These sources combined provide a long-term timeline of trade for the period 2004-2019.

<sup>43</sup> The percentage of mergers notified to the Commission that involve non-EU companies increased from ca 36% to ca. 58% from 2004 to 2013, see DG Competition, ‘Market definition in a globalised world’, *Competition policy brief*, Issue 2015(12), 2015.

<sup>44</sup> Like the sale of consumer products that rely on localised demand preferences (as in Case M.5046 – *Friesland/Campina*, for instance; also see Fletcher, A., and Lyons, B., *Geographic Market Definition in European Commission Merger Control*, Centre for Competition Policy, Norwich, 2016), or markets where regulation imposes heterogeneous conditions of competition at local or national level, like in the telecommunications sector, see Case M.7758 – *Hutchinson 3G Italy/Wind/JV*, for instance.

affected by globalisation and there is no clear evidence that they might be in the near future. The general development for more market integration can also be reversed through the introduction of trade barriers, for instance with the imposition of trade tariffs in specific sectors or the increase of trade barriers across sectors, as illustrated by the withdrawal of the UK from the EU and its internal market<sup>45</sup>.

## 2.5. Evaluation baseline

The baseline for comparison used in the evaluation depends on the evaluation criteria and related evaluation questions to be assessed.

The main point of comparison for the evaluation is the hypothetical situation of not having the Notice in place. This is in particular to assess its **relevance** (to assess whether the objectives are still pertinent compared to a situation where the objectives are not being pursued), **efficiency** (to assess whether there would be lower costs without the Notice in place) and **EU added value** (to assess whether the objectives could have been achieved at national level).

In these respects, the evaluation therefore looks at the functioning of the Notice as compared to a situation in which market definition would have to be carried out without a dedicated notice at EU level and instead only in light of other Commission guidance, relevant case-law at EU and national level, the enforcement practice of the Commission and the NCAs and academic research. In both merger and antitrust matters, this would imply that the companies involved would have to dedicate additional internal resources to researching a large number of Commission decisions and court judgments and possibly also literature on market definition to determine how the Commission would likely define the relevant market(s) and what elements it would take into account. This is not a simple exercise given the large number of decisions and judgments assessing many different relevant markets. This implies that companies would also likely have to spend more resources on consultancy from law firms and economic consultants to help them find the most relevant decisions and interpret them. Furthermore, in particular when companies need to determine whether they can benefit from an exemption to the antitrust rules, without the Notice they would face a higher risk of arriving at an incorrect conclusion when self-assessing their market share. This is because market shares can only be calculated based on a given definition of the relevant market.

A second point of comparison is the situation the Commission expected to have achieved, namely to have a Notice that continues to provide correct, comprehensive and clear guidance on market definition that is consistent with other Commission guidance, case-law and other policies. This is used for the **effectiveness** and **coherence** analyses, which assess whether the objectives of the Notice are currently met by providing the level of transparency envisaged in 1997 and whether there is coherence today.

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<sup>45</sup> The recent COVID-19 crisis may also have had a contractionary impact on trade, although it is more likely to be transitory.

### 3. IMPLEMENTATION / STATE OF PLAY

The Commission has applied the guidance set out in the Notice in a large number of antitrust and merger investigations and decisions since 1997<sup>46</sup>. As an instrument of soft law published at EU level, the principles set out in the Notice are binding on the Commission and limit its discretion in the methods and elements to consider when carrying out market definitions. In contrast, the Notice does not bind the EU Courts, NCAs or national courts nor was it designed to be applicable outside of EU competition law. That said, the evaluation results highlight three specific findings in this context.

First, the Notice has been quoted by the EU Courts as good practice to follow in the assessment of merger and antitrust cases. For instance in case T-446/05, *Amann & Söhne and Cousin Filterie v Commission* (2010), the General Court indicated that ‘It follows that the Market Definition Notice contributed to clarifying the limits, already implicit in the conferring provisions, of the exercise of the Commission’s discretion under Article 15(2) of Regulation No 17 and Article 23(2) of Council Regulation No 1/2003’. The General Court then follows by quoting paragraphs 4 and 5 of the Notice that ‘the Commission expects to increase the transparency of its policy and decision-making in the area of competition policy’ and that ‘[i]ncreased transparency will also result in companies and their advisers being able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, ... the establishment of certain agreements’<sup>47</sup>. The EU Courts’ rare criticisms of the Commission’s market definition assessments since the Notice’s adoption concern an incorrect assessment of facts or an incorrect application of the Notice, not deficiencies in the Notice itself. For example, in case T-427/08, *CEAHR v Commission* (2010), the General Court considered that the Commission committed an error because ‘in the light of those elements and in the absence of alternative evidence in the contested decision that account was taken of the criteria established by the case law and the notice on the definition of the relevant market (cited in paragraphs 67 to 70 above), the Court considers that the Commission has failed to establish that a moderate price increase on the services market would cause a shift in demand on the luxury/prestige watch market which could render such an increase unprofitable, nor that, in general, the price of services affects competition between primary products’<sup>48</sup>.

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<sup>46</sup> For instance, the Commission has adopted more than 7 200 merger decisions since 1998 which rely on the identification of (the absence of) overlapping business activities of the merging companies and thus require (at least a rough) market definition.

<sup>47</sup> See judgment of 28 April 2010, *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission*, T-446/05, EU:T:2010:165 (‘T-446/05, *Amann & Söhne and Cousin Filterie v Commission*’), paragraphs 59, 71–2, 137–8 and 146; see also T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, paragraph 294.

<sup>48</sup> Judgment of 15 December 2010, *Confédération européenne des associations d’horlogers-réparateurs (CEAHR) v Commission*, T-427/08, EU:T:2010:517 (‘T-427/08, *CEAHR v Commission*’), paragraph 118. See also judgment of 12 December 2018, *Servier SAS v Commission*, T-691/14, EU:T:2018:922, paragraphs 1380–592 and in particular paragraphs 1380–405 and 1589–91; and judgment of 25 October 2002, *Tetra Laval BV v Commission*, T-5/02, EU:T:2002:264, paragraphs 259–69.

Second, as an instrument of soft law published at EU level, the Notice does not require implementation at Member State level. Nevertheless, according to exchanges between the Commission services and the NCAs through the European Competition Network ('ECN'), most NCAs take into account the Notice in their enforcement of both national and EU antitrust and merger law even though it is not binding on them. Therefore, although this effect was not envisaged when the Notice was published, it is possible that the Notice has contributed to aligning the Commission's and NCAs' approach to market definition. This will be further assessed in Section 5.5 concerning the Notice's EU added value.

Third, there is evidence that the Notice is also used outside of EU antitrust and merger law. In particular, a number of respondents to the public consultation, mainly active in the telecommunications and energy sectors, indicated that they use the Notice when assessing the legal framework in sector-specific regulation, especially as regards the finding of significant market power. One respondent indicated using the Notice for civil proceedings to assess whether undertakings are competitors, e.g. in relation to the tort of unfair competition or breach of confidentiality<sup>49</sup>. Any resulting questions of coherence will be further assessed in Section 5.4 as regards the consistency of the Notice with other EU policies.

#### 4. METHODOLOGY

The evaluation process was launched in March 2020 and has assessed the Notice against the five Better Regulation criteria by asking the following evaluation questions:

**Relevance:** Does the Notice still pursue relevant objectives in aiming to provide guidance and transparency to stakeholders and in particular to provide correct, comprehensive and clear guidance on market definition in the Commission's antitrust and merger assessments? How well do those objectives correspond to the needs?

**Effectiveness:** To what extent has the Notice proven effective in providing guidance and transparency to all stakeholders? In particular, does the Notice continue to provide correct, comprehensive and clear guidance on market definition today?

**Efficiency:** Has the Notice led to increased benefits and reduced costs? Is there scope for further simplification and cost reduction?

**Coherence:** How well have the different components of the Notice operated together? Is the Notice in line with the judgments of the EU Courts and changes in the legal competition framework, and with other instruments of EU competition policy and other EU policies?

**EU added value:** To what extent has the Notice provided clear added value at EU level, for instance by contributing to a consistent approach to market definition by the Commission and the NCAs?

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<sup>49</sup> Replies to questions I.2.1 and I.4 of the public consultation questionnaire.

The evaluation has been carried out on the basis of a broad body of evidence and a wide-ranging consultation of and discussion with interested stakeholders. Section 4.1 identifies the sources used in the evaluation. Section 4.2 describes how the evidence gathered from various sources has been processed. Section 4.3 explains the limitations of the analysis carried out on this basis and the extent to which they could be addressed in the evaluation.

#### **4.1. Description and use of the sources of evidence**

##### Public consultations

Between 3 April and 15 May 2020, the Commission services gathered feedback on the evaluation roadmap, including the evaluation questions and the evaluation process. Some 44 stakeholders replied, many of them commenting already on the substance of the evaluation.

Between 26 June and 9 October 2020, the Commission services carried out an open public consultation on the basis of a dedicated online questionnaire to gather stakeholder views on the functioning of the Notice and to gather qualitative and quantitative evidence on all five evaluation criteria. The public consultation led to 86 contributions submitted through the online questionnaire and 10 position papers submitted outside the online tool. The contributions came from a variety of stakeholders, with a particularly strong participation from large companies located in the EU and from business associations. On 18 December 2020, the Commission services published the summary report of the contributions to the public consultation ('summary of the public consultation') on the Better Regulation portal and on a webpage on DG Competition's website dedicated to the Notice's evaluation. The summary report is also part of the synopsis report provided in Annex 2 to the staff working document.

##### Targeted consultation of national competition authorities

The Commission services also conducted a targeted consultation of NCAs, which was based on the same questionnaire as that used in the open public consultation. The Commission services received contributions from the NCAs of all 27 Member States, as well as from the NCAs of 2 EFTA States. The information provided by NCAs contributed to the assessment of all five evaluation criteria. As with the summary of the public consultation, on 18 December 2020 the Commission services published a summary report of the targeted NCA consultation ('summary of the NCA consultation') on the dedicated webpage on DG Competition's website. It is also part of the synopsis report provided in Annex 2 to the staff working document.

The Commission services further sent a smaller questionnaire to a number of NCAs from outside the EEA (Australia, Brazil, Canada, Japan, Korea, South Africa, the UK and the US) and received replies (written or oral) from all of them.

##### Stakeholder meetings

The Commission services organised a number of virtual meetings with stakeholders, including notably three workshops with the EEA NCAs as well as virtual meetings with a number of NCAs from outside the EEA (Australia, the UK and the US), with different



businesses and their associations, with representatives of law firms, with a Pan-European consumer organisation and with the Association of European Competition Law Judges. Details on those meetings are listed in Annex 2 to the staff working document.

Analysis of Commission decisions, EU Court judgments, EEA and non-EEA guidelines, national decisions and judgments as well as academic literature and other publications

The Commission services carried out extensive research into best practices in market definition, consisting of the following:

- review of the Commission's own enforcement decisions, focusing on the issues of market definition that have proven to be most contentious or most complex, such as those relating to market definitions in the digital economy or those relating to innovation issues;
- review of the case-law of the EU Courts with respect to market definition (the EU Courts have examined market definition issues in more than a hundred cases since the adoption of the Market Definition Notice<sup>50</sup>);
- analysis of decisions by EEA NCAs and by EEA national courts, including through frequent exchanges with NCAs during the evaluation;
- analysis of legal and economic literature in order to understand different proposals and theories on market definition discussed in academic research;
- consideration of non-EEA approaches to market definition based on exchanges with competition enforcers in Australia, Brazil, Canada, Japan, South Africa, South Korea, the UK and the US; and
- review of relevant papers and roundtables on the topic of market definition held in the context of international forums such as the OECD and the ICN.

External evaluation support study

DG Competition commissioned an external evaluation support study ('the support study') to support it in its analysis. Specifically, the purpose of the support study was to gather qualitative information on the basis of three tasks: (i) review of decisions by NCAs, judgments by national courts and guidelines issued by national authorities in the EEA; (ii) review of selected decisions by NCAs, judgments by national courts and guidelines issued by national authorities outside the EEA (namely Australia, Brazil, Canada, Japan, South Africa, South Korea, the UK and the US); and (iii) review of the legal and economic literature.

The support study covered four subject matters:

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<sup>50</sup> Since its establishment in 1952, the CJEU has had the opportunity to pronounce on numerous occasions as regards the role and substance of market definition. Since 1997, it has also ruled on the Notice's role in competition law assessments and has endorsed a number of the principles set out therein – making them part of EU case-law. The CJEU's case law has increased with time in direct correlation with the number of antitrust and merger assessments conducted by the Commission and also by NCAs, which have the competence to directly apply Articles 101 and 102 TFEU.

- (i) the impact of digitisation on market definition, namely approaches to market definition in relation to multi-sided platforms, ‘digital ecosystems’, data and online sales channels;
- (ii) the impact of innovation on market definition, namely approaches to market definition where innovation plays an important role in competition between undertakings, even if technology is not sold, purchased or licensed and/or demand for the products or services resulting from such innovation does not exist at the time of the assessment;
- (iii) approaches to geographic market definition, namely the standards applied in geographic market definition, the main factors and weight assigned to them, the types of evidence used and the role of supply-side substitutability; and
- (iv) the use of quantitative techniques in market definition, namely to identify relevant techniques (such as critical loss analysis, price tests, natural experiments or surveys) and the conditions under which the application of each technique is appropriate to inform the market definition analysis.

#### Evidence gathered through other Commission initiatives

In February 2016, at the request of DG Competition, Professors Bruce Lyons and Amelia Fletcher from the University of East Anglia prepared an independent economic report on the topic of *Geographic Market Definition in European Commission Merger Control*. DG Competition had asked Professors Lyons and Fletcher to evaluate its approach to geographic market definition on the basis of a sample of recent merger cases from the Commission where this topic played an important role in the assessment. They evaluated namely whether the Commission’s definition of geographic markets, taken together with its analysis of out-of-market competitive constraints, has set an appropriate framework for analysing mergers. The findings have informed the present evaluation in topics such as the evidence required to define geographic markets as discussed in Section 5.2.3

A number of pre-existing initiatives have also fed into the present evaluation of the Notice in topics pertaining to digitisation as presented in Section 5.2.5. In May 2017, the Commission published the final report of the e-commerce sector inquiry<sup>51</sup>. The results of the sector inquiry confirmed the importance of other parameters of competition besides price, namely quality, brand image and innovation. They also highlighted the growing importance of online distribution channels as an alternative to offline channels. Finally, and in relation to online transmission, the sector inquiry results pointed to changes in the way digital content is accessed and consumed, providing new business opportunities both to established operators and new entrants.

In 2017-2019, the Commission conducted a number of work streams on the effects and challenges for competition policy of the digitisation of the economy. These initiatives were designed to provide input to the Commission’s reflections about how EU competition policy can best serve European consumers in a fast-changing world and identify problems and solutions as markets go through rapid changes. First,

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<sup>51</sup> [https://ec.europa.eu/competition/antitrust/sector\\_inquiry\\_final\\_report\\_en.pdf](https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf).

Commissioner Vestager appointed a panel of three special advisers from outside the Commission, namely Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. The special advisers delivered their report in April 2019, *Competition Policy for the Digital Era, Report for the European Commission*. Second, the Commission sought written contributions from stakeholders involved in or affected by the digitisation of the economy. Third, on 17 January 2019, the Commission held a High-Level Conference on ‘Shaping competition policy in the era of digitisation’.

Evidence of ongoing policy initiatives has also informed the present evaluation. In October 2018 and September 2019 respectively, the Commission services launched reviews of the Vertical and Horizontal Block Exemption Regulations, which define certain categories of agreements that generally fulfil the conditions of exemption under Article 101(3) TFEU, in part by using market share criteria. The evaluations, which preceded the ongoing impact assessment phases, included open public consultations and were concluded with the publication of staff working documents in September 2020<sup>52</sup> and May 2021<sup>53</sup> respectively. These two reviews are relevant for the present evaluation in topics including the way in which markets shares are calculated for online intermediation platforms – a topic relevant for the Vertical Block Exemption Regulation and its accompanying Guidelines – or how to assess innovation in the presence of R&D activities – a topic addressed in the Horizontal Block Exemption Regulations and the Horizontal Cooperation Guidelines.

In September 2020, the Commission launched a reflection on how EU competition policy can best support the Green Deal and DG Competition subsequently launched a call for contributions. DG Competition also organised a conference on the issue in February 2021. Several contributions in this context highlighted the importance of further taking into account consumer preferences for environmentally-friendly products, services and/or technologies in market definition, in particular as a factor of product differentiation. The findings on “Non-price elements, including innovation” under section 5.2.5 are relevant for the role that sustainability plays in market definition.

In December 2020, the Commission services published the Impact Assessment assessing the possible policy options for the Digital Markets Act legislative proposal.<sup>54</sup> The impact assessment describes the growing importance of digital services and their providers in today’s economy and assesses the obstacles that prevent effective competition from working in digital markets, including barriers to entry such as network effects, switching costs, data dependency, scale and scope economies, behavioural bias and others. Since the proposal for a Digital Markets Act is of a regulatory nature, its implementation – if adopted along the lines of the proposal – will not involve the definition of markets. That

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<sup>52</sup> [Commission staff working document, Evaluation of the Vertical Block Exemption Regulation, SWD\(2020\)173final, 8 September 2020.](#)

<sup>53</sup> [Commission staff working document, Evaluation of the Horizontal Block Exemption Regulations, SWD\(2021\)103 final, 6 May 2021.](#)

<sup>54</sup> [https://ec.europa.eu/info/sites/info/files/impact-assessment-dma\\_en.pdf](https://ec.europa.eu/info/sites/info/files/impact-assessment-dma_en.pdf).

said, the public consultations leading to the Digital Markets Act, in particular the one concerning the need for a New Competition Tool,<sup>55</sup> had an indirect informative value for the purposes of the present evaluation with the replies gathered having helped the Commission services' understanding of digital markets.

#### 4.2. Processing and triangulation of the evidence collected

The Commission services analysed and triangulated the evidence collected from the various sources to arrive at the results of the evaluation.

The main sources of evidence used to inform the assessment of each evaluation criterion are listed in the table below. A further breakdown of this table, which includes the evaluation questions for each criterion and a more detailed reference to the sources used, is provided in the evaluation matrix contained in Annex 3 to the staff working document.

	Public consultation	Consultation of EEA NCAs	Stakeholder meetings	Research and support study	Other Commission initiatives
<b>Relevance</b>	✓	✓	✓	✓	✓
<b>Effectiveness</b>	✓	✓	✓	✓	✓
<b>Efficiency</b>	✓	✓	✓	✓	
<b>Coherence</b>	✓	✓	✓	✓	✓
<b>EU added value</b>	✓	✓	✓	✓	

For the assessment of each evaluation criterion, the Commission services proceeded as set out below.

The assessment started with a review of the Commission's enforcement practice and of the guidance provided by the EU Courts. That analysis resulted in a preliminary but comprehensive understanding of the main issues in market definition that have arisen over the last few years and of the methodologies used by the Commission and the EU Courts. That evidence was then compared against the results of the public consultation, the results of the NCA consultation (both inside and outside the EEA) and of the analysis of the academic literature and publications in international forums. That enabled the Commission services to gain an understanding of the main issues faced by stakeholders in market definition and establish the issues in which stakeholders held common positions, as well as the issues on which their positions diverged. The specific issues raised by stakeholders were assessed on the merits of the arguments invoked, the examples and the level of detail provided by stakeholders to support their positions with

<sup>55</sup> [https://ec.europa.eu/competition/consultations/2020\\_new\\_comp\\_tool/index\\_en.html](https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html).

evidence, the variety of different positions and the extent to which different types or groups of stakeholders shared the same view.

In line with the objectives of the Notice, the Commission services' evidence gathering focused primarily on identifying best practices in market definition and on identifying any gaps where the Notice may not have fully succeeded in providing correct, comprehensive and clear guidance.

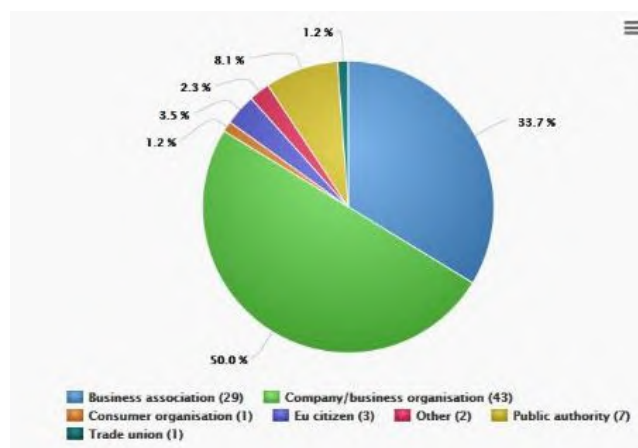
### 4.3. Limitations of the analysis

The analysis of the different evaluation criteria, including the methodology applied and the evidence used, is subject to the following limitations: (i) the difficulty of gathering quantifiable evidence on the benefits related to the Notice; and (ii) a certain lack of representativeness of the public consultation.

First, as regards the evaluation criterion of efficiency, it proved difficult to collect quantitative evidence of the benefits of having the Notice in place, compared to a situation without it. While all respondents to the public consultation questionnaire expressing a view and all NCAs expressing a view found that the net benefits associated with following the guidance in the Notice are positive, they considered that these benefits are hard to quantify. Accordingly, none of the respondents provided any estimates of the magnitude of the net benefits associated with the Notice. That said, none of the respondents listed any cost associated with the Notice's existence. The conclusions drawn in Section 5.3 below therefore essentially rely on qualitative evidence, including that provided by stakeholders in response to the public and the NCA consultations.

Second, evaluation activities subject to voluntary participation, by definition, do not necessarily lead to representative results. In this evaluation, this applies to the public consultation. While the Commission services received contributions from a variety of stakeholder groups, large businesses and their associations accounted for a particularly high share of responses, while representatives of small or medium-sized businesses or of consumers accounted for a much lower share. Furthermore, businesses from the telecommunications and media sectors were more represented than businesses from other sectors.

**Figure 2 Profile of respondents to the online questionnaire**



Any limitations were mitigated, however, by the other evaluation activities conducted in the context of this evaluation. These activities – explained more in detail in Annex 2 – included a consultation on the evaluation roadmap, a series of meetings and a consultation with the NCAs in the context of the ECN, as well as meetings with third-country competition authorities. The findings were also compared against the best practices in market definition as applied by the Commission and by competition authorities within and outside the EEA, and against the best practices identified in the academic literature. Furthermore, the Commission services held additional meetings with stakeholders under-represented in the public consultation, including with academics, judges and a consumer organisation.

Overall, therefore, the lack of representativeness of the public consultation did not result in a less complete overview of the main issues arising in market definition.

In the assessment set out in Section 5, reference is made to specific stakeholder groups whenever the views reported were shared primarily by one or more different stakeholder groups. While indicative of a trend, the fact that a view was broadly shared by all or only some of the stakeholder groups does not mean that the evaluation disregards diverging views, either within the same or across different stakeholder groups/sectors.

## **5. ANALYSIS AND ANSWERS TO THE EVALUATION QUESTIONS**

The following sections examine, in light of the various sources of evidence analysed, whether the Notice's objectives remain relevant, whether the Notice pursues those objectives effectively and efficiently, whether they are pursued consistently with other Commission guidance, case-law and other initiatives, and whether the Notice provides EU added value.

### **5.1. Relevance**

**Evaluation questions: Does the Notice still pursue relevant objectives in aiming to provide guidance and transparency to stakeholders and in particular to provide correct, comprehensive and clear guidance on market definition in the Commission's antitrust and merger assessments? How well do those objectives correspond to the needs?**

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 which 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 very relevant when it comes to meeting those needs. In some respects, it is even more important today than in 1997.

This is due, among other reasons, to: (i) the sustained need for the Commission to carry out market definition assessments; (ii) the shared enforcement of Articles 101 and 102 TFEU by the Commission and NCAs, which since 2004<sup>56</sup> extends to the power to apply Article 101(3) TFEU, thereby increasing the need for common approaches; (iii) the antitrust self-assessment system in place since 2004; and (iv) the use of market share thresholds in the antitrust and merger systems. The Notice's relevance is also illustrated by the frequent use of the Notice by the Commission, the EU Courts, NCAs and stakeholders in practice.

In assessing the Notice's relevance, the evaluation focused on whether its objectives have proven appropriate and whether they still correspond to current needs, taking into account developments since its adoption. As described in Section 2.3, the Notice aims to foster competition enforcement and compliance by providing correct, comprehensive and clear guidance on the Commission's approach to market definition, thereby increasing the transparency of the Commission's policy and decision-making and helping businesses to better anticipate the possibility that the Commission may raise competition concerns in an individual case.

The need to facilitate competition enforcement and compliance in the internal market to the benefit of consumers remains unchanged since 1997 and has been reflected in the EU treaties since the EU's inception<sup>57</sup>. The benefits of competition enforcement and policy have been studied and proven in different ways<sup>58</sup>. They include faster productivity growth, an increase in innovation and employment growth. That said, it is inherently difficult to measure quantitatively the impact of an effective competition enforcement system in a given timeframe. That is because one of its effects is deterring anti-competitive behaviour and mergers – which are impossible to measure as they are precisely what does not occur where the policy is effective. This notwithstanding, the Commission services annually estimate the customer savings resulting from Commission interventions in mergers based on the methodology and guidance provided by the OECD<sup>59</sup>. According to these estimates, the customer benefits resulting from merger interventions by the Commission in the period 2016–2020 were between EUR 55.2 and 91.9 billion<sup>60</sup>. These calculations underestimate the benefits' full amount as they do not

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<sup>56</sup> According to Article 45 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the Functioning of the European Union ('Council Regulation 1/2003'), the Regulation has been applied as from 1 May 2004. Prior to the adoption of that regulation, under Council Regulation No 17 of 6 February 1962, only the Commission was empowered to grant exceptions under Article 101(3) TFEU.

<sup>57</sup> For the current framework, see Article 3(3) of the [Treaty on European Union](#) and its Protocol 27 and Article 3(1)(b) and Articles 101-109 TFEU.

<sup>58</sup> Cf. for instance OECD (2014), [Factsheet on how competition policy affects macro-economic outcomes](#), with an overview of studies and papers.

<sup>59</sup> The Commission services also calculate the consumer benefits resulting from Commission cartel investigations, but these are of less relevance in this context as market definition plays a lesser role in cartel assessments, as explained in Section 2.2.

<sup>60</sup> Every year, the Commission services estimate the benefits to customers resulting from its merger interventions and publishes them in DG COMP's annual activity report. The methodology takes into account prohibitions, conditional approvals and withdrawals of notifications in Phase II and is based on three main parameters: (i) likely price increase avoided (two assumptions are typically used: 3% and

include benefits associated with the deterrence of anti-competitive mergers. Therefore, the calculations can provide a rough indication of some, but by no means all, of the benefits of EU merger enforcement in particular.

The evaluation results indicate that the objective of providing correct, comprehensive and clear guidance on the Commission’s approach to market definition is still very relevant when it comes to meeting those needs and in some respects is even more pertinent today than in 1997.

First, **there is still a need to define relevant markets.**

In fact, legal and economic developments have sustained the need for the Commission to carry out market definition assessments in its enforcement of EU antitrust and merger rules. This is illustrated for instance in the growing trend in the number of merger decisions adopted by the Commission since 1997.<sup>61</sup>

**Figure 3 : Number of annual merger decisions in the period 1991 to 2020**



A small number of stakeholders (including businesses and business associations) have played down the importance of market definition assessments due to changes in market dynamics. In the Crémer et al. (2019) report commissioned by the Commission, the authors argue that ‘In the digital world, market boundaries might not be as clear as in the “old economy”. They may change very quickly. Furthermore, in the case of multisided platforms, the interdependence of the “sides” becomes a crucial part of the analysis whereas the traditional role of market definition has been to isolate problems. Therefore,

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5% respectively for the lower and upper boundaries of the calculation); (ii) total size (by value) of the product markets affected; and (iii) expected duration of the price increase avoided (in each case the prevalent barriers to entry are specifically examined in order to estimate the relevant periods). See DG COMP, [Annual Competition Report 2019](#), page 12.

<sup>61</sup> The decision figures for antitrust decisions over this timeframe would not be illustrative given the change in the antitrust system introduced by Council Regulation 1/2003 that allowed for the decentralisation of some decisions to NCAs and stopped the notification regime.



[...], in digital markets, we should put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies’<sup>62</sup>.

However, the need for defining a market in most antitrust and merger assessments has been confirmed by EU court judgments. As described in Section 2.2, the CJEU explicitly confirmed the need for a market definition already in early cases predating the Notice<sup>63</sup>, and the EU Courts have continuously held that position also after the Notice’s adoption. In a recent judgment of January 2021 in T-691/18, *KPN v Commission*, for example, the General Court explained again that ‘[i]t must be recalled that, with regard to the application of the rules on the control of concentrations, a proper definition of the relevant market is a necessary precondition for the assessment of the effects of the concentration on competition’ (paragraph 63). Academic commentary and other commentary equally refer to market definition’s central role in EU competition law<sup>64</sup>.

In this context, Professors J-U Franck and M. Peitz indicated in a presentation to the Commission on 25 March 2021, ‘that the finding that market definition is more complex, error-prone and possibly less informative in the case of two-sided platforms may indeed lead to quite the opposite conclusion to the one stated above [statement in Cremer et al. (2019) report]: the (correct) application and interpretation of market definition on two-sided platforms requires special diligence and attention’.

**Second, there is still a need today for a notice providing guidance on market definition.**

In the first place, there was near consensus among the respondents to the public consultation that there is still a need for a notice on market definition. They explained that the Notice helps companies assess the compliance of their activities with competition rules and improves the predictability of competition authorities’ assessments, thereby contributing to legal certainty and to a reliable business environment<sup>65</sup>.

One business association explained that ‘A Notice is necessary and critical, as it provides an opportunity to understand the views of the enforcement authority as to what method is more acceptable, the comprehensiveness level of evidence. The relevant market definition is the foundation of any competitive assessment and it is fundamental especially for merger control analysis and for the assessment of a dominant position. How the relevant market is defined frequently decides the assessment result and the corresponding administrative decision of the enforcers on specific proceeding’<sup>66</sup>. One

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<sup>62</sup> Crémer, J., de Montjoye, Y., and Schweitzer, H., ‘Competition Policy for the Digital Era’, *Report for the European Commission*, 2019.

<sup>63</sup> See, for example, Case 27/76, *United Brands v Commission*, paragraph 10 and Case 6/72, *Continental Can v Commission*, paragraphs 29–35.

<sup>64</sup> See e.g. with further references, Woolfe, P., and Kerr Morrison, J., ‘Market Definition’, in *European Union Law of Competition* (Bellamy and Child eds., 8th edn 2018), pp. 257–326 2018. See also Ferro, M., *Market Definition in EU Competition Law*, 2019.

<sup>65</sup> See summary of the public consultation.

<sup>66</sup> Reply of business association to question II.1.1 of the public consultation questionnaire.

business organisation also indicated that ‘Market definition is an important step in competition cases. The determination of whether a potentially anticompetitive practice is permissible, or whether a merger can progress, often depends on the estimated effects on the relevant market [...]. Market definition also provides insight that can allow businesses to carry out internal legal risk assessments, and competition authorities to close an investigation at an early stage (e.g. under the horizontal or vertical block exemptions). Market definition is commonly accepted by courts and competition authorities as a useful intermediary step in competition cases’<sup>67</sup>.

In fact, as explained in Sections 2.3 and 2.5, companies often have to self-assess their market share, in particular as one of the elements determining the scope of the block exemption regulations for Article 101(3) TFEU. Similarly and as already mentioned, the Commission uses market share thresholds to identify merger cases suitable for simplified review. Furthermore, the Notice enables stakeholders to save on internal resources, and possibly on resources spent on consultancy from law firms and economic consultants. The absence of the Notice would trigger the need to research a large number of Commission decisions and court judgments and potentially also literature on market definition to determine how the Commission would likely define the relevant market(s) and what elements it would take into account in the context of an antitrust or merger investigation.

In the second place, almost all NCAs indicated that they consider the objectives pursued by the Notice to be still relevant<sup>68</sup>. The NCAs stated that the text is a useful tool for companies and their advisers as well as for competition authorities when considering how to define relevant markets in antitrust and merger assessments<sup>69</sup>.

This is also confirmed by the adoption of similar documents by the NCAs and by authorities outside the EEA. According to the consultation of the NCAs, around half of them have their own national guidelines on market definition<sup>70</sup> and some others mentioned that they have plans to adopt such an instrument in the coming months<sup>71</sup>. Authorities outside the EEA also have their own guidelines, including Australia, Brazil, Canada, Japan, South Korea, UK and the US<sup>72</sup>.

In the third place, the Notice’s relevance is confirmed by the customary references to it in Commission decisions. For instance, all decisions adopted between 2018 and 2020 concerning infringements of Article 102 TFEU contain references to the Notice<sup>73</sup>. In the

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<sup>67</sup> Reply of a business organisation to question II.1.1 of the public consultation questionnaire.

<sup>68</sup> Two NCAs indicated that the Notice’s objectives are no longer relevant because the guidance focuses on static patterns of substitution, whereas dynamic aspects of competition should be taken into account. However, these comments do not concern the relevance of the Notice’s objectives but the lack of guidance on dynamic aspects of competition and therefore relate to the Notice’s effectiveness

<sup>69</sup> See Summary of the NCA consultation.

<sup>70</sup> Namely Bulgaria Croatia, Finland, France, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania. Similarly, the EFTA Surveillance Authority.

<sup>71</sup> See Summary of the NCA consultation.

<sup>72</sup> See support study.

<sup>73</sup> On the basis of public versions of decisions during that period.

case of merger decisions, out of the 23 Phase II merger decisions adopted between 2018 and 2020, 19 contained a reference to the Notice. The Notice is also often referred to in judgments of the CJEU and the General Court<sup>74,75</sup>. These references confirm the Notice's relevance in the way in which it summarises and consolidates the general principles applicable to market definition that stem from case-law and case practice.

Even when the Notice is not directly quoted by the Commission in its decisions, it is still applied and used by both the Commission and the undertakings interacting with the Commission. This was confirmed by more than 75% of respondents to the public consultation, which indicated that they had assessed relevant product and geographic markets over the past five years, with more than half indicating that they consult the Notice several times per year<sup>76</sup>.

**Third, the notice today satisfies more needs than when adopted in 1997.**

Firstly, providing guidance on market definition in order to increase transparency has gained importance since 1997. This is because Council Regulation 1/2003 decentralised the application of Articles 101 and 102 TFEU by empowering NCAs and national courts to apply these two articles of the TFEU<sup>77</sup>. This increased the need for harmonisation of approaches among the different NCAs and the Commission, which can be better achieved through more transparency on the Commission's approach. Furthermore, the successive EU enlargements after 2003 have increased the number of NCAs applying the TFEU provisions, further enhancing the benefits of Commission guidance.

Secondly, providing guidance on market definition has become more relevant since 1997 in helping businesses better anticipate the possibility that the Commission may raise competition concerns in an individual case. This is because of the following two changes in the EU antitrust and merger systems:

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<sup>74</sup> Examples of recent court decisions referring to the Notice are T-691/18, *KPN v Commission*, paragraphs 67-69, on a decision declaring a concentration compatible with the internal market and the Agreement on the European Economic Area ('EEA Agreement'), T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, paragraphs 283, 294 and 330, on a decision declaring a concentration incompatible with internal market and the EEA Agreement, judgment of 29 February 2016, *EGL, Inc. and Others v Commission*, T-251/12, EU:T:2016:114, paragraphs 26 and 98, on a decision finding an infringement of Article 101 and judgment of 11 January 2017, *Topps Europe Ltd v Commission*, T-699/14, EU:T:2017:2 (hereinafter referred to as 'T-699/14, *Topps Europe v Commission*'), paragraph 82, on a decision rejecting the complaint lodged by the applicant concerning infringements of Articles 101 and 102 TFEU.

<sup>75</sup> Moreover, the EFTA Surveillance Authority has adopted a notice on relevant market that reflects the content of the Notice and is applied by the EFTA Surveillance Authority and interpreted by the EFTA Court. See Notice of the EFTA Surveillance Authority on the definition of relevant market for the purpose of competition law within the European Economic Area (EEA). OJ L 200, 16.7.1998, p.46 and EEA Supplement to the OJ No 28, 16.7.1998, p. 3.

<sup>76</sup> See Summary of the public consultation.

<sup>77</sup> Articles 5 and 11 of Council Regulation 1/2003.

- a) Council Regulation 1/2003 introduced a system of self-assessment following which companies can no longer notify their agreements to the Commission in order to benefit from the exemption under Article 101(3) TFEU<sup>78</sup>; and
- b) the Commission introduced in 2000 a simplified merger review which relies in part on the absence or limited nature of horizontal and vertical relationships<sup>79</sup> between the merging companies' activities as measured by market share thresholds, which requires businesses to self-assess their market share before choosing between the "normal" and the "simplified" merger control procedure.

Finally, it is important to mention that several respondents to the public and NCA consultations indicated that the Notice needs to be updated to reflect developments in case-law, as well as technological and economic developments that have changed the way certain markets function<sup>80</sup>. These submissions concern less the relevance of the Notice's objectives but rather its current effectiveness, which will be discussed in Section 5.2.

In this context, one needs to consider that the Notice aims to set out broad principles that apply to market definition across the board, including to evolving products and technologies, and at the same time to provide guidance on some specific issues. These broad principles include among others (i) defining product and geographic markets on the basis of demand, but also supply substitutability; (ii) relying on short-term and effective constraints in that assessment; (iii) taking into account price and non-price parameters; and (iv) carrying out the review using a broad evidence base. Had the Notice been drafted to focus on a series of particular topics instead, it could have quickly become outdated and lost most of its relevance, given the evolving nature of the economy and technology.

## 5.2. Effectiveness

**Evaluation questions: To what extent has the Notice proven effective in providing guidance and transparency to all stakeholders? In particular, does the Notice continue to provide correct, comprehensive and clear guidance on market definition today?**

The evaluation results indicate that the Notice is effective in providing guidance and transparency to stakeholders in many, but not all, respects. On key issues, the Notice continues to provide correct, comprehensive and clear guidance on market definition and the Commission's approach to it today, and continues to adequately reflect EU case-law. This is because the Notice goes beyond providing a repertory of case-law and practice, but also provides guidance on principles that are sufficiently general and apply to

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<sup>78</sup> Article 1 of Council Regulation 1/2003.

<sup>79</sup> Horizontal relationships arise when undertakings are engaged in business activities in the same product and geographic market. Vertical relationships arise when an undertaking is engaged in business activities in a product market that is upstream or downstream from a product market in which another undertaking is engaged.

<sup>80</sup> See Summary of the public consultation and Summary of the NCA consultation.

different market contexts. This has been essential to guarantee that the Notice has remained future-proof in most of its content for more than 20 years.

However, the evaluation results also suggest that there are areas where the Notice does not reflect current best practices as derived from: (i) EU case-law – which is binding on the Commission as the EU Courts are the ultimate authority for interpreting EU competition law; (ii) the Commission’s current practice; (iii) the practice of other leading competition authorities; and (iv) high-quality academic research<sup>81</sup>. These areas concern in particular evolutions since the Notice’s adoption in 1997 concerning different issues of market definition, as summarised in this section. These include the use and purpose of the SSNIP test in different market constellations, the assessment of market definitions in rapidly evolving markets (including those characterised by high levels of innovation), the use of quantitative techniques and refinement of market share calculations and, most notably, the application of the principles of market definition to phenomena linked to digital markets.

While the principles of market definition remain unchanged, the evaluation results suggest that their application in digital contexts can lead to additional complexities. These are linked, among others, to defining markets for multi-sided platforms (in particular where services are supplied at zero monetary price), to defining markets for ‘digital ecosystems’ and to assessing online vs offline competition. Other issues linked to digitisation and market definition concern new barriers to entry and switching costs (for instance data (portability), interoperability, privacy, network effects or single/multi-homing) and non-price considerations in substitution assessments (including the sustainability of products). Stakeholders shared a near-unanimous view during the evaluation that the Notice, published in 1997 and therefore preceding important advances in information technology, lacks appropriate guidance on the effects of digitisation on market definition. Nevertheless, the evaluation results also show that not all of the market definition issues arising have been settled, but rather that practices may evolve further in the future. This may make it challenging to provide exhaustive and future-proof guidance in a potential updated Notice on all of the issues mentioned during the evaluation. The individual points raised on digitisation concern a wide range of issues, which will be discussed in the following sections where relevant, and – as regards multi-sided or platform markets – in particular in Section 5.2.5.

The following discusses the Notice’s effectiveness in five subsections that largely follow the structure of the Notice itself:

- Subsection 5.2.1 discusses the role of market definition<sup>82</sup>;
- Subsection 5.2.2 definitions and basic principles of assessing substitutability<sup>83</sup>;
- Subsection 5.2.3 looks at the evidence used to define markets<sup>84</sup>;

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<sup>81</sup> This is acknowledged in paragraph 6 of the Notice, which reads: ‘The Commission’s interpretation of “relevant market” is without prejudice to the interpretation which may be given by the Court of Justice or the Court of First Instance of the European Communities.’

<sup>82</sup> See Notice, Section I. Introduction.

<sup>83</sup> See Notice, Section II. Definition of relevant market.

- Subsection 5.2.4 examines market shares<sup>85</sup>; and
- Subsection 5.2.5 focuses on additional considerations<sup>86</sup>.

The question assessed in each of the subsections is the same; that is whether the Notice continues to provide correct, comprehensive and clear guidance on market definition today with respect to that particular topic.

### **5.2.1. Role of market definition**

The evaluation results indicate that the Notice generally provides correct, comprehensive and clear guidance as to the role of market definition in competition law proceedings.

However, the evaluation results also indicate that the Notice does not reflect all refinements to the Commission's practice in this respect since 1997. These include: (i) the difference between (backward-looking) antitrust and (forward-looking) merger assessments and the possibility to define different markets for the same economic activity more in general (because of, for example, time difference between the decisions or the differences in facts of the cases); (ii) the role of market definition in differentiated markets; (iii) the practice of leaving market definitions open; and (iv) the precedent value of market definitions.

The Notice provides guidance on the role and need for market definition in competition law proceedings in EU law. In line with the principles set out in Section 2.2, the Notice provides that market definition is a tool to identify and define the boundaries of competition between firms and that its main purpose is to identify in a systematic way the competitive constraints that the undertakings involved face. Market definition also makes it possible to calculate meaningful market shares<sup>87</sup>. The Notice also explains that the concept of relevant market is closely related to the objectives pursued under EU competition policy and describes the role of market definition in Article 101, Article 102 TFEU and merger control assessments<sup>88</sup>.

The evaluation results indicate that the Notice provides correct, comprehensive and clear guidance as to the role of market definition. The evaluation results did not identify divergences between the description in the Notice and the role of market definition in practice. This is supported by the results of the public and NCA consultations. Several respondents, including NCAs and those from the business community, mentioned the role of market definition as one of the main points of continuity that have not changed since 1997 and that should continue guiding the principles of the Notice<sup>89</sup>. One business respondent commented, for example: 'Market definition is a tool to identify the

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<sup>84</sup> See Notice, Section III. Evidence relied on to define relevant markets.

<sup>85</sup> See Notice, Section IV. Calculation of market share.

<sup>86</sup> See Notice, Section V. Additional considerations.

<sup>87</sup> Paragraphs 2 and 3 of the Notice.

<sup>88</sup> Paragraphs 10-12 of the Notice.

<sup>89</sup> Summary of the public consultation and Summary of the NCA consultation.

immediate competitive constraints exercised on firms ... it plays, and should continue to play, an integral role in EU competition policy<sup>90</sup>.

However, the evaluation results suggest that the Notice does not reflect all refinements to the Commission's practice on the following issues: (i) the difference between (backward-looking) antitrust and (forward-looking) merger assessments and the possibility to define different markets for the same economic activity more in general (because of, for example, time difference between the decisions or differences in the facts of the cases); (ii) the role of market definition in differentiated markets; (iii) the practice of leaving market definitions open; and (iv) the precedent value of market definitions.

### **Differences in merger and antitrust assessments and defining different markets for the same economic activity**

Merger and antitrust assessments differ in that merger assessments concern the impact of the notified concentration and hence has a forward-looking aspect to it. In contrast, antitrust assessment mainly aims at establishing whether an infringement has happened in the past (or is currently on-going), but may also include forward-looking assessments when companies need to self-assess whether a future agreement or business practice may constitute an infringement of Article 101 or 102 TFEU.

Certain respondents to the consultations, including NCAs and those from the business community, argued that the Notice is not entirely clear on the differences in the approach between (backward-looking) antitrust and (forward-looking) merger cases and, more generally, on the possibility to define different markets for the same economic activity<sup>91</sup>.

The Commission practice shows that, where justified by the specificities of the case and markets at hand, the Commission has defined different relevant markets for the same economic activity, namely when there is a time lag between decisions<sup>92</sup> or when the time horizon considered in the decisions differ<sup>93</sup> (in particular in rapidly evolving markets) and depending also on the theory of harm under consideration<sup>94,95</sup>. That market dynamics

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<sup>90</sup> Reply of a business organisation to question II.1.1 of the public consultation questionnaire.

<sup>91</sup> Summary of the public consultation and Summary of the NCA consultation.

<sup>92</sup> See the examples of Commission defining different markets for similar products over time in M.580 – *ABB/Daimler-Benz* and M.5754 – *Alstom Holdings/Areva T&D* as concerns the market for rail technology, in M.3225 – *Alcan/Pechiney* and M.9076 – *Novelis/Aleris* as concerns steel and aluminium for automotive applications.

<sup>93</sup> This can be the case for forward-looking merger and backward-looking antitrust assessment. See for example the antitrust decision in AT.39711 – *Qualcomm* (predation), which was adopted in July 2019 but assessed the conduct of Qualcomm from June 2009 to July 2011, as opposed to the merger decision in M.8306 – *Qualcomm/NXP*, adopted in 2018. In the prior case, the Commission did not conclude whether LTE chipsets were in the same market as UMTS chipsets but conducted the assessment in a market only including UMTS chipsets, given that the volume and value of LTE chipsets traded was minimal in comparison to UMTS chipsets at least until 2011. In the latter case however, the Commission segmented the relevant market according to the cellular standard (e.g. LTE and UMTS separately). This was supported by for example earlier standard chipsets not exercising competitive constraint on later generation chipsets and it was further estimated that by 2020, chipsets supporting LTE would account for [60–70]% of all baseband processors shipped.

<sup>94</sup> In M.7932 – *Dow/DuPont*, the Commission defined a market at the level of crop/pest combination groupings, at the national level. The Commission also calculated market shares for these groupings at

may evolve and thus the boundaries of relevant markets may change over time is at least partially covered by paragraph 12 of the Notice, which suggests that there may be differences between concentration (merger) or cooperative joint venture and past behaviour (antitrust) assessments.

### **Differentiated markets**

Differentiation describes a situation where products or services are not perfect substitutes for customers. Differentiation can occur at both product<sup>96</sup> and geographic level<sup>97</sup>. Some NCAs observed that, while market differentiation is mentioned briefly, the Notice does not explicitly discuss the role of market definition in differentiated markets even if differentiated markets are considered in case practice.<sup>98</sup> One NCA in particular submitted that it could be interesting for the Notice to mention situations where market definition may not be as useful or necessary as is usually assumed, for instance if diversion ratios are available in a horizontal merger to assess the closeness of competition in differentiated markets. In the Commission's case practice, the extent to which market shares calculated on the basis of the market definition are informative may indeed vary depending on the degree of differentiation of the products and geographies assessed and the competitive assessment may include an assessment of closeness of competition in appropriate cases<sup>99</sup>.

### **Leaving market definitions open**

The Notice explains in paragraph 27 that the Commission may leave market definitions open in cases where no competition concerns arise. This practice has the effect of limiting the burden on companies to supply information, a benefit also observed by respondents to the public and NCA consultations<sup>100</sup>. Nonetheless, the Commission has developed a practice of leaving the market definition open not only when competition concerns do not arise but in all situations where concluding on the exact scope of the relevant market would not affect the outcome of the competitive assessment. The practice has been confirmed and accepted in the case-law of the EU Courts<sup>101</sup>.

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the EEA level for context as being informative of the strength of market players at the level of their portfolio of active ingredients, as well as global market shares of R&D suppliers, as being informative of the relative strength of suppliers bringing new active ingredients to the market.

<sup>95</sup> See also summary of the ECN meetings in Annex 2.2.4.

<sup>96</sup> Product differentiation occurs with respect to the attributes of the product, such as design, brand or any other specific feature that may appeal to the differing tastes and preferences of customers.

<sup>97</sup> 'Geographic differentiation' refers to the location of the product or service.

<sup>98</sup> Summary of the NCA consultation.

<sup>99</sup> See, for example, M.8444 *ArcelorMittal/Ilva* where the Commission concluded that the markets for flat carbon steel products in the EEA were geographically differentiated, and took that differentiation into account in the competitive assessment.

<sup>100</sup> Summary of the public consultation and Summary of the NCA consultation.

<sup>101</sup> See judgment of 8 July 2003, *Verband der freien Rohrwerke eV, Eisen- und Metallwerke Ferndorf GmbH and Rudolf Flender GmbH & Co. KG v Commission*, T-374/00, EU:T:2003:188, paragraphs 107 and 110; and judgment of 26 October 2017, *KPN BV v Commission*, T-394/15, EU:T:2017:756,



## **Precedent value**

The Notice does not explain whether market definitions in earlier cases are binding on the Commission. One business association responding to the public consultation argued in this respect that ‘the Notice should take a position on the precedent value of market definitions from merger to antitrust cases and vice-versa’, but also claimed that the Notice should clarify that ‘a market definition by the Commission in an earlier case is not binding on the Commission in a subsequent case’<sup>102</sup>. Such position has been confirmed in the EU Courts’ case-law<sup>103</sup>. The Commission’s decisional practice also indicates that while it may take existing market definition precedents as a starting point for the analysis in a given case<sup>104</sup>, the analysis is always case-specific and takes into account the specificities of the case and markets at hand.

### **5.2.2. Definitions and basic principles of assessing substitutability**

The evaluation results suggest that the Notice generally provides correct, comprehensive and clear guidance as to the definitions of the product and geographic market and the basic principles of assessing substitutability, namely to rely on demand substitution as the main competitive constraint, complemented by supply substitution if it is as immediate and effective as demand substitution. Furthermore, the evaluation results show that the current approach of assessing potential competition in the competitive assessment is sound and in line with EU case-law and international consensus.

Nonetheless, the evaluation results indicate that refinements of best practices in market definition have taken place since the adoption of the Notice. These include: (i) the temporal dimension of market definition; (ii) the use of the SSNIP (‘small but significant non-transitory increase in price’) test to assess substitutability (including issues with its application to multi-sided platforms and bidding markets); (iii) issues concerning supply substitutability; (iv) market definitions in rapidly evolving markets; (v) asymmetric constraints; and (vi) the assessment of geographic markets in conditions of globalisation and import competition.

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paragraph 60. See also T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, paragraphs 316–20. In the latter case, the Commission in the contested decision considered that the exact sub-segmentation of the grey cement market could be left open since the transaction would lead to a significant impediment of effective competition under all product market definitions. As regards the geographic market, the Commission concluded that it could be left open as the concentration would significantly impede effective competition under both possible alternative market definitions (circular catchment area or modified catchment area). M.7878 – *HeidelbergCement*, paragraphs 144 and 160.

<sup>102</sup> Position paper submitted in response to the public consultation.

<sup>103</sup> Judgment of 14 December 2005, *General Electric Company v Commission*, T-210/01, EU:T:2005:456, paragraph 120.

<sup>104</sup> This is independent of the instrument concerned. In other words, the Commission may, for example, in an antitrust assessment, take a market definition adopted in a merger case as the starting point or initial hypothesis for its analysis.

The Notice provides guidance on the basic principles of market definition. In particular, as explained in Section 2.2, markets are defined by a combination of product and geographic dimension<sup>105</sup>, in line with EU case-law. Furthermore, substitutability concerns the alternatives a customer and a supplier have, from a technical and economic perspective, in serving a specific customer demand by switching to the consumption or supply of alternative products or services (or to and from alternative areas). In defining markets, the Notice puts particular emphasis on demand substitution as the most immediate competitive constraint, while supply substitution can be considered where its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. Potential competition, on the other hand, is solely considered at the competitive assessment stage as it deals with the out-of-market constraints from more distant or future competitors that have yet to enter the market. This approach has been confirmed by EU Courts, which have affirmed the difference in timeliness between supply substitution and potential competition<sup>106</sup>.

The identification of product and geographic market as well as the basic principles of market definition have been explicitly confirmed in EU case-law<sup>107</sup>. In the consultations, the majority of NCAs and respondents to the public consultation also indicated that those elements and basic principles of market definition have not changed and should continue guiding the Notice. For example, a clear majority of NCAs explained that neither the identification of the sources of competitive constraints, nor the focus on demand substitutability as the main criterion have changed since the adoption of the Notice.<sup>108</sup> This view was overall supported by the public consultation.<sup>109</sup> Further, among the vast majority of respondents to the public consultation that considered that there are many points of continuity that have not changed since 1997, the three sources of competitive constraints, as basic principles of market definition, were mentioned most often as points that should continue guiding the principles of the Notice.<sup>110</sup>

Nonetheless, the evaluation results indicate that refinements of best practices in market definition have taken place since the adoption of the Notice. These include: (i) the temporal dimension of market definition; (ii) the use of the SSNIP test to assess substitutability (including issues with its application to multi-sided platforms and bidding markets); (iii) issues concerning supply-side substitutability; (iv) market definitions in

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<sup>105</sup> Paragraphs 7 to 9 of the Notice.

<sup>106</sup> Judgment of 30 September 2003, *Atlantic Container Line AB and Others v Commission*, T-191/98 and T-212/98 to T-241/98, EU:T:2003:245 ('T-191/98 and T-212/98 to T-241/98, *Atlantic Container Line AB and Others v Commission*'), paragraph 834. See also judgment of 13 May 2015, *Niki Luftfahrt GmbH v Commission*, T-162/10, EU:T:2015:283 ('T-162/10, *Niki Luftfahrt GmbH v Commission*'), paragraph 132, which quotes paragraph 24 of the Notice, which excludes potential competition from the market definition assessment, as the relevant framework for the assessment.

<sup>107</sup> See, for example, T-427/08, *CEAHR v Commission*, paragraph 67–700; judgment of 4 July 2006, *easyJet Airline Co. Ltd v Commission*, T-177/04, EU:T:2006:187 ('T-177/04, *easyJet v Commission*'), paragraph 99; T-191/98 and T-212/98 to T-241/98, *Atlantic Container Line AB and Others v Commission*, paragraph 834; and Case 322/81, *Michelin v Commission*, paragraph 37.

<sup>108</sup> See Summary of the NCA consultation.

<sup>109</sup> See Summary of the public consultation.

<sup>110</sup> See Summary of the public consultation.

rapidly evolving markets; (v) asymmetric constraints; and (vi) the assessment of geographic markets in conditions of globalisation and import competition. By contrast, the Commission services consider on the basis of the evaluation results that the Notice continues to provide correct, comprehensive and clear guidance with respect to (vii) the practice of assessing potential competition at the competitive assessment and not the market definition stage.

### **Temporal dimension**

Some NCA and business community respondents pointed out that the Notice does not describe the potential temporal dimension of market definition that has been considered in certain recent Commission cases<sup>111</sup>. Commission practice shows that the temporal dimension may be relevant in some cases where it can affect, for example, consumer preferences or the structure of supply due to factors such as seasonality or peak vs off-peak time considerations related to capacity. The Commission has considered the temporal dimension of market definition in certain recent cases<sup>112</sup>.

### **Assessing substitution – SSNIP test**

The SSNIP test is a possible tool for assessing demand substitution<sup>113</sup>. It consists of assessing whether a hypothetical monopolist – which owns all companies producing the product(s) which is/are the candidate(s) to constitute a relevant market – would find it profitable to increase price by a small but significant amount (in the range of 5% to 10%). If such a price increase is profitable, the candidate products constitute the relevant market. If such price increase is unprofitable, it indicates that the candidate market should be enlarged to include those alternative products to which the customers would switch.

Commission practice, and the findings of the support study, show that the SSNIP test (and other forms of the hypothetical monopolist test) are relied on by the Commission and many other competition authorities around the world in their guidance and market definition assessments in practice.<sup>114</sup> Many respondents of both consultations underlined that the conceptual framework is useful in guiding the assessment of demand-side substitution, and remains an important and useful thought experiment when defining a relevant market. They also highlighted, however, that the SSNIP test often cannot be carried out in practice and that there is currently no guidance in the Notice on how to apply it to markets where price is not the only parameter of competition<sup>115</sup>.

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<sup>111</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>112</sup> See, for example, M.8869 – *Ryanair/Laudamotion*, where summer and winter season flight schedules were considered, and M.8870 – *E.ON/Innogy*, where a separate market was defined for retail supply of heating electricity predominantly consumed during off-peak times.

<sup>113</sup> As detailed in the Notice, however, when supply-side substitution's effects are equivalent to demand substitution in terms of effectiveness and immediacy, they may also be taken into account when defining markets and so, in that respect, a hypothetical monopolist or SSNIP test may also rely on supply substitution, as part of the analysis.

<sup>114</sup> See section 5.1.2 of the support study.

<sup>115</sup> Summary of the public consultation and Summary of the NCA consultation.

The support study corroborated some of the points made and showed that the SSNIP test has **some recognised limitations**: for instance, it is inadequate for concentrated markets where existing prices may be above the competitive level (known as the ‘cellophane fallacy’); and it may produce multiple market definitions depending on the starting point, the price level, price differentiation and direction of widening out the candidate products<sup>116</sup>.

Several NCAs and respondents to the public consultation considered that while these limitations are not spelt out in the Notice, they are particularly true as regards **digital and, in particular, zero monetary price services**. Some respondents took the view that to accommodate dynamics in digital markets, the authorities should rely on other elements besides a price test, such as the SSNDQ (‘small but significant non-transitory decrease in quality’) or the SSNIC (‘small but significant non-transitory increase in cost’) tests<sup>117</sup>. The Commission applied the SSNDQ concept in a recent case without quantifying the quality deterioration or demand response<sup>118</sup>. In the context of market definition in **multi-sided platforms**, some respondents to the public consultation also considered that the profitability of a hypothetical SSNIP should take into account any network effects in multi-sided markets that result from the reaction of users on the other side of the market<sup>119</sup>. As highlighted by the support study, these indirect network effects can give rise to feedback loops between the different sides of a platform, where the higher the number of users is on one side, the higher is the value that users on the other side attribute to the platform<sup>120</sup>.

Commission practice shows that the SSNIP test has guided the analytical approach in many market definition assessments and that the Commission has often collected evidence to investigate the extent of demand and supply substitution between products in response to a SSNIP<sup>121</sup>. That said, the Commission has **rarely applied the SSNIP test empirically**. Moreover, a number of EU Court judgments have confirmed that there is no obligation on the Commission to do so, particularly because other types of evidence are equally valid ways to elucidate the market definition<sup>122</sup>. In this respect, several NCAs expressed the view that the Notice is not clear in that it does not set out the EU Courts’ findings that there is no obligation to carry out the test empirically<sup>123</sup>.

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<sup>116</sup> See sections 6.1 and 3.1 of the support study.

<sup>117</sup> See Summary of the public consultation and Summary of the NCA consultation. The support study finds that similar dynamics can be observed in market definitions where firms compete not (only) on price, but on innovation and quality, and it has been proposed to apply the SSNDQ test in such situations; see Section 3.1.4 of the support study.

<sup>118</sup> See AT.40099 – *Google Android*.

<sup>119</sup> See Summary of the public consultation.

<sup>120</sup> See Section 3.1.2 of the support study.

<sup>121</sup> See, for instance, M.7995 – *Deutsche Borse /LSE* and M.8451 – *Tronox/Cristal*.

<sup>122</sup> See, for example, T-699/14, *Topps Europe v Commission*, paragraph 82; and T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, paragraph 331.

<sup>123</sup> They also stressed that its quantitative implementation is very data-intensive and technically difficult. See Summary of the NCA consultation. Such comments are also in line with the guidance provided in other jurisdictions, such as in Australia, Canada and the UK. See Australian Competition and Consumer

Finally, some respondents from the business community to the public consultation and NCAs also mentioned the difficulties associated with the application of the SSNIP test in **bidding markets**, in particular in what concerns the identification of the relevant starting price for the application of the test, given that each tender results in a different price.<sup>124</sup> In this type of cases, the Commission often uses qualitative evidence to assess substitutability.<sup>125</sup>

### **Supply substitution**

The evaluation results suggest that the Notice adequately describes the role of supply-side substitution in market definition assessments, although there are some elements that lack clarity.

The Notice explains that supply-side substitution may be taken into account when defining markets, where its effects are equivalent to demand substitution in terms of immediacy and effectiveness<sup>126</sup>. The EU Courts have explicitly confirmed this principle by finding that ‘[a]lthough, from an economic point of view, demand substitutability constitutes the most immediate and effective assessment criterion in relation to the suppliers of a given product [...], supply-side substitutability may also be taken into account in defining the relevant market with regard to operations in which that substitutability has effects equivalent to demand substitutability in terms of immediacy and effectiveness’<sup>127</sup> and that ‘[s]ubstitutability must therefore be looked at not only from the supply side but also from the demand side, which remains, in principle, the most effective assessment criterion’<sup>128</sup>.

This appears to reflect broader international consensus among competition authorities to put emphasis on demand-side substitution. In particular, the NCAs shared the general view in the consultation that demand-side substitutability is the primary concept in market definition<sup>129</sup>. This was further supported by the findings of the support study, which reported that EEA jurisdictions tend to use demand substitution as the primary factor in delimiting the geographic market, but also consider supply substitution where supply-side effects can be demonstrated as imposing an effective competitive constraint

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Commission, *Merger Guidelines*, 2017, Competition Bureau, Canada, *Merger Enforcement Guidelines*, 2011, and Office of Fair Trading, UK, *Market Definition Guideline*, 2004.

<sup>124</sup> See also OECD (2006), [Competition in bidding markets](#).

<sup>125</sup> See for instance M.7278 – *General Electric/Alstom* and M.7555 – *Staple/Office Depot*.

<sup>126</sup> Paragraphs 13 and 20 of the Notice.

<sup>127</sup> T-446/05, *Amann & Söhne and Cousin Filterie v Commission*, paragraph 57.

<sup>128</sup> T-177/04, *easyJet v Commission*, paragraph 99; the General Court explicitly instructed that, both from an economic perspective and for the purposes of a market definition, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular with respect to their pricing decisions. The court further explained that demand substitution ‘remains, in principle, the most effective assessment criterion’, and concluded that in that particular case (considering the substitutability between airports), it was not sufficient to look at supply substitutability but demand substitutability needed to be assessed.

<sup>129</sup> See Summary of the NCA consultation.

on the behaviour of suppliers in the focal area<sup>130</sup>. In the US, supply-side substitutability is even explicitly excluded from market definition: According to the US Horizontal Merger Guidelines ‘[m]arket definition focuses solely on demand substitution factors, i.e. on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.’ The US Horizontal Merger Guidelines acknowledge the importance of supply-side factors for the competitive assessment, but they are not addressed at the market definition stage<sup>131</sup>.

In the public consultation, views were not equally unified. The majority of respondents either did not explicitly comment on the point or agreed that the importance assigned in the current Notice to supply-side substitution is correct and should be maintained. Nevertheless, some representatives of the business community, including in particular those active in digital products, suggested changes to the framework and considered that the Commission should start to consider supply substitution to the same extent as demand substitution. In their view, this would better take into account significant innovation and technological developments<sup>132</sup>. On the basis of the evaluation results, however, such view appears to conflict with best practices derived from the Commission’s practice, from case-law of the EU Courts, which sets out binding principles derived from economic theory, and from international consensus among competition authorities.

Furthermore, stakeholders belonging to most groups of respondents argued that the Notice’s explanations of supply-side substitutability lacked some clarity. Several NCAs submitted that the situations where supply-side substitutability is applicable to market definition are not clarified in the Notice, for example, in connection with the concepts of ‘significant additional costs’, ‘short term’, ‘effectiveness and immediacy’, and ‘most suppliers’<sup>133</sup>. Similarly, a business association submitted in the public consultation that more examples and references to case-law would be helpful to clarify those terms<sup>134</sup>.

### **Rapidly evolving markets**

The evaluation results suggest that the Notice lacks explanations on the process of defining markets in industries characterised by rapid technological progress, where newly developed products, services or processes change existing competitive dynamics.

This issue was raised by several respondents to the public consultation, as well as by NCAs. In particular, several NCAs and respondents to the public consultation argued for the need to carry out dynamic assessments. Respondents to the public consultation also

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<sup>130</sup> See Section 5.4 of the support study.

<sup>131</sup> See Section 5.4 of the support study. The guidelines nonetheless observe that ‘[i]f ... supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.’ US Horizontal Merger Guidelines, footnote 8.

<sup>132</sup> See Summary of the public consultation.

<sup>133</sup> See Summary of the NCA consultation.

<sup>134</sup> See Summary of the public consultation.

submitted that substitution evidence from past shocks and switching patterns is less relevant for market definition in rapidly evolving industries<sup>135</sup>.

The support study<sup>136</sup> and the Commission practice further suggest that defining markets in such industries may indeed raise conceptual particularities. When markets are changing in the short term and substitution possibilities are evolving rapidly, the Commission does not rely only on past substitution patterns but takes the expected changes into account when distinguishing in and out-of-market constraints<sup>137</sup>. Nonetheless, the Commission services consider on the basis of the evaluation results that the general principles of market definition apply to such markets as well. First, according to EU case-law, it is also important in rapidly evolving markets to have effective substitution possibilities that translate into effective choices for customers – primarily on the demand side, but also on the supply side<sup>138</sup>. Second, those substitution possibilities must be available in the short term<sup>139</sup>, the specific time frame being industry- and case-specific, for instance depending on purchasing patterns or production and innovation cycles. Third, the Commission needs to have reliable evidence that the changes will indeed happen. Fourth, the Commission can rely on a variety of sources of evidence in its assessment; in particular, internal documents of companies and evidence from industry experts are important sources of evidence, as quantitative variables are less likely to be available.

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<sup>135</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>136</sup> See Section 4 of the support study with respect to market definitions when innovation plays a strong role.

<sup>137</sup> For instance, in M.9064 – *Telia/Bonnier*, the Commission concluded that all the different distribution technologies of audiovisual (AV) services were part of the same product market in the geographies under investigation. One of the reasons was that a majority of respondents to the market investigation considered the retail supply of over-the-top (OTT) AV services as an alternative to the retail supply of AV services via another technology at the time or over a two to three-year horizon. In the case of mobile telecommunications, for example in M.7018 – *Telefonica Deutschland/E-Plus*, the Commission did not distinguish a market by 2G, 3G and 4G technology even before 4G was effectively rolled-out on the basis that all suppliers in the market were likely to be able to offer 4G services in the near future (i.e. a majority of respondents indicated that 4G demand would increase by 20 to 30% in the next two to three years), thus supporting a high degree of supply-side substitutability between these services in the near future.

<sup>138</sup> T-177/04, *easyJet v Commission*, paragraph 99.

<sup>139</sup> The CJEU used the term ‘short period’ in a 2020 ruling in judgment of 30 January 2020, *Generics (UK) Ltd and Others v Competition and Markets Authority* (‘CMA’), C-307/18, EU:C:2020:52 (‘C-307/18, *Generics (UK) and Others v CMA*’), when discussing whether originator drugs and generics fell into the same product market: ‘As regards, in particular, the definition of the product market to which, for the possible application of Article 102 TFEU, an originator medicine belongs [...], it is clear from the point made in the preceding paragraph of the present judgment that a supply of generic medicines containing the same active ingredient [...] could lead to a situation where the originator medicine is considered, in the professional circles concerned, to be interchangeable only with those generic medicines and, consequently, to belong to a specific market, limited exclusively to medicines which contain that active ingredient. Such a finding presupposes, however, in accordance with the principles set out in paragraph 129 of the present judgment, that there is a sufficient degree of interchangeability between the originator medicine and the generic medicines concerned. Such is the case if the manufacturers concerned of generic medicines are in a position to present themselves within a short period on the market concerned with sufficient strength to constitute a serious counterbalance to the manufacturer of the originator medicine already on the market’ (paragraphs 131–3, emphasis added).

## **Asymmetric constraints**

The Commission's previous decision practice indicates that situations can arise in which an asymmetry exists in the competitive pressure between products or geographies. This may imply that different relevant markets can be defined depending on the focal product or focal geographic area<sup>140</sup>. With respect to those specific decisions involving asymmetric constraints, the EU Courts have so far confirmed the Commission's approach<sup>141</sup>. A number of NCAs highlighted during the evaluation, that the Notice does not explicitly refer to asymmetric constraints, nor, consequently, does it explicitly address the Commission's previous decisional practice concerning such asymmetric constraints<sup>142</sup>.

## **Assessment of geographic markets in conditions of globalisation and import competition**

The evaluation results indicate that the Notice overall adequately describes the assessment of geographic markets in the context of globalisation, including in markets where there is increased competitive pressure from imports. Nevertheless, the results also show that the Commission has gathered more and more experience in analysing markets that are potentially global or otherwise broader than the EEA over the years.

By way of background, it should be recalled that following the Commission's prohibition of the Siemens/Alstom transaction in 2019, some stakeholders called for a relaxation of the EU competition rules. With regard to geographic market definition, this included calls from a limited number of stakeholders for wider market definitions, including more

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<sup>140</sup> For example, in AT.38233 – *Wanadoo Interactive*, the Commission found evidence that the rate of migration from 'low speed' to 'high-speed' was significantly higher than the rate of migration from 'high speed' to 'low speed', which suggested highly asymmetric substitutability between the services. Also, on the one hand, in M.6497 – *Hutchison 3G Austria/Orange Austria*, the Commission, starting from mobile data services as the focal product, found that there was only limited substitutability for mobile data services by fixed internet access services. On the other hand, in M.8808 – *T-Mobile Austria/UPC Austria*, the Commission assessed whether mobile internet access services can be used to access the internet at home in the same way as fixed connections are used, and concluded that the relevant product market for home internet access services, including both fixed and mobile technologies, could be defined as far as residential customers are concerned.

<sup>141</sup> In judgment of 30 January 2007, *France Télécom SA v Commission*, T-340/03, EU:T:2007:22, paragraphs 88–91, the General Court confirmed the Commission's findings in AT.38233 – *Wanadoo Interactive* and stated that 'the operation of such substitutability is extremely asymmetrical, the migrations of customers from offers of high-speed to low-speed access being negligible compared with the migrations in the other direction. However, according to the Commission, if the products were perfectly substitutable from the point of view of demand, the rates of migration should be identical or at least comparable. [...] Consequently, on the basis of all the foregoing, it should be held that the Commission was right to find that a sufficient degree of substitutability between high-speed and low-speed access did not exist and to define the market in question as that of high-speed internet access for residential customers'. In its judgment of 1 July 2010, *AstraZeneca AB and AstraZeneca plc v Commission*, T-321/05, EU:T:2010:266, paragraph 97, the General Court found that '[...] the fact that PPIs exercised a considerable competitive constraint over H2 blockers and, consequently, that PPIs belonged to the H2 blocker market between 1991 and 2000 is irrelevant in the context of this case, since it does not mean that H2 blockers exercised a significant competitive constraint over PPIs and, therefore, that H2 blockers belonged to the PPI market'.

<sup>142</sup> See summary of the NCA consultation.



global markets. According to those suggestions, the widening of geographic market definitions would make mergers between European companies easier. By contrast, other voices called for a prohibition of the Siemens/Alstom transaction and more generally advocated continued rigorous competition law enforcement to the benefit of European businesses and consumers, arguing among other points that competition (and not a relaxation of competition) promotes competitiveness.

As explained in Section 2.2, under the established geographic market definition methodology as endorsed by the EU Courts, where competitive conditions are sufficiently homogeneous between two areas, these areas will be included in the same geographic market. Conversely, where competitive conditions are not sufficiently homogeneous between two areas, these areas will be included in separate geographic markets. Past Commission practice shows that, irrespective of the conclusion on the scope of the areas included in the geographic market, competitive pressure from imports is fully taken into account in the competitive assessment, including in the calculation of market shares and in assessing the prospects of further expansion in the future. This aspect of taking into account competition from imports is not explained explicitly in the Notice.

The evaluation results also highlight that market definitions are not static over time, but reflect market developments<sup>143</sup>. In fact, in line with the trend for increasing inter-connectedness of economies, there is evidence to suggest that as globalisation has intensified, the Commission has used wider geographic market definitions more frequently in its decisions. While in 1992–2004, the Commission assessed a global market as one of the plausible markets in approximately 20% of merger cases with affected markets, in 2005–2018 the share rose to approximately 30%<sup>144</sup>. Looking in more detail, the Commission assessed a global market in circa 15% of merger cases with affected markets in 1992–1996, while that share rose to circa 24% 10 years later (2002–2006) and to ca. 27% 20 years later (2012–2016). Such evolutions can also be observed in some of the Commission’s subsequent decisions in the same industry<sup>145</sup>.

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<sup>143</sup> For examples of cases where the geographic scope of the relevant market has been revised in Commission decisions, see DG Competition, ‘Market definition in a globalised world’, *Competition policy brief*, Issue 2015(12), 2015.

<sup>144</sup> Similarly, the Commission considered markets to be wider than the EEA in ca. 56% of mergers with affected markets in 1992–2004, compared to ca. 62% in 2005–2018.

<sup>145</sup> See, for example, AT.38698 – *CISAC Agreement*, where the Commission took the view that the geographic scope of copyright administration services provided to CMO members was national. However, the Commission considered in relation to the geographic scope of inter-CMO services that ‘[t]he geographic scope of the market for the provision of copyright administration services to other public performance rights collecting societies has both a national aspect and wider cross-border elements’, explaining that in the absence of the restrictions contained in the RRAs CMOs would be able to grant multi-territorial licences. Later, in a merger decision, M.6800 – *PRS/M/STIM/GEMA/JV*, the Commission considered that, as the restrictions contained in the RRAs were removed, the market for the provision of copyright administration services was EEA-wide in scope. Also, in M.580 – *ABB/Daimler-Benz*, the Commission concluded on a national market for rail technology due to national or regional specifications. The Commission nevertheless explained that the ‘current efforts to align technical conditions in rail technology throughout the Community suggest that the situation may change in the future’. Later, in M.5754 – *Alstom Holdings/Areva T&D*, the Commission concluded that

NCAAs were supportive of the Notice's guidance on geographic markets in the context of globalisation and import competition, and they did not raise concerns on this point in the consultation. Nonetheless, one NCA noted that the Notice could be clearer by referring to the possibility of defining global markets more explicitly<sup>146</sup>. The views expressed by the respondents to the public consultation were more split<sup>147</sup>. While most respondents did not explicitly comment on the question, some respondents to the public consultation, including those from the business community and civil society, suggested that the Notice should reflect global competition more, in particular in the context of rapidly evolving markets and including the possibilities brought about by digitisation<sup>148</sup>. Nonetheless, other respondents, including those from the business community, explicitly rejected the idea that the Commission should change its approach or the Notice in this respect<sup>149</sup>.

The evaluation results overall suggest that the approach set out in the Notice allows the Commission to reflect market developments, as shown in individual cases, including by taking into account competition from imports, although this is not set out explicitly in the Notice. Moreover, while the Notice already includes an explicit reference to increased market integration in the Union<sup>150</sup>, it does not include explicit references to the Commission's practice on global markets.

While going beyond the purpose of this evaluation, it may be useful to note in this context that Professors Fletcher and Lyons saw no need for the Commission to fundamentally revise its methodology when they analysed the Commission's approach in 2017. They did make a number of technical suggestions for improvements or clarifications, however, namely: (i) that there should be greater clarity in Commission decisions that market definition is not an end in itself but a first step that provides a useful framework for the competitive analysis; and (ii) that the Commission should rely

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the market was at least EEA-wide due to the construction of high speed freight lines and trains which cross Member States, the existence of various packages of legislation and initiatives such as the European Rail Traffic Management System, the adoption of technical specifications for interoperability of rail networks, and the implementation of multi-country rail projects. A further example is the supply of certain mining equipment: In its 2000 decision M.2033 – *Metso/Svedala*, the Commission found that the relevant geographic market for crushers sold to mining customers was EEA-wide in scope. However, twenty years later in its 2020 decision M.9585 – *Outotec/Metso (Minerals business)*, the Commission found that the companies' activities overlapped in the supply of capital equipment for the mining industry at worldwide level.

<sup>146</sup> See Summary of the NCA consultation.

<sup>147</sup> See Summary of the public consultation.

<sup>148</sup> For example, a civil society association explained that global competition with third countries plays an increasing role and that the Notice needs to be adapted in order to strengthen the competitiveness of European companies compared to those of third countries.

<sup>149</sup> For example, a business association representing both large companies and SMEs explained that it saw no apparent need for major changes of the method or perspective when assessing the impact of global competition, observing that the assessment needs to continue to be fact-based and not rely on uncertain predictions of the future. Summary of the public consultation.

<sup>150</sup> Paragraph 32 of the Notice.

mainly on demand-side substitution at the market definition stage and address supply-side substitutability mainly at the competitive assessment stage<sup>151</sup>.

### **Potential competition**

As explained in Section 2.2, the Notice distinguishes between demand-side and supply-side substitutability, which is assessed at the market definition stage of the assessment<sup>152</sup>, and potential competition which is analysed under the competitive assessment, as per the criteria set out in the Horizontal Merger Guidelines<sup>153</sup>. Both supply-side substitution and potential competition rely on new supply becoming available, but they differ in terms of immediacy and switching dynamics<sup>154</sup>.

The Commission's practice of considering potential competition in competitive assessment but not in market definition is in line with the practice of all NCAs<sup>155</sup> and international consensus; and has found support in the EU Courts' case law, which has affirmed the difference between supply substitution and potential competition<sup>156</sup>.

Nevertheless, some respondents to the public consultation, including those from the business community, argued that the Commission should start considering potential competition at the market definition stage together with supply substitution in order to take better account of potential competition, for example in digital markets<sup>157</sup>.

### **5.2.3. Evidence to define markets**

The evaluation results indicate that the Notice generally provides correct, comprehensive and clear guidance as to the main evidence used to define markets.

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<sup>151</sup> Fletcher, A., and Lyons, B., *Geographic Market Definition in European Commission Merger Control*, Centre for Competition Policy, Norwich, 2016.

<sup>152</sup> Supply-side substitution may be taken into account when defining markets, where its effects are equivalent to demand substitution in terms of immediacy and effectiveness. See paragraphs 13 and 20 of the Notice.

<sup>153</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31, 5.2.2004, ('Horizontal Merger Guidelines,') section on 'Merger with a potential competitor', paragraphs 58-60, and section on 'Entry', paragraphs 68-75.

<sup>154</sup> Both supply substitution and potential competition have the capability to affect the outcome of a case. Where there is supply substitutability and it constitutes a sufficiently immediate and effective constraint, the market will include additional competitors of the undertaking involved that may be able to effectively constrain its behaviour in the market immediately. Potential competition in turn may provide such a strong future competitive force that it prevents market power from materialising. To that effect, see for example Case M.8744 – *Daimler/BMW/Car Sharing*, where, despite market shares above 90% in the car sharing markets in Berlin, the Commission considered that the transaction did not raise serious doubts given the entry plans of several other car sharing services.

<sup>155</sup> The NCAs agreed that the distinction between potential competition and supply substitution continues to be applicable as it makes a relevant distinction between actual competitors on the market today and more distant or future competitors. See also summary of the ECN meetings in Annex 2.2.4.

<sup>156</sup> T-191/98 and T-212/98 to T-241/98, *Atlantic Container Line AB and Others v Commission*, paragraph 834. See also T-162/10, *Niki Luftfahrt GmbH v Commission*, paragraph 132, which quotes the Notice's paragraph 24, which excludes potential competition from the market definition assessment, as the relevant framework for the assessment.

<sup>157</sup> See Summary of the public consultation and Summary of the NCA consultation.

However, the evaluation results also suggest that the Notice does not reflect refinements to the Commission's approach stemming from Commission practice following the Notice's adoption. These relate in particular to: (i) quantitative techniques; (ii) barriers and switching costs (in the context of digitisation); (iii) the assessment of trade flows; (iv) the assessment of price differences in geographic market definition; (v) the assessment of price discrimination; and (vi) the use of companies' internal documents.

The Notice describes a number of factors taken into account in market definition, as well as the sources of information used by the Commission to assess those factors.

The evaluation results indicate that the Notice provides correct, comprehensive and clear guidance as to the evidence to define markets, though with certain reservations. The evaluation results suggest that not all refinements to the Commission's approach since the adoption of the Notice are reflected in it.

### **Quantitative techniques**

The Notice refers to different quantitative methods to determine the product market. These are: natural experiments, consumer surveys, price co-movement analysis and more complex applications of the SSNIP test via estimation of the elasticity of demand<sup>158</sup>.

Several NCAs mentioned the development of quantitative techniques and the increased availability of data as assisting market definition today. Some respondents to the public consultation, such as those from the business community, noted that more weight should be given to economic analysis and the more sophisticated quantitative techniques developed since 1997 relative to qualitative factors. Some also suggested that consumer surveys (provided they are rigorously carried out to rule out bias) are a relevant source of evidence that should be used more often<sup>159</sup>.

The support study suggests that quantitative techniques have been improved in terms of their reliability and robustness since the Notice's adoption. For example, the importance of shocks being exogenous is now particularly stressed for natural experiments to provide meaningful results<sup>160</sup>. Further, some improvements have been introduced in the application of price tests<sup>161</sup>. In addition, the support study discusses critical loss analysis, which is not mentioned in the Notice. Critical loss analysis is a methodology to implement the SSNIP that has been used in some cases and that is relatively simple and not demanding in data (being mostly based on aggregate diversion ratios and margins<sup>162</sup>). Other aspects highlighted in the evaluation results which are not explicitly included in the Notice are that: (i) all these methods have their own strengths and also suffer from certain drawbacks, which makes their application case-specific; and (ii) they may be used as a complement to the qualitative evidence collected.

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<sup>158</sup> Paragraph 39 of the Notice.

<sup>159</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>160</sup> See Section 6.1.2 of the support study.

<sup>161</sup> See Section 6.3 of the support study.

<sup>162</sup> See, for instance, the application of critical loss analysis in M.4734 – *Ineos/Kerling* and M.9076 – *Novelis/Aleris*. See also application by NCAs described in Section 6.1.1 of the support study.

## **Barriers and switching costs**

Respondents pointed out that the Notice does not cover some sources of barriers to entry and switching costs that are becoming relevant in the context of digitisation. Such elements include the use of data, interoperability, privacy, network effects, ‘ecosystems’ and multi-homing. In its most recent practice, the Commission<sup>163</sup>, as well as other NCAs<sup>164</sup>, have taken into account these elements in defining relevant markets – even though they are not explicitly reflected in the Notice

## **Trade flows**

Certain NCAs pointed out<sup>165</sup> that while the Notice observes that trade flows are not conclusive for market definition<sup>166</sup>, this is not expressed as prominently in the Notice as it is reflected in practice. For example, considerable imports do not necessarily result in the expansion of a geographic market definition while the lack of such imports does not necessarily prevent such expansion either, but all other relevant factors are considered together with import flows before the Commission reaches a conclusion<sup>167</sup>. Similar approaches are found in other jurisdictions discussed in the support study<sup>168</sup>. Fletcher and Lyons go even further and recommend that the Commission should clarify that there is no ‘magic number’ for existing import levels within a market that would lead to a situation where no competition concerns can be found<sup>169</sup>.

Several NCAs and respondents to the public consultation further pointed out that the Notice does not discuss the framework for defining local markets on the basis of catchment areas drawn around suppliers or customers<sup>170</sup>. According to the support study, few NCAs directly comment on the use of catchment areas in their public guidelines, although there are several examples of the application of this technique in their practice<sup>171</sup>. In its practice, the Commission has applied the catchment area approach to defining the relevant geographic markets in cases where the distance between the

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<sup>163</sup> See, for instance, the assessment of the relevant markets in AT.40099 – *Google Android*, where the Commission took into account the presence of indirect network effects, multi-homing and interoperability. In AT.39740 – *Google Shopping*, the Commission observed that ‘there are a number of differences in the technical features of specialised and general search services [which] often rely on different sources of data’.

<sup>164</sup> See Section 3 of the support study.

<sup>165</sup> See Summary of the NCA consultation.

<sup>166</sup> Paragraphs 49 and 50 of the Notice.

<sup>167</sup> As an example, the Commission found in M.8444 – *ArcelorMittal/Ilva* that there were imports of flat carbon steel products into the EEA (and also exports out of the EEA). However, the Commission further found that customers sourced to a very large extent inside the EEA, that sourcing from imports was limited by non-price factors and that imports could not fully substitute EEA supplies. In light of that, and considering that the conditions of competition were not homogenous inside or outside of the EEA, the Commission concluded that the relevant markets were not wider than the EEA, despite the trade flows.

<sup>168</sup> Although trade flows are among the main factors to be taken into account by NCAs in the geographic market definition process. See section 5.2.2 of the support study.

<sup>169</sup> See Fletcher, A., and Lyons, B., *Geographic Market Definition in European Commission Merger Control*, Centre for Competition Policy, Norwich, 2016.

<sup>170</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>171</sup> See Section 6.4 of the support study.

location of the supplier and the location of the customer matters for purchasing decisions<sup>172</sup>. This includes cases where the relative transport costs are high, where travel inconveniences are significant compared to the value of the product, where security of supply is important, or where the product's technical qualities limit its transportability. The support study explains that this method is particularly prominent in competition cases concerning bricks-and-mortar retailers, where location and transport costs are important considerations in consumer behaviour<sup>173</sup>. The Notice does not explicitly clarify that the catchment area approach may be appropriate when defining local markets, which are also not currently referenced in the text of the Notice.

### **Price differences related to geographic markets**

The support study notes that price differences are one of the main factors taken into account by NCAs in the geographic market definition process<sup>174</sup>. The Notice currently observes in paragraph 28 that price differences are taken into account in the assessment of geographic markets although no reference to price differences is made in the Notice's related evidence section (paragraphs 44–52). In its practice, the Commission regularly assesses price differences and the underlying reasons for those price differences when defining geographic markets.<sup>175</sup>

### **Price discrimination**

A large majority of respondents to the public consultation and NCAs confirmed that the Notice (fully or partially) provides correct, comprehensive and clear guidance as regards price discrimination and customer markets as evidence to define the relevant product market, as detailed in the Notice. However, some NCA, civil society and business community respondents considered that the Notice does not provide adequate guidance on personalised pricing and that features such as e-commerce and platforms should be taken into account when assessing the possibility of defining markets for different categories of customers because of price discrimination<sup>176</sup>.

### **Companies' internal documents**

The Notice makes certain references to internal documents of companies, such as marketing studies, as a source of information used by the Commission to assess the

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<sup>172</sup> See, for example, M.7878 – *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* where, on the basis of 90% of actual deliveries of cement both for the Parties and for competitors, the Commission concluded on catchment areas of around 250 km around the Parties' cement plants.

<sup>173</sup> See Section 6.4 of the support study.

<sup>174</sup> See Section 5.2 of the support study.

<sup>175</sup> For example in M.7155 – *SSAB/Rautaruukki*, the Commission observed that there were substantial price differences between the Nordic countries and the rest of the EEA for certain flat carbon steel products, and that the differences varied between different products in the sense that they were higher in products where the merging parties had a strong market position. That information was one piece of information used to substantiate the finding that there was at least a serious possibility that the Nordic countries constituted a distinct geographic market. M.8792 – *T-Mobile NL/Tele2 NL* illustrates how price discrimination could lead to a narrow product market definition in the telecommunication industry.

<sup>176</sup> See Summary of the public consultation and Summary of the NCA consultation.

factors relevant for market definition<sup>177</sup>. These may include, for example, market research studies, marketing studies or any other document that discusses factors relevant to market definition such as the comparison of products and benchmarking, purchasing patterns of customers, research and development studies, or consumer preferences.

Nonetheless, some respondents to the public consultation considered that while internal documents are often used by the Commission in its assessment, their use is not mentioned in the Notice, and some business respondents also cautioned against misinterpretations related to internal documents.<sup>178</sup>

#### 5.2.4. Market shares

The evaluation results indicate that the Notice overall provides correct, comprehensive and clear guidance on the calculation of market shares, including on the variables and sources most often used to calculate this indicator of market power.

The evaluation results indicate, however, that the Notice does not provide comprehensive guidance on Commission practice regarding the metrics that can be used in digital markets, where the traditional volume and value metrics are not applicable or the best indicators. In addition, the treatment of captive sales, imports and sales of supply substitution players is not mentioned in the Notice with respect to the calculation of market shares. Finally, according to the evaluation results, the Notice does not discuss the time period by reference to which market shares are calculated.

Moreover, the evaluation results show that although the section on market share calculation strictly speaking exceeds market definition questions, it discusses points that are not discussed in other Commission's guidelines and as such contributes to providing comprehensive guidance to stakeholders.

The Notice provides guidance on calculating market shares. The guidance consists in listing the information sources that can be used and explaining that, when these are not available or reliable, the Commission may ask each supplier in the relevant market to provide its own sales in order to calculate total market size and market shares. The Notice further notes that elements other than sales can be used as a basis for calculating market shares, including capacity and reserves. The Notice also adds that in the case of differentiated products, a market share calculated on the basis of value will usually be considered to better reflect the relative position and strength of each supplier.

The evaluation results indicate that the Notice provides correct and clear guidance on the **variables most often used to estimate market shares**. As a general rule, and as indicated in the Notice, market shares are calculated on the basis of the value or volume of sales. In certain circumstances, these may be complemented by the calculation of

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<sup>177</sup> Paragraph 41 of the Notice.

<sup>178</sup> See Summary of the public consultation.

market shares by reference to other elements, for example capacity and reserves<sup>179</sup>. A large majority of respondents to the public consultation and NCAs confirmed that the Notice provides correct, comprehensive and clear guidance on the calculation of market shares<sup>180</sup>.

Nevertheless, the evaluation results also indicate that the Notice may not be fully comprehensive in this matter since it does not clarify what type of metrics should be used in the case of services provided in multi-sided platforms, at a zero monetary price, in ‘digital ecosystems’ and data markets<sup>181</sup>. With digitisation and the emergence of zero-monetary-price products/services, the Commission’s decisional practice increasingly uses metrics not explicitly mentioned in the Notice, such as number of active users, number of web visits, number of downloads and number of transactions<sup>182</sup>. These indicators are also used by NCAs, as described in the support study<sup>183</sup>.

Some respondents from the business community and NCAs also noted that the Notice does not provide comprehensive guidance on the **treatment of in-house sales**, or situations where **market participants are not active or located in the market (including imports)**<sup>184</sup>. Several respondents from the business community also indicated that static market shares are not a good indicator in **rapidly evolving markets**, in particular where innovation plays a strong role<sup>185</sup>. In this respect, Commission practice indicates that, where relevant, imports are included in the market share calculation in order to account for the constraint exercised by this source of supply<sup>186</sup>. In the case of imminent entry, the Commission has also relied on estimating firms’ hypothetical market shares after entry<sup>187</sup>. However, when this is not possible to do in reliable way, the Commission has recognised that the available market shares (limited to existing products) were less informative<sup>188</sup>.

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<sup>179</sup> See, for instance, the use of capacity shares in M.5978 – *GDF Suez/International Power*, M.7744 – *HeidelbergCement/Italcementi* and M.4000 – *Inco/Falconbridge*. In M.4000 – *Inco/Falconbridge*, market shares were also estimated based on reserves.

<sup>180</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>181</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>182</sup> For instance in AT.40099 – *Google Android* in relation to the market for general search services, the Commission used market shares considering different indicators, e.g. number of page views, number of site visits; similarly, in the market for Android app stores, the Commission used market shares based on user-side metrics (e.g. pre-installation of the app store and downloads from the app store). In M.7217 – *Facebook/WhatsApp*, for social network services or consumer communication services, the Commission relied on market shares calculated based on number of unique users.

<sup>183</sup> Section 3.1.4 of the support study.

<sup>184</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>185</sup> See Summary of the public consultation.

<sup>186</sup> For example, in M.8444 – *ArcelorMittal/Ilva*.

<sup>187</sup> For example, in M.1806 – *Astra Zeneca/Novartis*, on the basis of sales forecasts for a soon to be introduced product by Astra Zeneca, the Commission assigned market shares in one product market to it.

<sup>188</sup> For instance, in M.7932 – *Dow/DuPont*, where in several markets there were pipeline products about to be launched, the Commission explained that the market shares provided did not take into consideration the impact of these new products, which the Commission considered to be relevant for the competitive assessment.



The evaluation results indicate that the Notice provides correct and clear guidance on the **sources for the calculation of market shares**. The Commission applies the practice outlined in the Notice of using market share information provided by the companies involved. The Commission additionally relies on other sources such as studies commissioned from industry consultants and reports from trade associations as indicated in the Notice, but also on the internal documents of the companies involved. As indicated in the Notice, where no reliable estimates or other data sources are available, a market reconstruction based on requests for information from the relevant market participants (in most cases competitors) is often used<sup>189</sup>.

The preference given to value shares in the **case of differentiated markets**, as suggested by the Notice, has also been common Commission practice. However, as the evaluation also indicates, in many cases where there is a significant degree of product differentiation in a relevant market, the Commission has also relied on shares calculated for segments of the market<sup>190</sup>.

Some respondents from the business community indicated that the Notice does not provide guidance as to the **time period to be applied when calculating market shares**, in particular in the case of bidding markets or more generally in the case of infrequent purchases, where it may be appropriate to calculate market shares by reference to a longer period<sup>191</sup>.

Finally, two NCAs explained that more guidance is needed about the **role of market shares**. Three NCAs explained that ‘market shares’ is a static concept and should be complemented with elements about the dynamics of an industry. In contrast, one NCA argued that the **calculation of market shares does not fit well in the Notice** since it is already part of the competitive assessment<sup>192</sup>. The evaluation results indicate a close link between market definition and the calculation of market shares as described above (although strictly speaking they exceed market definition questions) and that since other Commission guidelines do not include extensive guidance on the calculation of market shares, the market share section contributes to providing comprehensive guidance to stakeholders.

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<sup>189</sup> For instance, in M.7265 – *Zimmer/Biomet*, the Commission supplemented the material from the industry association Eucomed’s database by sending requests for information, following the same template as Eucomed, to several market participants. See also market reconstruction exercises in M.9409 – *Aurubis/Metallo*, M.5778 – *Novartis/Alcon* and M.6576 – *Munksjo/Ahlstrom*.

<sup>190</sup> For example, in M.5658 – *Unilever/Sara Lee*, the Commission used segment shares for non-male deodorants, namely skin care, fragrance, anti-perspirant; in M.3169 – *Orange/Jazztel*, the Commission considered different customer types (business vs residential) and speed segments for fixed internet access; in M.9076 – *Novelis/Aleris*, the Commission relied on segment shares of Aluminium ABS and in M.7278 – *General Electric/Alstom*, the Commission assessed segments of the market for heavy duty gas turbines on the basis of power output.

<sup>191</sup> See Summary of the public consultation.

<sup>192</sup> See Summary of the NCA consultation.

### 5.2.5. Additional considerations

The evaluation results indicate that the Notice's final section largely provides correct, comprehensive and clear guidance in relation to aftermarkets and chains of substitution. Nevertheless, the evaluation results indicate that there may be scope for some additional clarity and explanations for a better understanding of Commission practice in these matters.

Furthermore, the results indicate that there are other market realities, currently not explicitly referred to in the Notice, where 'the application of the principles [of market definition] has to be undertaken with care'. These include: (i) digital markets, namely in relation to multi-sided platforms and services offered at a zero-monetary price, 'ecosystems', data and online channels; and (ii) non-price competition, including innovation.

The Notice provides guidance in relation to two specific topics, namely aftermarkets and chains of substitution, where 'the application of the principles [of market definition] has to be undertaken with care'<sup>193</sup>. The evaluation results indicate, however, that there are further topics where those principles similarly may have to be applied with care due to specific market dynamics, including digital markets and innovation<sup>194</sup>.

#### **Aftermarkets**

An aftermarket arises where the consumption of a certain durable product (primary product) leads to the subsequent purchase of another product(s) (secondary product). The evaluation results indicate that the Notice adequately reflects Commission practice by mentioning three possible ways to define relevant markets in relation to aftermarkets: (i) as a *system market* comprising 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 version of the primary product and; (iii) as *dual markets*, namely the market for the primary product on the one hand and the market for the secondary product on the other hand<sup>195</sup>.

A large majority of respondents to the public consultation and NCAs confirmed that the Notice provides correct, comprehensive and clear guidance as regards aftermarkets. Some respondents from the business community and NCAs indicated, however, that the Notice does not fully reflect the most recent judgment (T-427/08, *CEAHR v Commission*) and decisional practice in this field<sup>196</sup>. In particular, the evaluation results suggest that not all factors taken into account in the assessment are explicitly described in the Notice. In practice, according to the evaluation results, the judgment in T-427/08,

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<sup>193</sup> Paragraphs 56 to 58 of the Notice.

<sup>194</sup> Other topics also mentioned have already been covered in previous sections, namely price discrimination, asymmetric constraints, product differentiation and bidding markets.

<sup>195</sup> Paragraph 56 of the Notice.

<sup>196</sup> See Summary of the public consultation and Summary of the NCA consultation.

*CEAHR v Commission*, Commission practice<sup>197</sup>, guidance papers of other jurisdictions<sup>198</sup> and academic literature<sup>199</sup> suggest other relevant factors not included in the Notice that could be taken into account in determining whether there is a system market, whether there are multiple secondary markets or whether there are dual markets.

The evaluation results also show that the paragraph on aftermarkets in the Notice does not refer to ‘**digital ecosystems**’ even if they have been considered in case practice, as submitted by several respondents to the public consultation and NCAs, and are gaining importance following the most recent technological convergence<sup>200</sup>. In terms of market definition, the support study explains that digital ecosystems can, in particular in the case of user facing services, assume the form of aftermarkets and be thought of as a primary core product and several secondary (digital) products, whose complementarity is due to technological links or interoperability between products<sup>201</sup>.

In the context of the technological convergence, some respondents from the business community and NCAs also mentioned that the Notice does not explicitly indicate the treatment given to complementary products and products sold in a bundle. Commission practice shows that in markets where multiple goods or services are jointly demanded and supplied, referred to as **cluster markets**, under certain circumstances, it is also possible to include in the same relevant market complementary products<sup>202</sup>.

### **Chains of substitution**

The Notice explains that in certain markets it is possible for two (or more) products (or geographic areas) that are not direct substitutes to be included in the same relevant market due to a sequence of substitute products/geographic areas between them – a chain of substitution<sup>203</sup>. This is the case if substitution takes the form of successive iterations throughout the chain, which justifies the inclusion of each product or geographical area in the market.

A large majority of respondents to the public and NCAs consultations confirmed that the Notice provides correct, comprehensive and clear guidance as regards chains of substitution. However, some respondents from the business community and NCAs expressed the view that more guidance was necessary, and that some caution may be

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<sup>197</sup> For instance, AT.39692 – *IBM Maintenance Services*, AT.39097 – *Watch Repair*, AT.40099 – *Google Android*, M.7278 – *General Electric/Alstom*, M.7292 – *DEMB/Mondelez/Charger Opco*, M.7801 – *Wabtec/Faiveley* and M.8658 – *UTC/Rockwell Collins*.

<sup>198</sup> See Office of Fair Trading (OFT) (2004), *Market definition*.

<sup>199</sup> For instance, Borenstein, S., MacKie-Mason, J., and Netz, J., ‘Antitrust Policy in Aftermarkets’, *Antitrust Law Journal*, volume 63, 1995; Schulz, L., ‘The Economics of Aftermarkets’, *Journal of European Law & Practice*, volume 6(2), 2015, and Shapiro, C., and Teece D., ‘Systems competition and aftermarkets: an economic analysis of Kodak’, *Antitrust Bulletin*, volume 39(1), 1994.

<sup>200</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>201</sup> See Section 3.2 of the support study.

<sup>202</sup> See, for instance, M.7421 – *Orange/Jazztel* and M.7555 – *Staples/Office Depot*.

<sup>203</sup> Paragraph 57 of the Notice.

needed regarding the application of this concept. Furthermore, three NCAs noted that it may not be necessary to refer to the concept of chain of substitution anymore<sup>204</sup>.

In specific cases, the Commission has applied the concept of chain of substitution (see footnotes 205 and 206). However, the evaluation results indicate that this must be carefully considered given the risk of widening the markets excessively because a continuity of products or geographic areas does not indicate per se that there is only one relevant market, namely when there are breaks in the chain of substitution. The Notice indicates that, when applying this concept, consideration should be given to the possible interdependence of the prices of products/geographic areas at the extremes of the chain<sup>205</sup>. Moreover, other factors not explicitly mentioned in the Notice have also been considered in certain circumstances, for instance the possibility of price discrimination and the size of the overlap between the different areas/products<sup>206</sup>.

### **Digital markets**

There are no explicit references in the Notice to the phenomena found in digital markets; however, they appear regularly in Commission practice, as also indicated by almost all respondents to the public and NCA consultations. These include multi-sided platforms, zero-monetary price services, treatment of data in market definition and e-commerce<sup>207</sup>.

According to Commission practice, in a **multi-sided context**, relevant markets can be defined: (i) for the platform as a whole, in a way that encompasses all customer groups ('single market approach')<sup>208</sup>; or (ii) for each side, i.e. separate relevant markets defined for different sides of the platform ('multi-markets approach')<sup>209</sup>. The support study concludes that the academic literature<sup>210</sup> and the NCA practice do not appear to endorse the distinction between defining a single market for transaction platforms and defining separate markets on each side for non-transaction platforms. Instead, according to the support study, whether a market should be defined as encompassing all sides of the platform or not depends on the following: platform typology (and, within the typology, the platform's business model, i.e. how the two sides interact), and other factors such as

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<sup>204</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>205</sup> See, for instance, M.5335 – *Lufthansa/SN Airholding* and M.9413 – *Lactalis/Nova Castellis*.

<sup>206</sup> See, for instance, AT.40220 – *Qualcomm* (exclusivity payments) and M.4919 – *Statoilhydro/Conocophillips*.

<sup>207</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>208</sup> For instance, in M.4523 – *Travelport/Worldspan*, the Commission defined a single market for global distribution system services encompassing both the travel services providers' side and the travel agents' side. In M.8124 – *Microsoft/LinkedIn*, the Commission defined a single market for online recruiting services, encompassing both job seekers and recruiters.

<sup>209</sup> For instance, in cases involving advertising-funded search engines or social networks, the Commission defined online advertising services as a relevant market, separate from the markets for services provided to other categories of users (and vice versa). This was the case in M.5727 – *Microsoft/Yahoo Search Business*, M.6281 – *Microsoft/Skype*, M.7217 – *Facebook/WhatsApp*, M.8124 – *Microsoft/LinkedIn*, as well as in AT.39740 – *Google Search (Shopping)* and AT.40099 – *Google Android*.

<sup>210</sup> See also the presentation to the Commission by Professors J-U Franck and M. Peitz on 25 March 2021.

substitution possibilities across the various user-groups (i.e. which other products or services the user sides regard as interchangeable)<sup>211</sup>.

The evaluation results show that the Notice does not make explicit reference to all of the elements that may be taken into account by the Commission<sup>212</sup> and NCAs<sup>213</sup> when defining relevant markets in the case of multi-sided platforms. The elements in question include: network effects and interdependency of demand on both sides (i.e. indirect network effects), pricing structure<sup>214</sup> and pricing strategies, as well as multi- versus single-homing<sup>215</sup>. The evaluation results also highlight the increasing importance of **data** and their effects on market definition, which is currently not explicitly reflected in the Notice<sup>216</sup>.

Commission practice further shows that, although not mentioned in the Notice, **zero monetary prices** are not an impediment to, but an integral part of, a platform's profit maximising strategy. According to the evaluation results, the fact that a product is offered at a zero monetary price does not imply that there is no market for that product, as long as zero monetary prices form part of 'an overarching commercial strategy' of the platform<sup>217</sup>. The position that a market may exist when a product is offered without monetary remuneration by users was taken by the Commission in several cases involving multi-sided platforms<sup>218</sup>. This position was (implicitly) confirmed by the Court of First Instance in *Microsoft* where it found that streaming media players constitute a separate relevant market, even though they were typically provided to consumers free of charge<sup>219</sup>. The support study confirmed that authorities are prepared to acknowledge the existence of relevant markets also in the context of zero monetary prices<sup>220</sup>.

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<sup>211</sup> See Section 3.1.1 of the support study. See also the summary of ECN meetings in Annex 2.2.4.

<sup>212</sup> See, for instance, M.4523 – *Travelport/Worldspan*, AT.39740 – *Google Search (Shopping)* and AT.40099 – *Google Android*. The CJEU also indicated in judgment of 11 September 2014, *Groupement des Cartes Bancaires (CB) v Commission*, C-67/13 P, EU:C:2014:2204, that defining a separate relevant market for one side of a two-sided system should not prevent the interdependencies between the two sides of the market from being taken into account in assessing the existence of a restriction of competition under Article 101(1) TFEU.

<sup>213</sup> See Section 3.1 of the support study.

<sup>214</sup> i.e. the ratio of the prices of the different sides.

<sup>215</sup> Customers are said to single-home when they use a single platform for a specific purpose and to multi-home when they use multiple platforms for the same purpose in parallel.

<sup>216</sup> See Section 3.3 of the support study. See also M.4726 – *Thomson Corporation/Reuters Group*, where the Commission considered several data-related markets as regards financial information and M.4854 – *TomTom/Tele Atlas*, where the Commission defined a market for the provision of digital map databases. In cases like M.4731 – *Google/DoubleClick*, M.7217 – *Facebook/WhatsApp*, M.8124 – *Microsoft/LinkedIn* and AT.39740 – *Google Search (Shopping)*, the Commission analysed the role of data in competition between digital players.

<sup>217</sup> See Cr  mer, J., de Montjoye, Y., and Schweitzer H., *Competition Policy for the Digital Era*, Report for the European Commission, 2019. See also the presentation to the Commission by Professors J-U Franck and M. Peitz on 25 March 2021.

<sup>218</sup> See, for instance, AT.37792 – *Microsoft*, AT.39740 – *Google Search (Shopping)*, AT.40099 – *Google Android*, M.6281 – *Microsoft/Skype*, M.7217 – *Facebook/WhatsApp* and M.8124 – *Microsoft/LinkedIn*.

<sup>219</sup> Judgment of 17 September 2007, *Microsoft Corp. v Commission*, T-201/04, EU:T:2007:289, paragraphs 927–933 and 966–970.

<sup>220</sup> See Section 3.1.4 of the support study.

Finally, in relation to digital markets, although there is no explicit reference to e-commerce in the current Notice, according to the evaluation results, including the support study, the Commission and other NCAs have looked at how to define the relevant product market in **e-commerce** cases on several occasions in both antitrust and merger decisions, in particular as regards the substitutability between online and offline channels<sup>221</sup>.

### **Non-price elements, including innovation**

The evaluation results indicate that the Notice correctly reflects Commission practice on non-price elements as relevant for market definition, both in its product and geographic dimension, and that they can be essential when it comes to assessing product substitutability<sup>222</sup>. However, the results also suggest that the Notice does not explicitly provide specific guidance as regards market definition in markets with a heavy innovation component.

Respondents to the public consultation (including respondents from all groups of stakeholders) consider that the Notice lacks adequate guidance on innovation. According to those respondents, this relates in particular to the definition of markets around key inputs such as innovation capabilities and to the question of whether competition from innovators outside a given product market could exert a significant constraint. The NCAs consulted also indicated that innovation presents a series of challenges in defining markets in innovation-intensive sectors<sup>223</sup>.

The approach to the complexities associated with innovation has been progressively incorporated into the EU competition law *acquis*, including in several merger and antitrust guidelines, such as the Horizontal Merger Guidelines, the Horizontal Cooperation Guidelines<sup>224</sup> and the Technology Transfer Guidelines<sup>225</sup>. For instance, the Horizontal Cooperation Guidelines distinguish between three different levels of assessing R&D agreements: ‘existing product markets’, ‘existing technology markets’ and ‘competition in innovation (R&D efforts)’<sup>226</sup>.

The evaluation results, and in particular the support study<sup>227</sup>, further indicate that competition authorities have mostly followed three main approaches, roughly identified depending on the nature of innovation that characterises the industry in question: (i) where innovation aspects are assessed as part of existing product markets; (ii) where

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<sup>221</sup> See Section 3.4 of the support study. As regards Commission cases, see, for instance, Case AT.40420 – *ZeniMax*, AT.40153 – *Amazon MFN*, M.4611 – *Egmont/Bonnier*, M.7726 – *Coty/Procter & Gamble* beauty business, and M.8394 – *Essilor/Luxottica*.

<sup>222</sup> See paragraphs 2, 7, 25, 29, 36, 44 and 46 of the Notice.

<sup>223</sup> See Summary of the public consultation and Summary of the NCA consultation.

<sup>224</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C11, 14.1.2011 (‘Horizontal Cooperation Guidelines’).

<sup>225</sup> Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014 (‘Technology Transfer Guidelines’).

<sup>226</sup> Horizontal Cooperation Guidelines, at Section 3.2.

<sup>227</sup> See Section 4 of the support study.

innovation aspects are assessed as part of separate technology markets for licensed/traded technologies; and (iii) where innovation aspects are assessed as part of separate innovation spaces or R&D hubs for non-traded innovation results<sup>228</sup>.

### 5.3. Efficiency

**Evaluation questions: Has the Notice led to increased benefits and reduced costs? Is there scope for further simplification and cost reduction?**

The evidence gathered in the evaluation suggests that there appear to be no costs associated with the Notice as compared to a scenario where no guidance would be provided. On the contrary, the Notice generates benefits not only for the Commission's work but also for the stakeholders using it. This is because by clarifying the principles the Commission takes into account when defining markets and the most important elements it uses in that process, the Notice helps companies to reduce costs. These include: (i) costs associated with external legal assistance, and (ii) costs of competition law infringements stemming from an incorrect assessment of their market position (legal fees and fines as well as negative effects of losing investments or changing commercial strategy). There is evidence to suggest that those savings may be significant although they could not be quantified precisely in the evaluation. Furthermore, the Notice generates additional sizeable benefits by helping to meet the need to facilitate competition enforcement and compliance in the internal market, to the benefit of consumers.

Nevertheless, the evaluation results indicate that the Notice's benefits for both stakeholders and the Commission could increase if further guidance, and thus transparency, was provided on certain specific points.

The evaluation assessed whether the Notice has been efficient in achieving its objectives, taking into account the costs and benefits associated with using it. In accordance with the current EU competition law framework, businesses self-assess their position in the relevant market prior to engaging in certain business practices or prior to deciding whether to agree and notify a certain merger. This self-assessment necessarily entails costs for businesses. However, the Notice aims to facilitate this self-assessment by providing guidance on the principles and evidence used by the Commission in market definition. The Notice does not impose any additional obligations on businesses compared to a situation without any guidance in place. This is because the Notice codifies best practices derived from the past practice of the Commission and other leading competition authorities, as well as from guidance provided by the EU Courts, building on established economic principles.

<sup>228</sup> For instance, in M.7275 – *Novartis/GlaxoSmithKline Oncology*, the Commission concluded that the transaction would lead to a reduction of potential competition for innovative cancer treatments regarding overlaps between a marketed product and a pipeline Phase III product, as well as to a reduction of innovation competition regarding overlaps between pipeline products at earlier stages of development, namely in Phase I and Phase II. In M.7932 – *Dow/Dupont*, the Commission also assessed the parties' pipeline projects both in relation to potential competition and innovation competition. See also M.6278 – *Takeda/Nycomed* and M.8084 – *Bayer/Monsanto*.

In assessing whether the Notice has been efficient in achieving its objectives, the following elements were analysed: (i) the costs and benefits associated with the Notice compared to what would have happened if it did not exist; and (ii) the potential for improving the Notice to further increase the associated benefits.

First, the evaluation results show that the Notice has been an efficient instrument because **its benefits have exceeded its costs**.

In the first place, the results indicate that there are **no costs associated with using the Notice as compared to a scenario where no guidance was provided**. As shown in Sections 5.1 and 5.2 above, the evaluation results suggest that the Notice remains relevant and that it has overall been effective in providing correct, comprehensive and clear guidance. The results indicate that, even if the Notice is not as comprehensive today as it was in 1997 and even if it could be made clearer in some respects (see Section 5.2 on effectiveness), the baseline scenario of having no Notice would not improve this situation. On the contrary, in the absence of a notice providing guidance, stakeholders would have to anticipate what type of analysis the Commission was going to carry out and what evidence it would rely on based on various sources, including previous practice, court guidance and economic principles, which would require extra resources from those stakeholders. This finding is confirmed by the fact that the NCAs and stakeholders replying to the public consultation consider the Notice's costs to be limited or even zero<sup>229</sup>.

In the second place, and in any event, **respondents to the public consultation considered that there are significant benefits associated with the Notice**. Although they were not able to quantify the benefits, respondents stated that the Notice improves legal certainty, thereby helping companies to reduce costs. Such costs include: (i) costs associated with external legal assistance (due to the Notice at least part of the assessment can be carried out in-house); and (ii) costs of competition law infringements stemming from an incorrect assessment of their market position (including legal fees and fines, and the negative effects of making investments or adopting a commercial strategy that later need to be changed)<sup>230</sup>.

One business respondent indicated that 'Without the Notice, companies would face greater uncertainty when taking commercial decisions and expend additional time and resources self-assessing their behaviour, while facing the risk of longer investigations and inconsistent decisions by the Commission's case teams'<sup>231</sup>. Another business respondent explained that 'A clear guidance on how to define markets helps to identify a business perimeter and the forces to take into account within. It allows companies to make strategic business decisions, such as acquisitions and developing a new activity, with more legal certainty more rapidly and more efficiently. Quantifying the magnitude of the net benefits would need to be assessed on a case-by-case basis as all strategic

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<sup>229</sup> See Summary of the public consultation and Summary of NCAs consultation.

<sup>230</sup> See Summary of the public consultation.

<sup>231</sup> Reply of a business organisation to question IV.1.1 of the public consultation questionnaire.



decisions do not rely in the same way on the legal analysis’<sup>232</sup>. One business respondent added that ‘Competition law compliance would be significantly more costly and inefficient (higher costs, less legal certainty, longer delays, etc.) if the Commission gave no guidance on its approach to market definition’<sup>233</sup>.

As explained in Section 2.5, in both merger and antitrust matters, having no notice would make it harder for companies to determine how the Commission would likely define the relevant market(s) and what elements it would take into account. This would involve dedicating additional internal resources to researching a large number of Commission decisions and EU Court judgments and possibly also literature on market definition. Companies would also likely spend more resources on consultancy from law firms and economic consultants to help them find the most relevant decisions and interpret them, resulting in additional costs but also in substantial delays.

There is, however, scarce evidence of the amount of administrative costs incurred by businesses in the context of competition enforcement to which these savings would apply. Moreover, the costs related to defining the relevant markets are only one part of the total costs incurred by businesses in this context, which are impossible to disentangle from the total. Nevertheless, the total costs incurred by undertakings involved in a competition law investigation are significant. A PriceWaterhouseCoopers (2003) study<sup>234</sup> that examined data for 59 transactions identified average external merger review costs (including legal fees, other advisory fees and translation and other miscellaneous costs) per transaction of EUR 3.3 million and average external costs per jurisdiction of EUR 540 000<sup>235</sup>. Updating these costs to current prices gives figures of EUR 4.3 million and EUR 700 000 respectively. The savings per undertaking associated with an increase in the level of transparency as a result of the Notice should therefore be significant.

In the third place, **NCAAs also considered that the Notice generates several benefits**. Among the benefits, NCAAs noted that the Notice provides guidance and transparency to companies and their advisers, which increases legal certainty and avoids the need to explain the basic principles of market definition in every case, thereby allowing the analysis to focus on the more important aspects of market definition. The Notice also provides a reference tool for NCAAs that do not have their own market definition guidelines, as well as to courts reviewing competition cases. The NCAAs further mentioned that the Notice plays an important role in ensuring consistency across the ECN – including with NCAAs that have issued their own guidance on market definition<sup>236</sup>.

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<sup>232</sup> Reply of a business organisation to question IV.1.1 of the public consultation questionnaire.

<sup>233</sup> Reply of business to question IV.1.1 of the public consultation questionnaire.

<sup>234</sup> PricewaterhouseCoopers, ‘A tax on mergers? Surveying the costs to business of multijurisdictional merger review’, 2003, commissioned by International Bar Association and American Bar Association, [http://www.pwcglobal.com/uk/eng/about/svcs/vs/pwc\\_mergers.pdf](http://www.pwcglobal.com/uk/eng/about/svcs/vs/pwc_mergers.pdf).

<sup>235</sup> For the 28 transactions subject only to initial review, the external costs per transaction averaged EUR 545 000. The average external cost attributable to in-depth reviews were, as expected, much higher, at EUR 5.438 million per transaction.

<sup>236</sup> See Summary of the NCA consultation.

In the fourth place, and as explained in Section 5.1, given that the Notice helps facilitate competition enforcement and compliance in the internal market to the benefit of consumers, a share of those sizeable benefits would be attributable to the Notice.

Second, in relation to the **possible scope for further benefits**, the results of the evaluation showed that there is scope to improve the level of transparency provided by the Notice in certain specific points. The Commission services consider that such improvements could increase the ease with which the Notice can be applied to a wide range of cases and could make it better suited to assess current market dynamics (see Section 5.2 on effectiveness).

The results of the evaluation indicate that the Notice should continue to be based on the right balance between: (i) setting out established broad principles that are sufficiently general and apply to different market contexts; and (ii) providing further guidance on specific issues. In fact, the respondents to the public consultation and NCAs overall agreed that although the principles expressed in the Notice do not need to be changed, there are trends and developments that have affected its application. This is the case, for example, for digitisation (and its different aspects, including multi-sided platforms, data, ‘ecosystems’) and innovation-driven markets, as well as the quantitative tools applied<sup>237</sup>. Furthermore, in terms of technical improvements, respondents to the public consultation and NCAs suggested using more references to Commission decisions, EU Court judgments and hypothetical examples in the Notice to enhance its user-friendliness.

This indicates that the Notice’s benefits could be higher and the costs of self-assessment and cooperation lower if the Notice were to be updated on points where it might not be entirely comprehensive or clear. Any such potential update should, of course, be done in a way that guarantees that the Notice remains future-proof as much as possible, by setting out and illustrating broad principles that are applicable across cases rather than providing just a repertory of case-law and practice.

#### **5.4. Coherence**

**Evaluation questions: How well have the different components of the Notice operated together? Is the Notice in line with the judgments of the EU Courts and changes in the legal competition framework, and with other instruments of EU competition policy and other EU policies?**

The evidence gathered in the evaluation suggests that the different components of the Notice operate well together and that they are generally in line with other antitrust and merger guidance, with the main principles set out in the case law and with 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

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<sup>237</sup> See Summary of the public consultation.

updated by reference to the merger control standard of ‘significant impediment to effective competition’ introduced by the 2004 EU Merger Regulation. The evaluation also highlighted the need to ensure consistency between a potential review of the Notice and the parallel reviews of some of the antitrust guidance documents.

The evaluation assessed whether the Notice sets out a coherent approach, both internally – looking at how the various components of the Notice operate together to achieve its objectives – and externally – looking at the Notice in the wider context in which it operates. When looking at the external coherence of the Notice, and linked to the fact that the Notice is applied across EU competition law instruments, the Notice’s coherence was assessed along four main areas: consistency with other antitrust laws and guidance, consistency with other merger laws and guidance, consistency with EU case-law and, finally, consistency with EU policies other than competition law.

The evidence gathered in the evaluation suggests that the different components of the Notice operate well together and that they are generally in line with other antitrust and merger guidance, with the main principles set out in the case-law and with other EU policies.

First, ahead of analysing specific aspects of the Notice’s coherence, the Commission services note that **NCA’s and the respondents to the public consultations showed strong agreement on the Notice’s internal and external coherence**. Almost all NCAs considered that the Notice is internally and externally coherent<sup>238</sup>. Respondents in the public consultation also expressed very positive views, although not all respondents were in a position to reply to all questions, potentially due to the technical nature of the questions asked<sup>239</sup>. In providing their positive comments, a number of both public and NCA respondents flagged that the high coherence of the Notice and its ability to stay internally and externally coherent 23 years after its initial adoption was due to a large degree to its focus on broad principles.

Second, concerning the **Notice’s internal coherence**, the evaluation results suggest that the different components of the Notice work well together without apparent contradictions. Nonetheless, as already highlighted in Section 5.2 on effectiveness, the evaluation results indicate that some relationships within the Notice are not clearly explained. For example, the evaluation results suggest that the relationship and differences between demand-side substitutability, supply-side substitutability and potential competition lack clarity in part. In this respect, it transpires from both the public and the NCA consultations that whereas those three elements are seemingly presented as equally ranked ‘three main sources of constraints’ in paragraph 13 of the Notice, other parts of the Notice and the Commission’s practice seem to give higher importance to demand-side elements. The role of the SSNIP in the Notice was also flagged by some respondents as not being fully coherent at times and some respondents considered that excessive importance is given in the Notice to the quantitative test underlying the SSNIP

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<sup>238</sup> See Summary of the NCA consultation.

<sup>239</sup> See Summary of the public consultation.

methodology, especially when compared with the Commission's decisional practice. Individual respondents in both consultations (NCA and public consultation) also called for more clarity about the differences and the role of market definition in antitrust and merger assessments in the different parts of the Notice, and about the need to clarify whether a market definition analysis is always needed. This latter argument came up in an especially prominent manner in the consultations with respect to 'by object' cases under Article 101 TFEU<sup>240</sup>. Individual respondents to both consultations also pointed out that in their view, the delineation between the 'evidence', 'process' and 'additional considerations' sections of the Notice should be rethought.

Third, the evaluation also shows similar support among stakeholders of all respondent groups as regards the Notice's **consistency with other instruments providing guidance on EU antitrust rules** (the Horizontal and Vertical Block Exemption Regulations and other instruments based on Articles 101 and 102 TFEU). As with the previously described aspects of coherence, there was near-consensus among NCAs on this issue and a large majority of respondents to the public consultation expressing a view agreed. One issue mentioned several times, however, concerned the consistency between the Notice and the Vertical Block Exemption Regulation and its accompanying Guidelines<sup>241</sup> (currently also under review<sup>242</sup>), and more specifically the way in which both documents treated terms such as 'buyer', 'customer' or 'consumer'. Furthermore, the staff working document of the Vertical Block Exemption Regulation presents issues related to:

- market definition, including the diverging interpretations of the relevant markets in vertical relationships, (page 61);
- perceived inconsistencies between the various block exemptions as regards the definition of potential competitors (page 73) and the concept of potential competitor set out in paragraph 27 of the Vertical Guidelines (page 78); and
- the roundtable discussions on whether the EU stipulations on market definition should be made binding on NCAs to avoid markets being defined too narrowly and the possibility of divergent market definitions by different authorities (page 137).

Concerning the review of the horizontal rules<sup>243</sup>, respondents generally mentioned that all references to market definition in the Horizontal Cooperation Guidelines could be included in the Notice rather than in two different documents. However, some respondents, including some from the business community, considered that specific guidance outside the Notice could also be useful, for example on digital phenomena.

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<sup>240</sup> By-object cases are those where it is unnecessary to look at the effects of the conduct on the market.

<sup>241</sup> Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. OJ L 102, 23.4.2010, pp. 1–7 and Commission notice – Guidelines on Vertical Restraints, SEC/2010/0411 final ('Vertical Block Exemption Regulation and its accompanying Guidelines').

<sup>242</sup> [Commission staff working document, Evaluation of the Vertical Block Exemption Regulation, SWD\(2020\)173final, 8 September 2020.](#)

<sup>243</sup> [Commission staff working document, Evaluation of the Horizontal Block Exemption Regulations, SWD\(2021\)103 final, 6 May 2021.](#)

Fourth, the evaluation showed also that the Notice is generally **consistent with the EU Merger Regulation and with other instruments providing guidance on EU merger control rules** (in particular the Horizontal Merger Guidelines and the Non-Horizontal Merger Guidelines<sup>244</sup>). While support within the public consultation remained at similar levels as for the previous point on consistency with antitrust rules, the number of NCAs showing their disagreement about the Notice's consistency with merger control rules was slightly larger. The evaluation showed that respondents to both consultations seemed to agree that the Notice does not reflect the substantive test of 'significant impediment to effective competition' codified by the 2004 EU Merger Regulation and the references to the dominance test in paragraph 10 of the Notice are thus out dated. Some respondents from the business community also argued that the concept of potential competition in the Notice is not fully aligned with that expressed in the Horizontal Merger Guidelines.

Fifth, the evaluation showed that the Notice is generally consistent **with the case-law of the General Court and the CJEU and with Commission practice**. While no apparent contradictions were flagged, the evaluation indicated that the Notice does not entirely reflect court rulings over the past 23 years, or market developments and the subsequent evolutions in the Commission's decisional practice. These include, according to the evaluation results, the role of market definition as a means but not an end in itself<sup>245</sup> and the fact that market shares provide only a first indication of market power<sup>246</sup>. The public consultations feeding into the evaluation also brought forward topics where recent case-law of the EU Courts is not reflected in the Notice. Examples mentioned<sup>247</sup> included the more limited importance of market shares in fast-moving markets<sup>248</sup>, the Commission's discretion in the assessment of evidence of economic nature<sup>249</sup> and the factors playing a role in the assessment of substitutability<sup>250</sup>.

Sixth, the evaluation also showed that **the Notice is consistent with other Commission policies**, with the telecommunications framework (including the concept of 'significant market power')<sup>251</sup> being flagged as one key area where consistency should be ensured.

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<sup>244</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265 of 18/10/2008 ('Non-Horizontal Merger Guidelines').

<sup>245</sup> See, for example, judgment of 6 July 2000, *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, judgment of 22 March 2000, *the Coca-Cola Company and Coca-Cola Enterprises Inc. v Commission*, T-125/97, EU:T:2000:84, and judgment of 23 May 2019, *KPN BV v Commission*, T-370/17, EU:T:2019:354 ('T-370/17, *KPN BV v Commission*').

<sup>246</sup> Judgment of 28 May 2020, *CK Telecoms UK Investments Ltd v Commission*, T-399/16, EU:T:2020:217.

<sup>247</sup> A more detailed list of the case-law mentioned in the public consultation can be found in the Summary of the open public consultation.

<sup>248</sup> Judgment of 11 December 2013, *Cisco Systems, Inc. and Messagenet SpA v Commission*, T-79/12, EU:T:2013:635.

<sup>249</sup> See, for example, T-370/17, *KPN BV v Commission*, paragraphs 58–9, and the cases cited therein.

<sup>250</sup> C-307/18, *Generics (UK) and Others v CMA*.

<sup>251</sup> See, for example, Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018, p. 36–214. According its Article 63(2), 'an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.'

The evaluation also showed that the Notice is relevant for the Common Market Organisation Regulation applicable in the agricultural sector<sup>252</sup> to the extent that the latter quotes the Notice, thus ensuring consistency between the two, and that the Geo-Blocking and P2B Regulations<sup>253</sup> also have a certain connection with the Notice, although no inconsistency was identified. The evaluation further showed that consistency should also be ensured in particular with the reviews of the Block Exemptions Regulations for horizontal and vertical agreements (ongoing), as well as with the proposal for a Digital Markets Act<sup>254</sup> (currently following the ordinary legislative procedure), even if, as explained above, the definition of relevant market is not foreseen in the current proposal for a Digital Markets Act, which is an *ex ante* regulatory act based on internal market principles. Finally, the results of the evaluation indicate that the Notice is also consistent with broader EU policies: as an essential element of EU competition policy, market definition (and the Notice) is inherently linked to a well-functioning single market and to all benefits and policies linked to it. Furthermore, the Commission's examination of competition policy's contribution to the EU Green Deal has highlighted the importance of taking into account consumer preferences for environmentally friendly products, services and/or technologies in market definition where relevant, in particular as a factor of product differentiation. Similarly, the evaluation has highlighted the importance of making sure that the Notice is fit for purpose in an increasingly digital economy to support competition enforcement in increasingly digital markets – in line with the Commission's Digital Agenda.

### 5.5. EU added value

**Evaluation question: To what extent has the Notice at EU level provided clear added value, for instance by contributing to a consistent approach to market definition by the Commission and the EU national competition authorities?**

The evaluation results suggest that the Notice has added value by helping to ensure a consistent approach to EU competition rules among the NCAs and the Commission and

<sup>252</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L 347, 20.12.2013, p. 671–854. See, for example, Articles 207 and 208 relating to the concepts of 'relevant market' and 'dominant position' respectively.

<sup>253</sup> Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I, 2.3.2018, p. 1–15, and Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79. Both Regulations seek to realise the full potential of the digital single market and contribute respectively to the prevention of unjustified geo-blocking and to increasing transparency, fairness and effective redress possibilities for business users in their use of online intermediation services.

<sup>254</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector, COM/2020/842 final ('Digital Markets Act').

by offering a common point of reference for NCAs also in the interpretation of national competition laws.

The evaluation results also show that the added value would be higher if the Notice were easier to use. Suggestions to improve it include adding examples or references to the case-law underlying its statements or providing further guidance on market definition issues in national and regional markets which are often relevant for NCAs.

Article 3 of the TFEU includes ‘establishing of the competition rules necessary for the functioning of the internal market’ as an exclusive EU competence, acknowledging the value of a common EU competition policy for the internal market and for the benefit of EU citizens. That notwithstanding, and as explained in Section 5.1, the NCAs and national courts apply Articles 101 and 102 TFEU alongside the Commission. Moreover, while NCAs cannot apply the EU Merger Regulation, they have their own merger control systems, many of which are similar to that applicable under the EU Merger Regulation.

The evaluation exercise aimed at assessing whether the Notice (i) has added value at the EU level in the assessment of relevant product and geographic markets when applying EU competition law (including application by NCAs) and (ii) has helped align the definition of the relevant markets by NCAs and the Commission.

In relation to the first question, the evaluation indicated that the Notice is regarded as having substantial added value both for enforcers (NCAs)<sup>255</sup> and for businesses and other categories of stakeholders<sup>256</sup>. In this respect, the evaluation results show that the existence of different merger control regimes or different authorities enforcing Articles 101 and 102 TFEU entails the risk of divergent interpretation of the same or similar legal concepts. Examples of such divergences in market definition have, for example, been identified by the evaluation of the Vertical Block Exemption Regulation<sup>257</sup> and also by the support study accompanying this staff working document.

While those instances are not widespread and mainly pertain to market definition questions in relation to new business models or changing business environments, all respondents saw the Notice as a useful starting point from which questions of market definition could be faced and consider that such divergences would likely increase in the absence of a Notice. In particular, the Notice’s broad nature was regarded as an asset in that it enabled it to remain (mostly) up to date and overall accessible to different groups of stakeholders not sharing a common field of specialisation. In the words of a business stakeholder: ‘The notice as it is currently drafted avoids the pitfall often blamed on new legal texts for focusing on specific cases, unnecessarily complicating the rules and making them harder to understand. Completing and adapting the Notice to the new

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<sup>255</sup> See Summary of the NCA consultation.

<sup>256</sup> See Summary of the public consultation.

<sup>257</sup> [Commission staff working document, Evaluation of the Vertical Block Exemption Regulation, SWD\(2020\)173final, 8 September 2020](#), at page 61.

challenges faced by many market[s] with the digitalisation and globalisation should not lead to a loss of this quality<sup>258</sup>.

Having said this, some NCAs and respondents to the public consultation also suggested potential ways in which the Notice could further boost its added value. This included the possible addition of examples and references to case-law. A number of NCAs also suggested paying more attention to, and giving more explanations of, regional and national markets.

Concerning the second question, the evaluation results indicate that the Notice has for the most part helped align the NCAs' and Commission's definitions of the relevant markets and that NCAs and the Commission have generally used the Notice in a consistent manner when enforcing EU competition rules. Three respondents to the public consultation who disagreed with this statement found that market definitions were not always aligned across Member States or with the Commission, flagging the risk of legal uncertainty that this could entail.

Finally, the evaluation results also showed that the Notice further contributed to the alignment of national competition laws by influencing the way in which markets are defined in the application of national competition laws. This alignment – flagged by the stakeholders replying to the public consultation<sup>259</sup> and also by the NCAs<sup>260</sup> – seems to have taken place by implementing what stakeholders have called a 'harmonised methodology'. Moreover, during the consultations and meetings held as part of the evaluation, NCAs themselves confirmed this alignment and indicated that they often consult the Notice for national proceedings and quote it in their respective decisions<sup>261</sup> or internal procedural documents<sup>262</sup>. This alignment could be regarded as a further positive effect insofar as it reduces regulatory fragmentation along national borders and provides businesses with a series of common principles, many of which can be used concerning proceedings on the basis of both EU and national competition laws.

## 6. CONCLUSIONS

The purpose of the evaluation was to assess the functioning of the Notice 23 years after its publication, including an assessment of market developments and evolutions in best practices in market definition.

Overall, the evidence gathered in the evaluation suggests that the Notice is a very useful instrument that remains highly relevant. The Notice facilitates competition enforcement and compliance in the EU by providing transparency on an important first step in many

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<sup>258</sup> Reply of a business organisation to question VI.1.1 of the public consultation questionnaire.

<sup>259</sup> See Summary of the public consultation.

<sup>260</sup> See Summary of the NCA consultation.

<sup>261</sup> See, for example, point 270 of the French NCA's decision of 19 December 2019 in relation to the implementation of anticompetitive behaviour in the sector of online search advertising, available at [https://www.autoritedelaconcurrence.fr/sites/default/files/integral\\_texts/2020-02/19d26.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-02/19d26.pdf).

<sup>262</sup> See, for example, the Spanish NCA's 'Methodology for the preparation of market studies', at point 127. Available at <https://www.cnmc.es/file/126383/download>.



of the Commission's competition assessments and by allowing companies to better anticipate whether the Commission may raise competition concerns. The evaluation results also show, however, that the Notice does not fully reflect developments in best practices in market definition that have taken place in the period since its inception.

More specifically, the evaluation results suggest that while the Notice's objectives remain highly relevant, the Notice is effective in reaching its objectives in many, but not all respects. Furthermore, the evaluation results show that the Notice pursues its objectives efficiently and coherently, and that it provides EU added value. 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. It is one of the goals of the Union, and 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 very relevant when it comes to meeting those needs and in some respects even more important today than in 1997. First, this is due to the sustained need for the Commission to carry out market definition assessments. Second, the Notice's importance is also illustrated by the frequent use that the Commission, the EU Courts, NCAs and stakeholders make of it in practice. Third, the Notice today satisfies more needs than when adopted in 1997, for example as a result of the antitrust self-assessment system in place since 2004 and the use of market share thresholds in the antitrust and merger systems.

## **Effectiveness**

The evaluation results indicate that the Notice is effective in providing guidance and transparency to stakeholders in many, but not necessarily in all respects. Three main cross-cutting conclusions deserve highlighting.

First, on key issues, the Notice continues to provide correct, comprehensive and clear guidance on market definition, in particular by adequately summarising best practices in market definition as derived from EU case-law, from Commission competition cases, 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 parts in judgments of the EU Courts. The Commission's market definitions continue to be guided by the 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 reviews on a broad basis of evidence. This further 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 also suggest that there are areas where the Notice might not be fully up to date, including evolutions set out in EU case-law. For instance, 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 difference between antitrust and merger assessments and the possibility to define different markets for the same economic activity more in general;
- the role of market definition in differentiated markets;
- the practice of leaving market definitions open;
- the precedent value of market definitions;
- the temporal dimension of market definition;
- the use and purpose of the SSNIP test in different market constellations;
- certain issues concerning supply substitutability;
- the assessment of market definitions in rapidly evolving markets;
- asymmetric constraints;
- the assessment of geographic markets in conditions of globalisation and import competition, including clarifications about global market definitions;
- quantitative techniques;
- the role of trade flows;
- the assessment of price differences in geographic market definition;
- the assessment of price discrimination;
- the use of companies' internal documents as evidence in market definition;
- the calculation of market shares;
- aftermarkets and clusters;
- chains of substitution; and
- non-price competition, including innovation.

Third, the evaluation results indicate that while the principles of market definition remain unchanged (as outlined earlier in this section) their application in digital contexts can lead to additional complexities that may not be fully addressed in the Notice. These are linked, among others, to: (i) defining markets for multi-sided platforms, in particular where services are supplied at zero monetary price; (ii) defining markets for 'ecosystems' or for data; or (iii) assessing online vs offline competition. Digitisation may also lead to new barriers to entry and switching costs, including due to the role of data and data portability, interoperability, privacy considerations, networks effects or single-/multi-homing. Digitisation may also increase the need to reflect non-price considerations in substitution assessments. The evaluation results also show, however, that not all of the market definition issues arising as a result of digitalisation have settled into best practices, but rather that practices are likely to evolve further in the future – which may make it challenging to provide exhaustive and future-proof guidance on all of the issues in an updated Notice. These results further highlight that any potential update to the Notice should reflect principles rather than specific market definitions; in other words, to go beyond having a Notice solely built as a compilation of case-law and case practice.

## **Efficiency**

The evidence gathered in the evaluation suggests that there appear to be no costs associated with the Notice as compared to a scenario where no guidance would be provided. On the contrary, the Notice generates benefits not only for the Commission's work but also for the stakeholders using it. This is because, by clarifying the principles the Commission takes into account when defining markets and the most important elements used by the Commission in that process, the Notice helps companies to reduce costs, including (i) costs associated with external legal assistance, and (ii) costs of competition law infringements stemming from an incorrect assessment of their market position (legal fees and fines as well as negative effects of losing investments or changing commercial strategy). There is evidence to suggest that those savings may be significant although they could not be quantified precisely in the evaluation. Nevertheless, the results of the evaluation also indicate that the benefits of the Notice for both stakeholders and the Commission could increase if the Notice was updated in relation to certain specific points.

## **Coherence**

The evidence gathered in the evaluation suggests that the different components of the Notice operate well together and that they are generally in line with other antitrust and merger 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.

The evaluation also highlighted the need to ensure coherence in the future between a potential review of the Notice and the parallel reviews of some of the antitrust guidance documents.

## **EU added value**

The evaluation suggests that the Notice has had additional added value by helping ensure a consistent approach to EU competition rules among the NCAs and the Commission, and by offering a common point of reference for NCAs, including in the interpretation of national competition laws. The results of the evaluation also show that the added value could be higher if the Notice was 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.

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.

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## ANNEX 1: PROCEDURAL INFORMATION

### 1.1. Lead DG, Decide Planning/CWP references

DG Competition is the lead DG for the evaluation of the Notice. The evaluation was registered in the Decide Planning with the reference PLAN/2020/7511.

### 1.2. Organisation and timing

The evaluation roadmap was published on 3 April 2020. The evaluation roadmap set out the background of the evaluation as well as its purpose and scope. The evaluation roadmap also presented the consultation activities to be conducted by the Commission services in the context of the evaluation (notably a public consultation, exchanges with European and foreign NCAs and possible discussions with stakeholders). The evaluation roadmap also explained the methodology that would be followed to gather relevant information for the purpose of the evaluation. This includes a review of the case practice of the Commission and of NCAs, an analysis of the case-law of the EU Courts on market definition, and a review of latest economic thinking on market definition principles and practice.

The evaluation was carried out in close cooperation with other interested Commission services. The inter-service steering group ('ISSG') set up for that purpose comprises representatives of the Directorates-General AGRI, CLIMA, CNECT, DEFIS, ECFIN, EMPL, ENER, ENV, FISMA, GROW, HOME, JUST, MARE, MOVE, RTD, SANTE and TRADE, as well as the Secretariat-General and the Legal Service, which are associated by default with any such initiative. The ISSG was consulted on the evaluation roadmap, the consultation strategy and the online evaluation questionnaire aimed at collecting the views of the stakeholders in the public consultation. The ISSG also reviewed the summary of the results of the public consultation and was consulted on the tender specifications of the evaluation study. Finally, the ISSG was consulted on the draft SWD conclusions.

The different milestones of the evaluation phase are reflected in the table below:

Timing	Step
30 March 2020	Launch of the evaluation in the Commission's Decide planning
3 April 2020	Publication of the evaluation roadmap (4-week feedback period)
30 April 2020	ISSG meeting to introduce the evaluation: objectives, timeline and next steps
19 May 2020	ISSG meeting to discuss the draft questionnaire for the public consultation and the research work streams of the evaluation
26 June 2020	Publication of the online evaluation questionnaire (14-week consultation period)

8 September 2020	Signature of the contract for the evaluation support study
4 December 2020	ISSG meeting to present an overview of the feedback received in the public consultation and in the NCA consultation
18 December 2020	Publication of the summaries of the open public consultation and the consultation with NCAs Publication of the contributions received in the context of the open public consultation
15 January 2021	Upstream meeting with the Regulatory Scrutiny Board ('RSB')
23 March 2021	ISSG meeting to discuss the draft staff working document
5 May 2021	Consultation of the RSB in written procedure
7 May 2021	Positive opinion by the RSB with comments
19 May 2021	ISSG meeting to discuss implementation of RSB comments
4 June 2021	Publication of the external support study
17 June 2021	ISSG Meeting to discuss the final draft staff working document

### 1.3. External evaluation support study

As explained in Section 4.1, DG Competition commissioned a support study in order to support it in its analysis. Specifically, the purpose of the support study was to gather qualitative information on the basis of three tasks: (i) review of decisions by NCAs, judgments by national courts and guidelines issued by NCAs in the EEA; (ii) review of selected decisions, judgments by national courts and guidelines issued by competition authorities outside the EEA (namely Australia, Brazil, Canada, Japan, South Africa, South Korea, the UK and the US); and (iii) review of the legal and economic literature. Most of the materials analysed under (i) were gathered by DG Competition via the NCA consultation.

The evaluation study was tendered on the basis of DG Competition's framework contract for evaluations and impact assessments in the field of antitrust. The framework contract is based on the cascade procedure, according to which a request for an offer for a specific contract is made to the first placed tenderer, who can then decide to submit an offer or to reject the request. In the latter case, the request is passed on to the second placed tenderer. The framework contract was signed in early September 2020 with two of the three tenderers who had participated in the tender procedure. The first placed tenderer was a consortium led by VVA Brussels (an Italian-based business consultancy), which includes Grimaldi Studio Legale, LE Europe, Österreichisches Institut für Wirtschaftsforschung and WIK-Consult. The second placed tenderer was a consortium

led by BKP Economic Advisors, which includes Analysys Mason, Deutsches Institut für Wirtschaftsforschung and Learlab.

The first placed tenderer under the framework contract was invited to submit an offer for the evaluation study on 9 July 2020. On the basis of this offer, DG Competition signed the contract for the evaluation study with the consortium led by VVA on 8 September 2020. Due to special circumstances, the contractor was granted an extension of eight working days to deliver the final report of the study, initially scheduled for a 20-week duration. The contractor submitted the interim report of the evaluation study to the Commission on 12 November 2020 and the final report on 9 February 2021; after some further revision, the final report was approved on 21 May 2021.

#### **1.4. Consultation of the Regulatory Scrutiny Board**

The outcome of the RSB consultation was a positive opinion, issued on 7 May 2021. The following table provides information on how the comments made by the RSB were addressed in this staff working document:

RSB comments	Action taken
<p>The report should clarify in how far case law and case practice determine the content of the Notice. It should show how much discretion the Commission has, within the boundaries of the guidance provided by the Court, to shape the content and the level of detail of the Notice. In so doing, it should specify the trade-offs and risks of (too) detailed guidance.</p>	<p>Sections 5.2 and 5.3, as well as Section 4 on methodology, have been amended to address the Board's comments in this respect. The report now makes clear that the CJEU remains the ultimate judicial authority of the EU as regards the interpretation and application of EU competition law and that the Notice is without prejudice to the Court's interpretation of competition law. At the same time, the report now explains that the Notice goes beyond providing a repertory of case-law and that the Commission has a certain degree of discretion as to how it shapes the content of the Notice and its level of detail by codifying best practices as derived from EU case-law, from the practice of the Commission and other leading competition authorities and from academic research.</p>
<p>The report should further develop the baseline by describing how stakeholders would act in the absence of the Notice and the costs and risks they would face. It should also describe how the market definition practice by national competition authorities could diverge more without the Notice.</p>	<p>The description of the baseline scenario under Section 2.5 now provides more detailed explanations about what stakeholders would have to do in the absence of the Notice. Sections 2.3, 5.1, 5.3 and 5.5 also reflect the types of costs and problems faced by the different stakeholders were the Notice not to exist.</p> <p>Furthermore, Section 5.5 has been amended to better reflect, first, the type of divergences that could exist in the absence of a Notice and, second, the way in which the current Notice is helping achieve a common approach to market definition.</p>

<p>The report should assess how future-proof the Notice is in the context of increased competition in global markets and the evolving technological and digital transformation of the economy. It should also explore the appropriate balance between broader principles and case law and practice driven guidance.</p>	<p>Sections 5.1 and 5.2 now discuss the way in which the Notice can remain future-proof in an evolving economic context. Section 5.3 also provides additional ideas on how a revised Notice could continue to be future proof.</p> <p>Section 2.3 dealing with the Notice's intervention logic now also presents an explanation of the trade-offs to be considered when including broad principles or case-specific guidance in the Notice.</p>
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In addition to the comments set out above, the RSB provided some technical comments, which were taken into account when finalising the staff working document.

### 1.5. Other evidence, sources and quality

As explained in Section 4.1, for the purposes of the evaluation, the Commission services assessed the Commission's own case practice as well as the judgments of the EU Courts. For this assessment, the Commission services focused on decisions and rulings issued after the adoption of the current Notice in 1997. However, the research also took into account decisions and rulings preceding that date. While both antitrust and merger legislation underwent substantial changes during the period in question, with the adoption of Council Regulation 1/2003 and the Merger Regulation, those changes did not have any effect on the robustness of the research. This was because the purpose and goals of market definition remained unchanged.

The Commission services also reviewed academic books, articles, papers and summaries of roundtables on the topic of market definition held in the context of international forums such as the OECD and the ICN. Relevant materials also included pre-existing materials on different competition law topics prepared or commissioned by the Commission or its departments and that have been presented in Section 4.1, such as the 2016 study on geographic market definition by Professors Lyons and Fletcher, the 2017 e-commerce sector inquiry and the 2019 special advisor report on *Shaping competition policy in the era of digitisation*.

The Commission services also:

- carried out extensive research into best practices in market definition;
- analysed decisions and notices on market definition by all EEA NCAs and by EEA national courts;
- considered non-EEA approaches to market definition based on exchanges with competition enforcers in Australia, Brazil, Canada, Japan, South Africa, South Korea, the UK and the US.

The analysis of the EEA and non-EEA materials was also furthered by the support study presented in the previous section. While the Commission services cannot ensure that all relevant cases and judgments have been communicated to it by the consulted authorities, all authorities contacted agreed to take part in the exercise – at times with extensive



teams made up of experts from their different teams. This illustrates the importance given to the project by the Commission's counterparts and ensured the robustness of the results.

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## **ANNEX 2: STAKEHOLDER CONSULTATION**

### **2.1. The stakeholder engagement strategy**

This Annex presents the results of the consultation activities carried out in the context of the Notice's evaluation.

As presented in the evaluation roadmap, the objective of the stakeholder consultation was to deliver an in-depth evaluation of high quality on whether the Notice fulfilled its objectives of providing guidance and transparency and whether there was a need to update it in light of developments since 1997.

The stakeholder consultations were carried out on a broad basis in order to gather the views from a diverse group of stakeholders. Stakeholders whose views fed into the present staff working document included:

1. businesses and their associations, including SMEs;
2. trade associations and labour unions;
3. consumers, in particular through consumer organisations;
4. national authorities, including national ministries and regional bodies (given the technical aspect of the consultation, competition law enforcers in the EEA and elsewhere were explicitly targeted);
5. international organisations; and
6. the general public, in particular through the open public consultations.

### **2.2. Consultation activities**

#### **2.2.1. Consultation on the evaluation roadmap**

The evaluation roadmap was open for feedback between 3 April and 15 May 2020. During that period, the Commission services received 44 formal submissions on the published roadmap.

In their replies, respondents overwhelmingly welcomed the evaluation of the Notice and considered market definition as relevant. Respondents considered that there was a need to review the Notice not as a means of criticism (no respondent explicitly advocated discontinuing the Notice or market definition as an exercise) but rather to bring the review up to the current economic, legal and societal standards.

Directly related to this need to modernise the Notice, a majority of respondents called for it to better deal with digitisation and its distinguishing traits. In this respect, several respondents argued that the dynamic nature of the digital economy may require a more nuanced way to draw the boundaries of relevant markets, while paying greater attention to the competitive assessment. Closely linked to this need to nuance the use of market definition, respondents also requested better explanation of the fact that market definition is a means – and not an end in itself – that should help preserve legal certainty.

The importance of consumer welfare and the relative weight of pricing also featured high on respondents' agendas: numerous respondents cited the importance of better codifying the use of non-pricing analyses, which are regularly used by the Commission, but which are afforded little

space in the Notice. Respondents highlighted that the Notice lacks adequate guidance on the principles detailed in the SSNIP test, on when and how it should be carried out, and on possible alternatives (e.g. the SSNDQ test) for zero-price markets or markets where non-monetary parameters are especially prominent.

The relationship between supply-side substitutability and the assessment of potential competition was also identified as needing clarification, both as regards the product and geographic dimensions.

Finally, respondents also flagged how market definition may need to become more forward-looking, if anything to be able to take better into account innovation pipelines, also in relation to potential competition.

### **2.2.2. Open public consultation**

The public consultation was open between 26 June and 9 October 2020. During this period, 86 stakeholders submitted replies through the Commission's Better Regulation portal. A further 10 stakeholders also publicly submitted their opinion to the Commission services in the context of the public consultation, but not through the Commission's Better Regulation page<sup>263</sup>.

In terms of categories of respondents to the public consultation, the large majority of the respondents were businesses or business associations (that is 72 respondents, of which 43 were businesses and 29 business associations, corresponding to 84% of all respondents). Other respondents included public bodies (7 respondents, or 8%) as well as representatives of civil society including EU citizens (3 respondents, or 3.5%), a consumer organisation (1 respondent, or 1%), a trade union (1 respondents, or 1%) and others (2 respondents, or 2%).

In terms of size of respondents, almost 60% (corresponding to 51 respondents) indicated that they are a large organisation (i.e. more than 250 employees). 12% (corresponding to 10 respondents) stated that they are medium-sized (i.e. between 50 and 249 employees), while 14% (corresponding to 12 respondents) indicated that they are a small organisation (i.e. from 10 to 49 employees), and 12% (corresponding to 10 respondents) stated that they are micro-sized (i.e. between 0 and 9 employees).

As to the geographical distribution of responses, the large majority of respondents were from an EU Member State (67 respondents). 12 respondents were from the UK and 6 were from the US.

Respondents to the consultation were also overall familiar with the Notice and over 75% of them had assessed relevant product and geographic markets over the past 5 years, mainly in the context of performing antitrust and merger assessments under both EU and national laws. Detailed responses were obtained regarding the five criteria for better regulation.

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<sup>263</sup> The replies submitted by these respondents largely mirrored those submitted through the open public questionnaire. Given that these respondents submitted their replies as free text and did not follow the pre-set questionnaire, it has been impossible to include the replies of these respondents in the percentages discussed in this section.

First, regarding the **relevance** of the Notice, there was near consensus among respondents that there was still a need for it to provide correct, comprehensive and clear guidance on market definition (all but two of those expressing an opinion). At the same time, several respondents noted that the Notice needs to be updated to reflect developments in case-law, as well as technological and economic developments that have changed the way certain markets function. Respondents generally indicated that the Notice helped companies assess the compliance of their activities with competition rules and improved the predictability of competition authorities' assessments, thereby contributing to legal certainty and to a reliable business environment.

Second, concerning the **effectiveness** of the Notice, the majority of respondents indicated that there were points of continuity that have not changed since 1997. There was broad consensus that these points of continuity should continue guiding the principles of the Notice going forward, such as the basic principles of market definition and the role of market definition as a framework for the competitive assessment.

While there was agreement among respondents that many of the principles expressed in the Notice did not need to be changed, most respondents indicated that there were major trends and developments that needed to be reflected in updated guidance. Among these, nearly all respondents who expressed a view, including all stakeholder categories (business community, public bodies and civil society), identified digitalisation as a trend that had affected the way markets work, noting that these developments are not always reflected in the Notice. Respondents indicated that the multi-sided nature of platforms and the prevalence of 'digital ecosystems' were relevant for market definition. Moreover, they also indicated that products or services that were offered for free (zero-price markets) and the growing importance of data were all elements on which the Notice lacks adequate guidance. In addition to digitisation, respondents also requested guidance on the ways in which market definition deals with innovation, including the types of situations where competition from innovative players outside the product market should be considered in market definition. Other topics raised in the consultation, but for which there was no consensus, included the question of whether potential competition should be taken into account at the stage of market definition, and the weight to be given to supply-side and demand-side substitutability as a means to achieve a dynamic assessment of market definition.

These comments were also translated into the views expressed by the different respondents as regards the different sections of the Notice<sup>264</sup>.

Respondents expressed overall support for the idea that the Notice provided correct, comprehensive and clear guidance as regards the definition of the relevant market, although around half of the respondents only partially agreed to that statement and considered that changing market realities could be included in the Notice. Some respondents also pointed out that the wording of the Notice should be harmonised with the 'significant impediment of effective competition' test of the 2004 EU Merger Regulation, and that more clarity was needed as regards the differences in approach between (backward-looking) antitrust and (forward-looking) merger cases.

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<sup>264</sup> See Summary of the public consultation.

On the question of whether the Notice provided correct, comprehensive and clear guidance on the basic principles for market definition, there was mixed feedback from respondents. Respondents recognised the established sources of competitive constraints to be the main sources. However, they considered that there was a need to adapt them on demand-side substitutability, with most respondents calling for the importance and use of the SSNIP to be limited. Respondents also called for further details and explanations on supply-side substitutability, and several of them criticised the brief explanations on potential competition in the Notice.

There was mixed feedback on whether the Notice provided correct, comprehensive and clear guidance on the process of defining the relevant market in practice. More specifically, on geographic markets, most respondents considered that the list in the Notice (national, EU-wide or EEA-wide) could be supplemented to include global markets, some of which were allegedly becoming more frequent in light of digitisation. Many respondents also took the view that investigations were at times creating an unnecessary administrative burden and proposed to make requests for information more targeted and less broad.

As to whether the Notice provided correct, comprehensive and clear guidance on the evidence needed to define the relevant product and geographic market, there was mixed feedback. Some respondents expressed the opinion that previous decisions should be the starting point of the assessment. Others argued instead that Commission should have the burden of proving that the market definitions in those decisions were still valid. Some respondents indicated the relevance of including references to examples and previous cases in the Notice. Respondents called for updating the list of quantitative techniques and indicated that the Commission should rely on a variety of evidence when defining markets (consumers' and competitors' views, internal documents, evidence of switching, industry experts...). New trends such as personalised pricing should also be considered for inclusion in the new Notice.

There was also mixed feedback regarding whether the Notice provided correct, comprehensive and clear guidance on the calculation of market shares. Some respondents questioned what evidence should be used in the case of services provided at a zero monetary price, multi-sided platforms, online services, 'digital ecosystems' and data markets. Some respondents also indicated that, especially in digital markets, static market shares could not be a good indicator of market power and that competitive constraints from outside the market and from potential competition should also be considered.

There was also mixed feedback about whether the Notice provided correct, comprehensive and clear guidance on the additional considerations detailed in the Notice. The topics mentioned as needing guidance included digital markets (including multi-sided platforms, zero monetary prices and the role of data), innovation and rapid evolving markets, bidding markets, captive sales, aftermarkets and bundles.

Third, on **efficiency**, all respondents who expressed a view agreed that the net benefits associated with following the guidance described in the Notice were positive compared to a situation without the Notice in place. In other words, respondents agreed that the Notice's benefits exceeded its costs. Respondents, however, were not able to find a way to quantify the Notice's net benefits, even though they stated that it improved legal certainty in a way that helped companies reduce costs. Respondents explicitly mentioned: (i) costs associated with external legal assistance (as at

least a part of the assessment can be carried out in-house); (ii) costs of competition law infringements stemming from an incorrect assessment of their market position; and (iii) opportunity costs.

Fourth, respondents to the public consultation were in consensus or expressed a strong agreement regarding the Notice's internal and external **coherence**.

Most respondents expressing a view on the Notice's internal coherence indicated that its different components work well together without apparent contradictions, while a fifth indicated that there are contradictions between its different components. Of the respondents that disagreed, several pointed out that despite identifying 'three main sources of constraints' (para. 2), the Notice put the emphasis on the demand side, while seemingly putting supply-side and potential competition at a different level and only dealing with them at later stages in the Notice (paras. 20 and 24 respectively). Some respondents also flagged the need to rethink whether the Notice was coherent in relation to digital markets.

On external coherence, around four fifths of the respondents expressing a view agreed that the Notice was coherent with other instruments providing guidance on the interpretation of the EU antitrust and merger rules. Respondents' comments highlighted the need to ensure coherence during ongoing reviews of antitrust Block Exemption Regulations and also flagged some perceived incoherencies. The issue flagged most prominently was the need to change the merger dominance test appearing in the Notice to adapt it to the 'significant impediment to effective competition' test of the Merger Regulation. Respondents also flagged a number of judgments by the EU Courts which should inform the new text of the Notice.

The views on the Notice's coherence with existing or upcoming EU legislation or policies (including legislation and policies in fields other than competition law) were more divergent than on other coherence topics. In this respect, first, almost half of the respondents did not express a view; and, second, of those expressing a view, around half agreed on the existence of such coherence. In addition to the need to ensure coherence with the ongoing reviews of the Block Exemption Regulations, respondents noted the importance of keeping coherence between the Notice and the Commission's work on the proposals for a Digital Markets Act and a Digital Services Act – adopted on 15 December 2020, after the conclusion of the public consultation featured in this summary.

Fifth, respondents overwhelmingly acknowledged the Notice's **EU added value**. Respondents noted that it contributed to legal certainty and that having a Notice at EU level enabled the development of a common analytical framework for authorities to enforce and for companies to self-assess. Nearly all respondents expressing a view also agreed that having an EU-level Notice had helped align the definition of the relevant markets by the NCAs and the Commission.

### **2.2.3. Summary of the targeted consultation of national competition authorities**

In the context of the ECN – a network bringing together the Commission, the EFTA Surveillance Authority and all the NCAs of the EEA – the Commission services submitted a questionnaire to gather their views on the five evaluation criteria of the Notice. The Commission services received 29 responses, 27 of which came from EU national competition authorities.

First, on **relevance**, NCAs generally indicated that they consider the objectives pursued by the Notice to be still relevant. These objectives are namely to provide correct, comprehensive and clear guidance on market definition in EU competition law. NCAs flagged that the text is a useful tool for companies and their advisers and for competition authorities when considering how to define relevant markets in antitrust and merger assessments. Some NCAs indicated the Notice should be updated to provide guidance on rapid evolving markets in particular.

Second, on **effectiveness**, nearly all NCAs that expressed a view considered that there were points of continuity that had not changed since 1997 and that should continue guiding the principles of the Notice going forward. These included: (i) the relevance of the product and geographic dimensions of the relevant market; (ii) the basic principles of market definition; and (iii) the process and the type of evidence relied on in defining markets.

While there was agreement that many of the principles expressed in the Notice did not need to be changed, most NCAs considered that there were major trends and developments that have affected the Notice's application and need to be reflected in it. These included: (i) the impact of digitalisation; (ii) the proliferation of markets with non-price competition; and (iii) the development of quantitative techniques and the availability of data. Other trends and developments mentioned were the need for updated guidance on the SSNIP test as well as its conceptual limitations. It was also mentioned that the Notice should further clarify that market definition is a tool to assist the competitive assessment rather than a goal in itself and that it could be left open even when competition concerns arise.

There was overall support for the idea that the Notice provided correct, comprehensive and clear guidance on the definition of the relevant market. Still, some NCAs were of the view that the Notice is overly reliant on price analysis and that, particularly for digital markets where services are often provided at zero monetary prices, it should rely on other sources of evidence. Some NCAs pointed out that the wording of the Notice should be harmonised with the 'significant impediment of effective competition' test of the 2004 EU Merger Regulation.

As for whether the Notice provided correct, comprehensive and clear guidance on the basic principles for market definition, there was mixed feedback from the NCAs. There was a general view that while demand-side substitutability is the primary concept in market definition, the situations where supply-side substitutability is applicable to market definition should be further detailed in the Notice. Some NCAs noted that the SSNIP test was sometimes not fully applicable either due to the 'cellophane fallacy', lack of robustness regarding starting points and inclusion candidates, lack of data or limitations in its applicability to geographic market definition. Some NCAs considered that this is particularly true as regards digital or zero-monetary-price services and they suggested that authorities should rather rely on other elements besides price. Furthermore, although there was near consensus that supply-side substitution and potential competition have different roles, the overall view was that more guidance was needed on the differences between them.

There was overall support for the idea that the Notice provided correct, comprehensive and clear guidance on the process of defining the relevant market in practice. Several NCAs, however, indicated that the Notice should provide more guidance on how to assess the geographic dimension of the market, noting the increased difficulties in defining geographic markets in the context of digitisation and e-commerce. While one NCA noted that the Notice should explicitly

refer to global markets in its text, others suggested that it should provide more guidance on local/regional markets. Other NCAs considered that the description of the process of gathering evidence should take account of the techniques and technology currently used when defining the product and geographic markets.

There was mixed feedback from the NCAs on whether the Notice provided correct, comprehensive and clear guidance on the evidence to define the relevant product and geographic market. A few of the NCAs asked for clarification regarding the usefulness of previous cases, case-law and decisions from NCAs to complement evidence, while others noted that explanations about how to weigh the different elements of evidence are necessary, in particular when there is conflicting evidence. Some NCAs noted that the list of evidence should include market evolutions in terms of digitisation (e.g. online vs offline sales, multi-sided platforms), non-price variables and globalisation, while one NCA explained that in rapidly evolving markets, past evidence was less relevant. Some NCAs asked for more clarity on the need for more examples and guidance on types of price discrimination and on personalised and artificial intelligence pricing. Several NCAs considered that the Notice should better explain under which conditions the guidance on trade flows can go beyond a static analysis and more into a dynamic hypothetical monopolist test, and when evidence on trade flows can be conclusive in geographic market definition. Other NCAs considered that the Notice could provide some guidance on the different approaches to diversion to other areas and include examples of the methodologies and quantitative tests which could be used, with a particular emphasis on catchment areas and isochrones. Several NCAs were of the view that the Notice would benefit from more examples, taking into account developments in data analysis and availability. Transportation costs and barriers to entry were mentioned among the elements of geographic market definition that required more guidance as to their relevance.

There was mixed feedback on whether the Notice provided correct, comprehensive and clear guidance on the calculation of market shares. Several NCAs noted that the Notice should clarify what type of instruments should be used in the case of services provided at a zero monetary price, multi-sided platforms, online services, platform ‘ecosystems’ and data markets. Others mentioned that it would be useful to illustrate the points made with some examples, for instance when to use volume, value, etc. Some NCAs explained that market shares were a static concept and should be complemented with elements about the dynamics of an industry (e.g. innovation, multi-sided platforms), while others noted that clarification was needed as regards the treatment of in-house and captive sales.

As to whether the Notice provided correct, comprehensive and clear guidance on the additional considerations detailed in the Notice, there was mixed feedback. The topics mentioned by NCAs as needing guidance included: digital markets (including multi-sided platforms, zero monetary prices), aftermarkets, bidding markets, non-price competition (including innovation), bundles, asymmetric substitution, product and price differentiation, indirect substitution and intermediate products. On chains of substitution, some NCAs noted that it may not be necessary to refer to them anymore, while some other NCAs asked for guidance as regards breaks in the chain, the relation with the SSNIP test, the role of niche products, price differentiation, and the role of chains of substitution in geographic markets.

Third, on **efficiency** there was consensus among the NCAs that expressed a view that the benefits of having the Notice in place exceed its costs. Among the benefits, NCAs noted that the Notice provides guidance and transparency to companies and their advisers and provides a reference tool



for NCAs that do not have their own market definition guidelines. In their view, this ensures consistency across the ECN and is useful to courts reviewing competition cases. NCAs believed the costs of the Notice to be limited or even zero but noted that the actual cost is hard to quantify.

Fourth, on **coherence** NCAs expressed strong agreement that the Notice is internally and externally coherent, in particular regarding: (i) the internal coherence of the Notice; (ii) coherence with antitrust instruments; (iii) coherence with merger instruments; (iv) coherence with EU case-law; and (iv) coherence with EU policies.

Sixth, on **EU added value**, all NCAs expressing a view were in consensus that the Notice had added value in the assessment of relevant product and geographic markets when applying EU competition law (including application by national competition authorities). Similarly, NCAs expressing a view agreed that the Notice had helped align the NCAs' and the Commission's definitions of the relevant markets, by providing them with a useful focal point for their work. The NCAs also agreed that the Notice makes their antitrust and merger work more effective. Some NCAs pointed out possible ways to improve the Notice's EU added value. These suggestions included the inclusion of examples and references to cases and a better explanation of geographic market definition, including explanations regarding markets smaller than a single Member State, and the extent to which NCAs could in practice assess global markets with limited resources.

#### **2.2.4. Summary of targeted stakeholder workshops**

The consultation activities also included the project team's participation in a number of exchanges with stakeholders across various sectors. Given the particular circumstances of the COVID-19 crisis, all these exchanges took place in a virtual environment.

First, DG Competition organised calls with national government bodies and NCAs who requested additional information on the evaluation of the Notice. The Commission services ensured the availability of the information to all Member States by also including a presentation of the evaluation to the Working Party on Competition in the Council of the European Union.

Second, DG Competition held discussions with the competition authorities of Australia, Brazil, Canada, Japan, South Africa, South Korea, the UK and the US. These discussions informed the support study presented in Section 4.1.

Third, as is standard practice concerning European competition policy matters, the Commission services organised three meetings in the context of the ECN in order to gather NCAs' views on the evaluation of the Notice. These meetings were complemented by a targeted consultation through a questionnaire, the replies to which are summarised in Section 2.2.3 of this Annex.

In the 6 May meeting, the Commission services presented the review of the Notice by detailing: (i) the timeline of the process; (ii) the main anticipated subject matters for the evaluation; and (iii) the main steps of the process.

The NCAs noted that they regularly use the Notice's main principles. They also found that the Notice worked quite well and that its existence was very relevant. However, they very much welcomed the Notice's revision given recent developments in the economy, like digitalisation and the advent of zero-priced services, two-sided and quickly evolving markets.

Some general big-picture comments about the Notice were debated. These included the idea that market definition is a tool to assist the competitive assessment and not an end in itself, the limitations and further need for guidance on the SSNIP test and the reduced role of prices in the definition of technologically-advanced innovative markets.

Other points for discussion centred on the practice of leaving the market definition open and the use of, and need for, further guidance on quantitative techniques. Specific issues regarding geographic market definition were also debated. These included the primary role of demand-side substitution, where to draw the line between supply-side substitution and potential competition, the impact of globalisation and the need for guidance on local markets and catchment areas.

Some NCAs also expressed the view that there is value in having a broad notice focusing on general principles that can remain in place for several years, as was the case for the original 1997 Notice.

In the 16 December meeting, the Commission services presented the outcomes of the public consultation and of the NCA consultation. The discussions focused on two main topics: (i) general topics of market definition; and (ii) the effects of digitalisation on market definition.

On general topics of market definition, NCAs explained that there are several case constellations where the market can be left open, in particular where there is no legal consequence attached to the market share and/or where there is no effect on the substantive assessment, including in cases where NCAs find competition concerns. Furthermore, NCAs indicated that there may be differences in the relevant market definition, including depending on whether this relates to a merger case or an antitrust case and the concerns analysed. NCAs added the following as scenarios where different markets can be defined: (i) asymmetric substitution; (ii) if the theory of harm concerns increase in buyer (as opposed to selling) power; and (iii) if an innovation (as opposed to price or other) theory of harm is pursued. NCAs also explained that potential competition (in particular from longer-term/future competitors) is only taken into account in the competitive assessment. The opposite may blur the lines between actual competitors and more distant/future competitors, which would not help arrive at accurate results.

In relation to digitalisation's effects on market definition, and in particular in relation to the possibility of defining one or multiple markets in the case of multi-sided platforms, NCAs indicated that in some cases one market was defined (for instance for classified ads, dating sites), while in others a market for each side of the market was considered (for instance regarding advertisers, food delivery platforms and end users in social networks and newspapers). Aspects that tilt the balance in favour of defining a single market include, according to NCAs, the fact that a platform is transactional, that network effects affect both sides of the market and that the platform can be considered a matching one. In contrast, when demand from each user group is very different (e.g. users and advertisers), substitution patterns are different and indirect networks effects may then also be comparatively lower, different markets should be defined according to NCAs. Moreover, in the case of zero price services, there was a consensus on the need to focus on the functionalities and characteristics of the offered services and on switching behaviour. No NCA had defined markets using a SSNIP adapted to quality variations. Finally, NCAs stated that they had looked into the possibility of segmenting retail markets into offline and online, including investigations into consumer behaviour by way of consumer surveys.

In the 15 April 2021 meeting, the Commission services summarised the preliminary findings of the evaluation and the findings of the support study. The discussions focused on two main topics: (i) geographic market definition; and (ii) quantitative techniques.

On geographic market definition, some NCAs indicated that trade flows and imports cannot constitute conclusive evidence on their own to determine the geographic market definition and should therefore be considered in conjunction with other elements. Furthermore, the markets could be defined as regional, national or EEA-wide, even though there are substantial imports. Catchment areas were reported to be used widely with recent progress made by some NCAs in analysing granular shipment or customer journey data. NCAs pointed out that supply-side substitutability should be taken into account if it is immediate and credible and if there are past examples of suppliers switching quickly between the supply of different goods or services. Nevertheless, the role of supply-side substitutability has been limited in defining geographic markets. Moreover, even if a product could be traded in the EU and customers could buy products from foreign countries, according to NCAs, the actual conditions of competition need to be assessed to define the geographic market. NCAs identified a number of barriers to trade. These included transport costs, language barriers, diverging local consumer preferences, established customer relationships, and reliability of delivery and delivery time. On the concept of homogeneous conditions of competition, some NCAs indicated that they apply the standard.

On quantitative techniques, some NCAs reported that the theoretical concept of SSNIP is used frequently with a focus typically on demand-side substitutability. The quantitative implementations of the SSNIP test are used less often given the limitations associated with, for instance, the cellophane fallacy or its application to multi-product markets. As regards in particular the data used when performing a quantitative SSNIP, some NCAs indicated that they use surveys. Some mentioned that they apply a critical loss analysis in which they use real switching data that complement consumer surveys. In addition, NCAs pointed out other quantitative techniques applicable in the market definition, such as catchment areas and shock analysis if there are sufficient data. In addition, cross-price elasticity might also be helpful according to some NCAs. The last point for discussion centred on the type of quantitative evidence used in market definition. NCAs expressed the view that surveys are a useful tool to gather data if direct evidence, e.g. transaction data, is not available. Nonetheless, the phrasing of the precise questions is important and the conduct of the survey may pose an organisational challenge for the authorities. Moreover, responses in surveys might not always be reliable as they are based on hypothetical scenarios. Finally, NCAs agreed that quantitative evidence is often better than qualitative evidence, but the balance between quantitative and qualitative elements depend on the availability of reliable data.

Fourth, exchanges were also organised with European consumer organisations (through their umbrella organisation BEUC<sup>265</sup>), as well as with a number of private-sector stakeholders (e.g. the European Round Table for Industry, Eurocommerce).

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<sup>265</sup> Notes on the meeting available at [https://ec.europa.eu/competition/consultations/2020\\_market\\_definition\\_notice/BEUC\\_workshop\\_on\\_market\\_definition\\_2021.pdf](https://ec.europa.eu/competition/consultations/2020_market_definition_notice/BEUC_workshop_on_market_definition_2021.pdf)

### ANNEX 3: METHODS AND ANALYTICAL MODELS

Evaluation criteria and questions	Indicator	Sources
<b>Relevance</b>		
Does the Notice still pursue relevant objectives in aiming to provide guidance and transparency to stakeholders and in particular to provide correct, comprehensive and clear guidance on market definition in the Commission's antitrust and merger assessments? How well do those objective correspond to the needs?	<ol style="list-style-type: none"> <li>1. Importance of competition enforcement</li> <li>2. Number of competition enforcement decisions with market definition assessments</li> <li>3. Relevance of decentralised application of Articles 101 and 102</li> <li>4. Relevance of self-assessment system in antitrust and of market share thresholds in antitrust and merger control</li> <li>5. Frequency of the use of the Notice by the Commission, the EU Courts and stakeholders</li> <li>6. Adoption of similar documents at national level</li> </ol>	<ol style="list-style-type: none"> <li>1. Public consultation</li> <li>2. NCAs consultation</li> <li>3. Stakeholder meetings</li> <li>4. Analysis of Commission decisions, EU Court judgments, EEA and non-EEA guidelines, national decisions and judgments, as well as academic literature and other publications</li> <li>5. Support study</li> <li>6. Evidence gathered through other Commission initiatives</li> </ol>
<b>Effectiveness</b>		
To what extent has the Notice proven effective in providing guidance and transparency to all stakeholders? In particular, does the Notice continue to provide correct, comprehensive and clear guidance on market definition today?	<ol style="list-style-type: none"> <li>1. Main points of continuity and major trends and developments in market definition since 1997</li> <li>2. Best practices in market definition as identified in EU Court judgments, Commission practice, NCA practice, NCA guidelines and academic research</li> </ol>	<ol style="list-style-type: none"> <li>1. Public consultation</li> <li>2. NCAs consultation</li> <li>3. Stakeholder meetings</li> <li>4. Analysis of Commission decisions, EU Court judgments, EEA and non-EEA guidelines, national decisions and judgments, as well as academic literature and other publications</li> <li>5. Support study</li> <li>6. Evidence gathered through other Commission initiatives</li> </ol>
<b>Efficiency</b>		
Has the Notice led to increased benefits and reduced costs? Is there scope for further simplification and cost reduction?	<ol style="list-style-type: none"> <li>1. Costs of using the Notice</li> <li>2. Benefits of using the Notice</li> <li>3. Savings in terms of administrative costs incurred by businesses</li> </ol>	<ol style="list-style-type: none"> <li>1. Public consultation</li> <li>2. NCAs consultation</li> <li>3. Stakeholder meetings</li> <li>4. Analysis of Commission decisions, EU Court judgments, EEA and non-EEA guidelines, national decisions and judgments, as well as academic literature and other publications</li> <li>5. Support study</li> </ol>

Coherence		
<p>How well have the different components of the Notice operated together?</p> <p>Is the Notice in line with the judgments of the EU Courts and changes in the legal competition framework, and with other instruments of EU competition policy and other EU policies?</p>	<p>1. Level of internal coherence</p> <p>2. Level of external coherence</p>	<p>1. Public consultation</p> <p>2. NCAs consultation</p> <p>3. Stakeholder meetings</p> <p>4. Analysis of Commission decisions, EU Court judgments, EEA and non-EEA guidelines, national decisions and judgments, as well as academic literature and other publications</p> <p>5. Support study</p> <p>6. Evidence gathered through other Commission initiatives</p>
EU added value		
<p>To what extent has the Notice at EU level provided clear added value, for instance by contributing to a consistent approach to market definition by the Commission and the EU national competition authorities?</p>	<p>1. Competence for designing EU competition law</p> <p>2. Contribution to consistent approaches to EU competition rules among the NCAs and the Commission</p>	<p>1. Public consultation</p> <p>2. NCAs consultation</p> <p>3. Stakeholder meetings</p> <p>4. Analysis of Commission decisions, EU Court judgments, EEA and non-EEA guidelines, national decisions and judgments, as well as academic literature and other publications</p> <p>5. Support study</p>

#### ANNEX 4: SUMMARY OF COSTS AND BENEFITS

The costs and benefits associated to the Notice are specified below,

Relevant agents	Costs	Benefits
Stakeholders	No costs	Reduction in costs: <sup>266</sup> (i) costs associated with external legal assistance (as at least a part of the assessment can be carried out in-house due to the Notice), and (ii) costs of competition law infringements stemming from an incorrect assessment of their market position (these include legal fees and fines as well as negative effects of making investments or adopting a commercial strategy that later needs to be changed).
European Commission	No costs	Increase in legal certainty and avoidance of the need to explain the basic principles of market definition in every case, thereby allowing the analysis to focus on the more important aspects of market definition.
National authorities	No costs	Provision of a reference tool for NCAs that do not have their own market definition guidelines, as well as to courts reviewing competition cases. Ensuring of consistency across the ECN – including with NCAs that have issued their own guidance on market definition

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<sup>266</sup> As a reference one can consider the average external merger review costs (including legal fees, other advisory fees and translation and other miscellaneous costs) which corresponded to EUR 700 000 per jurisdiction pursuant to the study quoted in footnote 234.