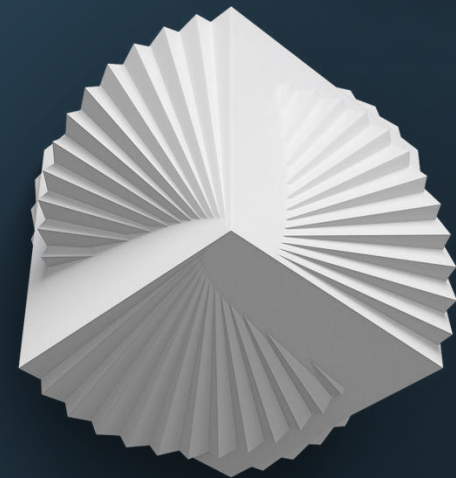
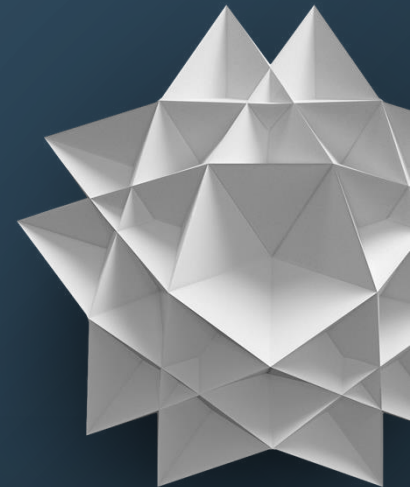


Mergers: Market Definition and Economic Analysis

Advanced EU Competition Law Conference
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Focus on Draft Revised Market Definition Notice

Part 1 Economic Principles and Evidence

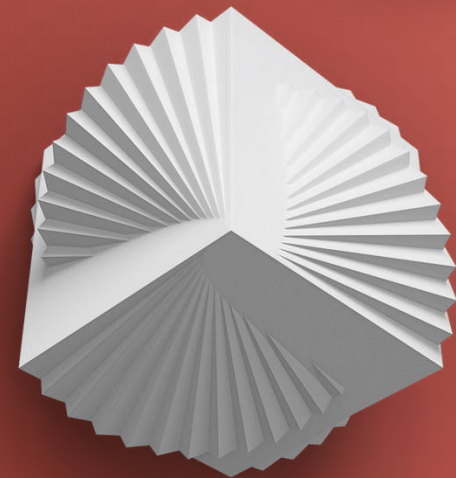
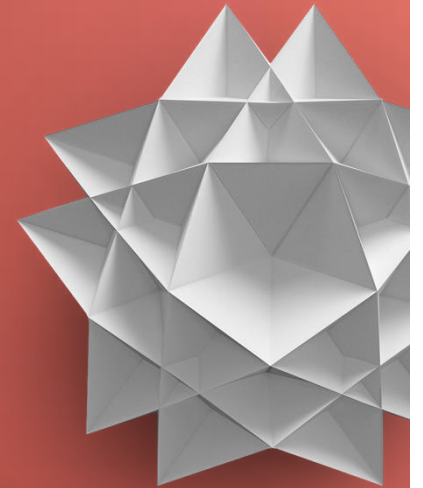
- Economic Principles of Market Definition and Economic Analysis
- Evidence for Market Definition
- Key Take-aways

Part 2 Specific Issues

- Geographic Market Definition (Global and local competition)
- Innovation
- Multisided Platforms
- After Markets, Bundles and Digital Ecosystems
- Key Take-aways

Part 1

(Draft) Revised Market Definition Notice: Economic Principles and Evidence



Economic Principles of Market Definition and Analysis

Identify relevant substitutes: “identify and define the boundaries of competition between undertakings”

- Demand-side and supply-side substitution (not product characteristics per se)
- SSNIP test as a conceptual principle – note that the SSNIP test can be extended in a number of ways to incorporate e.g. dynamic demand, multi-sided markets but this is not explicitly covered by the draft notice
- Difference between mergers and antitrust
- Explicit recognition that markets may be defined differently according to undertaking concerned (asymmetric constraints)
- May differ by customer group (price discrimination)

Role of market definition

- First step of the analysis
- Market shares are “not the sole indicator” (reference to guidelines on substantive assessment)
- Market shares less informative for differentiated products (section 4.1).

“A detailed competitive assessment of how closely suppliers compete with each other may reduce the importance of market shares and hence that of market definition. Therefore, although market definition remains an important step, **analysing how closely suppliers compete may become more relevant in the competitive assessment of differentiated markets.**”

Evidence for Market Definition

No hierarchy of evidence

- *“The Commission adopts an open approach to empirical evidence, aimed at making effective use of all available information which may be relevant to the individual cases, and makes an overall assessment based on this evidence. The Commission does not apply a rigid hierarchy of different sources of information or types of evidence.”*

Empirical evidence

- Evidence on **actual substitution** is in principle more reliable than evidence on **hypothetical substitution** (but case by case assessment that depends on the strength of the analysis)

... heavily scrutinized

- E.g., quantitative measures of substitutability between different products (**diversion ratios, cross-price elasticities**):
“In order to be reliable, such quantitative evidence must be sufficiently robust.”
- *“The Commission may also rely on public information, market or industry reports, as well as market statistics or economic studies, including by external consultants of the undertaking(s) involved.”*
- However, footnote points that such studies will be subject to “particular scrutiny”, *“since evidence carries a lower probative value if it has been influenced by the Commission’s investigation”*.

But what about qualitative evidence?

- Risk of double standard

Illustration: SalMar / NTS (31/10/2022)

Background

EC cleared merger between salmon farmers SalMar's and NTS in **Norway and Iceland**, subject to **divestment of NTS' Icelandic subsidiary**.

Market Definition

Claiming Norwegian and Icelandic salmon are *not* substitutes, the EC defined a separate market for the supply of Icelandic salmon.

EC's use of "qualitative evidence" is problematic

EC considers a recipe for "Icelandic salmon" as evidence for excluding Norwegian salmon from the market. Does this really mean that Iceland and Norwegian salmon are not substitutes?

Recipe for Icelandic salmon



ingredients

portions

- 4 +

4

Buy Icelandic salmon fillets with skin á 200 g online

600g _

Red cabbage

Link within recipe to purchase Norwegian salmon

Organic salmon fillet

The organic salmon fillet comes from organic aquaculture farms in **Norway**. They are subject to strict requirements for species-appropriate husbandry and feeding and thus correspond to the standards for ecological-biological management in the EU. The organic salmon also benefit from the cold, clear water of the Norwegian fjords, where they grow and thrive in their natural habitat without social confinement. This is reflected in an aromatic salmon taste and particularly tender meat, which can be prepared freshly caught filleted very easily and in a variety of ways.

highlights [Ingredients & Nutrients](#) [Storage & Shelf Life](#) [Manufacturer](#) [supply chain](#)



Salmo salar
Latin designation

From an aquaculture in **Norway** (FAO 05) . *

✓ Fresh, organic quality, vacuum packed. Virtually boneless. This product is pre-ordered for you and can be ordered until Friday at 10 a.m. for the coming week.

Product Highlights

From an organic aquaculture.
[BIO products](#)

Source: <https://www.deutschesee.de/rezepte/island-lachs-mit-knaeckebrotkruste.html>

Source: <https://www.deutschesee.de/shop/bio-lachsfilet-81162.html>

Key Take-aways



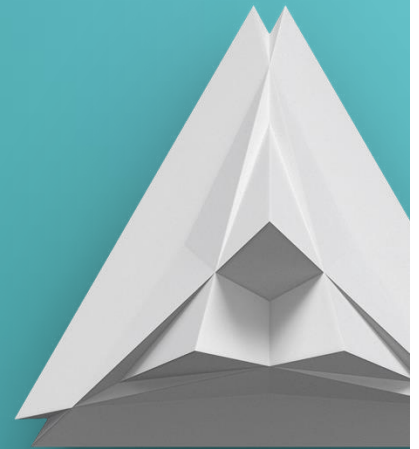
- 1 Restate key principles / hypothetical monopolist test as relevant conceptual framework
- 2 Makes it clear that market definition / market shares are less informative for differentiated products
- 3 Examples of recent cases
- 4 Flexibility



- 1 Should say more on role and weight of market definition
- 2 Should say more on how to assess qualitative evidence versus empirical evidence
- 3 Language shows some undue bias in favor of qualitative evidence versus empirical evidence ("typically indicates" v. "may... if sufficiently robust")

Part 2

(Draft) Revised Market Definition Notice: Specific issues



Geographic Markets – Global competition

Global market may exclude specific areas

- In Siemens/Alstom for example, the Commission defined a global market excluding China, South Korea and Japan for high speed and very high speed trains
- Due to “*insurmountable entry barriers for foreign suppliers in these three countries*”

Role of imports

- Imports taken into account for market definition
- But only **current imports** (if insufficiently homogenous conditions of competitions across areas)
- **Additional competitive constraints exerted by imports** taken into account in competitive assessment “*for instance by examining whether imports are likely to expand in the future when the case calls for a forward looking assessment*” (e.g. import elasticities and event studies)

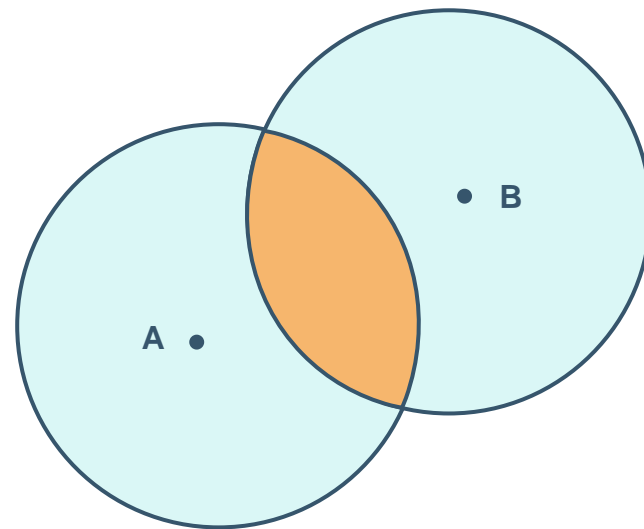
Also relevant for market shares calculations

- If conditions of competitions are not sufficiently homogenous, “*the Commission takes the competitive constraints (if any) from importers on the undertaking(s) involved into account in the competitive assessment, (including with respect to market shares and potential future expansion) rather than by expanding the relevant geographic market*”
- Inspired by Fletcher/Lyons report suggestion to include “**swing capacity**” and “**rapid entrants**” from outside the geographic market within market shares (also in US merger guidelines)

Geographic Markets – Local competition

How to define local markets

- New in notice as Commission has had some (more limited) experience in local markets
- Allows for flexibility (e.g. catchment areas based on 80% of sales, but other cut-offs considered)
- Distance or travel time according to context
- Recognition of importance of **customer-centered analysis** in case of price discrimination
- Some unfortunate references (e.g. catchment areas centered on mid-point)



Innovation

Market definition for pipeline products

- **No mention of the difficulties and biases** encountered when attempting to do so (uncertainty, identification of alternatives, etc.)
- **Inconsistency with potential competition** analyzed at competitive assessment stage

Innovation spaces

- Earlier stages of research, no identifiable product
- **Market shares based on R&D or number of patents or citations**
- May be “*relevant to identify the boundaries within which the undertakings compete in such earlier innovation efforts*”

A potentially biased approach?

- Given that innovation is a key parameter of competition and future product developments are uncertain, “*The Commission may factor in all potential outcomes of R&D processes and assess in particular those scenarios where competition would be affected by the conduct or the transaction in question.*”
- Does this include potentially **pro-competitive scenarios**?

What weight to give to market definition in such cases?

Multisided platforms

One or several markets?

- Both possible (e.g. Microsoft/LinkedIn single market for online recruiting services including job seekers and recruiters; in Mastercard the Commission defined different markets for the acquiring and issuing side of the market).
- Depends on “*whether there are significant differences in the substitution possibilities on each side of the platform*” (same firms competing on both sides, product differentiation on each side, single/multi-homing...)

Indirect network effects

- Demand by one side influences demand on the other side

Ignores that structure of pricing matters critically in multisided platforms

- When defining separate markets, “*network effects and constraints from the other side may still be taken into account in the competitive assessment*”

Does not provide much actionable guidance...

What weight to give to market definition in such cases?

Aftermarkets and Ecosystems

Different approaches to market definition

- **System markets** comprising both the primary and secondary product (e.g. GE/Alstom: gas turbines and subsequent servicing)
- **Multiple markets**: one market for the primary product and one aftermarket for each primary market (e.g. spare parts for watch repair)
- **Dual markets**: one market for the primary product and one market for the secondary product (e.g. after sales services in Assa Abloy/Agta Record)

Aftermarket case-law established in physical world is ill-suited to digital markets!

- E.g. the multitudes of services associated with a phone are very different from say the traditional aftermarket of ink cartridges for printers.
- In digital markets, the Commission may define a single primary market and multiple secondary markets
- Or a bundle? Leaves the possibility open.
- In any case, the Commission may “*take into account elements such as network effects, switching costs and (single and/or multi)-homing decisions for the purpose of defining relevant product market(s).*”

What weight to give to market definition in such cases?

Key Take-aways



- 1 Update notice with new issues that have arisen in past 25 years.
- 2 Emphasis on customer-centered approach in case of price discrimination.
- 3 Draft market definition notice generally takes a flexible approach to these issues.



- 1 Limited guidance on how the market will be defined: flip side of flexibility... but also short on principles for a number of issues.
- 2 Some unfortunate case references / illustrations.
- 3 **Should be clearer about the role of market definition: market definition should be given little weight in settings where competition is complex, uncertain and/or there are interactions across markets!**

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