

Introduction: Symposium on market definition

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The European Commission is currently considering a possible revision of its 1997 market definition notice. The notice was adopted at a time when economic analysis was starting to become more central in the application of European competition law. Without a doubt, the Commission has accumulated an important body of legal and economic practice defining markets in the nearly 25 years since the adoption of the notice – after all, DG Competition did not even have a Chief Economist Team at the time the market definition notice was adopted. If the goal of the notice update is to provide predictive value as to the Commission's current approach to market definition, then there is ample room to reflect the learnings of recent years. In addition, there may be room for improving the notice to better reflect the refinements in economic analysis that took place over the last two decades and expand on methods for situations in which current tools may not be well-suited. Notably, the increased importance of the digital sector raises many questions as to how market definition should be applied in the digital economy, which are unanswered by the current notice.

The various articles in this symposium show that there is ample scope for such an update, and also as some of the articles point out, for underlining the limitations and considering the proper weight to attribute to the market definition exercise in competition cases in light of recent experience.

First, Meyring, Patureau and Gritsch provide thoughtful considerations on what one could expect from a potential update of the market definition notice. The authors first discuss the role that notices play in the EU legal order, and then consider the implications for potential changes to the market definition notice in the digital sector. They stress that legal notices can create legitimate expectations and limit the Commission's powers in areas where it exercises discretion, and provide a useful point reference for the Courts. While there can be not legitimate expectation that a notice will be followed in scenarios that were not anticipated when it was adopted, departing from the notice would in principle requires robust justification. Notices should therefore seek to provide direction without closing doors that may become useful in the future.

Meyring and al. highlight two broad themes emerging from the consultation with respect to digital markets: first, applying the framework of the market definition notice to digital products and services is more difficult than in traditional markets; second, there is a clear dynamic element to be accounted for. In this context, the authors call for assessing market power taking into account the specificities of multi-sided platforms and the new ecosystem economy, potentially giving less weight to historical evidence in rapidly changing markets, expanding the analysis beyond sole price considerations and providing more clarity on innovation and data. The authors stress that such an update could be particularly useful to limit the risk that different competition authorities adopt diverging views, and to avoid that the current framework be applied too strictly, without proper consideration for out-of-market constraints.

Given the role of the updated market definition notice, which will be called to be applied flexibly for many years to come, Meyring and al. argue that the revision *would not do enforcement good service by taking sides on ongoing debates* and should acknowledge the limitations of market definition *to avoid an ill-suited use and overemphasis of a tool that has limitations*. With regard to digital platforms in particular, shortcomings and the need for complementary tools should be recognized where appropriate.

Second, Vandenborre and Janssens provide further background and reflection on the policy debate regarding digital platforms, and propose a direction for improvement of the analysis in that space.

Specifically, the authors recommend that less emphasis be placed on market definition, and to focus more on theories of harm and the identification of anti-competitive strategies. Yet, the authors note that market definition remains of great practical importance for cases reviewed by the European Commission and contrast the Commission's current approach to market definition in the digital space with the recently updated CMA guidelines, which *place more emphasis on the competitive assessment as opposed to a static, highly descriptive, market definition*.

Third, Moresi addresses the implications of dynamic demand and penetration pricing for market definition, and shows how the SSNIP test should be modified in such a dynamic setting. In young and growing industries where consumer demand is dynamic and firms engage in penetration pricing, each firm has an incentive to price low to stimulate future demand from existing and future potential customers. The hypothetical monopolist internalizes the effect of low current prices on future demand, and more so than the individual firms do. Failing to account for this effect tends to introduce a bias towards defining relevant markets that are too narrow. Importantly, Moresi provides an original and formal contribution to the debate by establishing modified hypothetical monopolist test formulas that properly capture this dynamic effect.

Fourth, Ralston, Leslie, O'Reilly, Masters and Heinen discuss multi-sided markets, and focus on three main questions: *(how) are the indirect network effects of two-sided markets relevant? How can the SSNIP test be applied? And how many markets should be defined?* The authors explain that the SSNIP test (including its non-price equivalents) provides a clear conceptual framework for assessing competitive constraints and that, within this framework, two-sidedness is directly relevant for market definition. The authors point out that the revised market definition notice could usefully clarify the role of the SSNIP test (and its non-price equivalents) as *the conceptual standard for market definition*, and the stage at which two-sidedness should be taken into account in the assessment. Similarly, the revised market definition notice could bring clarity by addressing the question of whether two-sided platforms comprise a single or several markets. This is a question of direct practical relevance since, under EU competition law, it determines whether efficiencies on one side of a platform can offset anticompetitive effects on the other side.

Finally, Aliende Rodriguez, Ashall and Rarity focus on evidentiary issues for market definition. The authors argue that the notice would benefit from a closer reflection of the current practice, and also point to areas where the current practice itself could be improved. The authors cover sources of evidence, such as eQuestionnaire, testimonies and internal documents, and stress the difficulty to manage an ever-growing burden on both the parties and the Commission. The authors argue that the notice would benefit from clarifying the role that previous decisions play in market definition analysis, which should be seen as evidence rather than precedent. Importantly, the authors stress that the Commission should consider going away from its current practice of conducting its analysis under a wide array of conceivable market definitions that are ultimately left open, and rather make a positive determination on the competitive constraints to be taken into account into the competitive assessment.

Taken together, the articles included in this symposium provide powerful insights on the direction of travel for market definition. The market definition notice was adopted at a time where the dominance test was applicable to EU merger review, and market shares were central to many competition analyses. In light of recent economic learning and the evolutions in the economy, now more than ever is a time to reflect on the role of market definition in competition cases.

In digital markets in particular, there are numerous interlinkages between the different ecosystem components, and it makes little sense to look at markets separately, ignoring the broader competitive landscape. Recognizing that both sources of market power *and* efficiencies manifest themselves across interlinked goods and services is crucial for a meaningful competitive assessment of digital markets. While the updated market definition notice should keep a flexible toolkit and avoid closing doors, as the

papers in this symposium make clear, there would also be considerable value in explaining the role and limits of market definition, and stressing the need to go beyond the constraints of a binary market definition exercise for a proper assessment of effects.