



ERT

Expert Paper

ERT Response to the Market Definition Notice review

October 2020

ERT on Competition Policy

ERT strongly believes in competition policy and enforcement to secure fairer markets and strong competition. These are fundamental to the functioning of the internal market and to the benefit of EU consumers.

As outlined in ERT's strategic paper launched in April 2019 entitled *Strengthening Europe's Place in the World*, companies led by ERT Members are committed to creating jobs and prosperity in Europe but call on policymakers to create the required framework conditions for European companies to compete successfully and at scale globally.

ERT voiced in its *Competing at Scale* publication (October 2019) its deep conviction in competition policy and enforcement to secure fairer markets and strong competition. ERT also welcomes the increasing focus in Europe (at both the Commission and NCA level) on the challenges posed by changing market demands, including the digitalisation of all parts of the economy.

As a leading competition authority, DG Competition sets an important global example, and its messages carry significant weight.



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1. Introduction

1.1 The Competition Policy Working Group of the European Round Table for Industry (hereafter ‘ERT’) welcomes the review of the 1997 Market Definition Notice and considers it a timely initiative. ERT strongly believes in competition policy and enforcement to secure fairer markets as well as strong competition and welcomes the EU’s efforts to explore how competition policy could evolve to reflect changing global market conditions. The pace of change in many markets has accelerated rapidly in recent years. As underlined in the 2019 ERT paper “Competing at Scale”, dynamic innovation in many sectors of the economy, especially in relation to the digital economy, requires a clear and up-to-date analytical framework for market definition. A broader and more dynamic assessment of market definition is needed.¹

1.2 ERT encourages the Commission to develop a framework that: (i) provides legal certainty to businesses, (ii) clarifies the precedent value of market definitions in EU Merger Regulation (‘EUMR’) cases for the antitrust self-assessment under Articles 101 (vertical or horizontal agreements) and 102 (in dominance scenarios) and (iii) includes practical examples.

1.3 If the view is that, in relation to certain conduct or business scenarios in the digital context in particular, the use of market definition is less important than a broader competitive assessment, such approach should be clearly explained, well-grounded in economic theory, and limited to specific cases, if at all.

1.4 Competitive pressure of EU or global markets or players should be taken into account also for the definition of local regions as a market. In addition, the market-definition framework should be consistent with other EU policies, in particular considering the current debate on ensuring a global level playing field.

2. The importance of a clear market definition guidance

2.1 Self-assessment: The Notice has the purpose of providing “guidance as to how the Commission applies the concept of relevant product and

geographic market in its ongoing enforcement of [EU] competition law [...]”.² The framework as such was intended to provide businesses with the legal certainty needed for self-assessment.³ The importance of the Commission’s guidance for market definition is even more needed today given that:

- (a) The notification system has been abolished (since 2004) and self-assessment at the EU and national level is key;
- (b) There is a risk of inconsistency amongst authorities and there is certainly increased complexity in carrying out self-assessments, particularly under Articles 101 and 102;
- (c) Market definition has become more challenging given the fast pace of innovation and market developments driven by scientific and technological breakthroughs in the past decade in particular; and
- (d) The Commission’s approach to evidence gathering to define the relevant market (in particular through the use of e-questionnaires) has significantly increased the burden on market participants.

2.2 Although not legally binding in nature, clear guidelines ought to serve the dual function of providing companies with a degree of legal certainty across different types of cases (EUMR, Article 101 horizontal and vertical and Article 102), without hindering their potential to expand or consolidate in dynamic markets.

2.3 Precedent value: The Notice should clearly take a position on the precedent value of market definitions from EUMR cases to Article 101 and 102 cases and vice-versa. The Notice should make clear when there is relevant precedent value for market definitions between the different cases; alternatively, there should be an effort to explain the circumstances in which the application of the market definition in the case at hand (e.g. EUMR) is of no relevance (e.g., in the context of Articles 101 and 102).

2.4 The Notice should also impose a degree of discipline on the authorities: if the authorities choose to deviate from the guidelines, they have

¹ ERT, Competing at Scale – EU Competition Policy fit for the Global Stage, October 2019, p. 9.

² Paragraph 1 of the Notice.

³ “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” (paragraph 4 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” (paragraph 5 of the Notice).

an obligation to clearly explain their methodology thereby increasing predictability and safeguarding due process.

2.5 Finally, ERT strongly encourages the Commission to refer in paragraph 6 of the Notice to the *Coca-Cola v Commission* ruling that a market definition by the Commission in an earlier case is not binding on the Commission in a subsequent case.⁴ While the Commission may rely on market definition precedents in a subsequent case, that subsequent market definition has to take into account current economic conditions, and so may need to be updated on this basis. This requirement to always consider current economic conditions should be clearly stipulated in the updated Notice.

2.6 Open-access database: To help deliver on its commitment to transparency and efficiency (i.e., where compliance costs are proportionate to the benefits), ERT encourages the Commission to launch and maintain a regularly updated database where companies can search for all market definitions in both antitrust and merger cases decided in the last years, without prejudice to cases where it is appropriate to leave the question of market definition open and provided that this does not add further burden onto businesses. This database should be developed to include national decisions that are normally published, without imposing any pressure on national authorities that prefer not to publish their decisions.

2.7 Subject to para. 2.3 above, the purpose of the proposed database is to facilitate a review of prior and already-existing decisional practice, whilst not precluding a dynamic approach to market definition in new cases which reflects the fast pace of change in many markets today.

2.8 National authorities: ERT recommends that the revised Notice and the Commission's regular consultations with National Competition Authorities ('NCAs') will encourage a more harmonised approach to market definition at national level under the auspices of the European Competition Network.

2.9 For example, when the market is European or global, national authorities should recognise so, and for example the local market-share thresholds that may trigger a merger filing (for example in Spain

or Portugal) should not find application. Similarly, when the market is European or global, the national authorities should not focus on local effects at the competitive analysis stage, as the market definition sets the framework for the assessment of effects on the relevant market.

2.10 Definition left open: The Notice states that the precise definition of a relevant market will be left open if the operation in question does not raise competition concerns, thereby reducing the burden on companies to supply information.⁵ Paragraph 27 of the Notice should make it clear that the Commission ought to reflect this approach in its merger notification procedures. The Commission's move to introduce the practice in merger cases, Section 6 of the Form CO, requiring merging parties to define "all plausible alternative product and geographic market definitions" and to provide market data for all identified markets should be revisited. In practice, the Commission often interprets the "plausible" threshold, contrary to the ordinary definition of the word, as meaning any possible market segment. This approach often relates to purely theoretical market definitions and thereby creates significant burden for all involved parties (including, the merging parties or third parties consulted in the market test), without adding significant value to the quality and result of the clearance decision.

2.11 At the same time, in those cases where the Commission has already available the relevant data and market test results due to the investigation, then it should define the market, and not leave it open for the sake of leaving it open.

2.12 Safe harbour / starting point: Market definition is an important tool in identifying whether a firm or firms have market power (or will have market power post-merger) or can take comfort in "safe harbours". This question lies at the heart of the analyses under Article 102 TFEU and the EUMR,⁶ as well as vertical and horizontal analysis under applicable block exemptions and guidelines. The General Court has recently reaffirmed that market definition is an essential stage of any merger analysis and must take account of the overall economic context.⁷ It opined that market shares may only be used as indicia of competition concerns to the extent the market is correctly

⁴ Joined Cases T-125/97 and T-127/97, *Coca-Cola v Commission*, ECLI:EU:T:2000:84, paragraph 82. ⁵ Case T-342/99 *Airtours plc v. Commission* [2002].

⁵ Paragraph 27 of the Notice.

⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24, 29.01.2004, p. 1-22.

⁷ Case T-399/16, *CK Telecoms v Commission*, judgment of 28 May 2020.

defined. The same is true for any HHI analysis (Herfindahl-Hirschman Index) of concentration levels.

2.13 It follows that, as a general principal, any updated Notice must recognise that market definition serves as starting point or first screening device and does not preclude a comprehensive competitive (effects based) assessment of the theory of harm, closeness of competition, or any anti-competitive strategies. Put differently, the analysis of market power and competitive effects should not pre-empt or be conflated with the initial process of defining the market.

2.14 State aids: ERT recommends that the Commission take the opportunity to acknowledge in paragraph 1 of the Notice that market definition has a role to play in the State aid domain. Although the concept of aid in Article 107 TFEU can cut across markets (in the case of a tax measure for example) where the issue of selectivity is paramount, the very notion of State aid as such is predicated on there being a “distortion of competition”, which means the analysis ought to be grounded in a defined market.

3. Market definition is based on facts, yet is not static

3.1 Context: Market definition is essentially a matter of interchangeability,⁹ which is assessed by reference to robust and reliable data. This is frequently not available, and EU Courts have recognised that the Commission has a “margin of assessment”, but also a duty to explain their methodologies and to adequately address evidence submitted in rebuttal. Market definition should continue to be based on facts and evidence. The Notice should provide a clear framework on market definition in the context of competition procedures and the requirements and standards that need to be met by the competition authorities. The Notice should clarify that it is not appropriate to carry over regulatory market definitions in competition cases without a thorough analysis of the specific context.

3.2 EUMR vs 101 and 102: In certain cases, it might be appropriate to take a different approach to the exercise of market definition in the context of an Articles 101 or 102 TFEU analysis on the one hand, and a prospective merger review on the other hand: according to the Notice, this “might lead to different results depending on the nature of the competition issue being examined”.⁹ However, when this is the case, it should be explained explicitly in the decision

as per the comments in para. 2.3 above.

3.3 Traditionally, in an Article 101/102 context, the analysis is primarily static and focused on past behaviour although there is recognition for a more forward-looking and dynamic approach factoring in future developments and convergence of markets. It is critical that the Notice provides businesses with clear guidance to facilitate robust self-assessments, including the relevance of EUMR market definition precedents.

3.4 As regards rapidly changing digital markets, the Commission should ensure a future-proof framework that is able to anticipate the challenges ahead. The Commission should set out more specific examples to illustrate its guidance.

3.5 Not only demand or price substitutability:

The Commission’s analysis centres primarily on demand substitutability. This in turn is inherently focused on price elements and has traditionally not included other factors (e.g., data as the currency, quality, range, innovation, reputation, tipping and multi-homing) which are increasingly just as important. Even for those products and services where price is still relevant, it is critical that the Commission takes into account other important factors which consumers take into account when considering competing products and services, including innovation, quality, variety and social and environmental sustainability.

3.6 For instance, paragraphs 15 - 19 of the Notice should reflect that price is less relevant in some sectors, particularly in multi-sided markets or where customers are not charged a price in monetary terms. If there is a free side, the substitutability logic of the SSNIP test should be adapted by using non-monetary indicators such as attention (Attentional-SSNIP), quality (SSNIQ - based on a variation of quality), or a cost-oriented test (SSNIC - based on variation of costs), and reliance on non-monetary factors such as privacy.

3.7 There are many key questions that need to be addressed. For instance, how to determine market shares in zero priced markets (e.g., based on the amount transactions closed, search queries made or any other indicator)? When is it appropriate to consider free services substitutable to paid services? When might convergent products and services form part of the same market if linked to the same technology or platform?

⁹ Case 6/72, *Continental Can v Commission*, EU:C:1973:22.

⁸ Paragraph 12 of the Notice.

3.8 Multiple supply inputs: On supply-side substitutability, ERT encourages the Commission to recognise the speed of change in today's economy: recognising, for instance, that an online platform may be able to enter a new market with the potential to rapidly monopolise that market in a way that was inconceivable just a few years' ago. In this context, there should be more weight on supply side substitution with regard to multipurpose product inputs such as data in the digital economy.

3.9 The limited emphasis on supply-side substitutability at market definition stage also creates issues in highly bespoke markets in which orders or tenders are based on sophisticated customer requirements. Suppliers in these cases make significant investments (in terms of time, cost, resources) to design tailor-made solutions for customers that in turn may have limited ability to change their requirements making demand-side substitution impractical. The Notice should explicitly recognise in paragraphs 20 - 23 that bespoke sectors of this nature should be analysed on a case-by-case basis, particularly in respect of the time period and cost constraints currently set out in the Notice.

3.10 Potential competition: The current Notice excludes potential competition as a competitive constraint at the market definition stage on the basis that the conditions under which potential competition will actually represent effective constraint will depend on the specific circumstances related to the entry conditions. In our view however, paragraph 24 of the Notice should be amended to include potential competitors at the stage of market definition, without whom both the product- and the geographic market definition may not accurately capture competitive constraints on the relevant parties.

3.11 Such potential competition should be likely, timely and sufficient. For example, EU legislation indicates that the entry of new competitors ought to be likely, timely and sufficient to be considered a competitive constraint on the merging parties to deter or defeat any potential anti-competitive effects of the merger.¹⁰ ERT considers that such probable entry should be considered at the market definition stage already.

3.12 No speculation about products/services development and R&D: As explained above, the use of market definition across different cases (including in relation to identifying potential future markets) is critical to increasing business certainty. The Notice should clarify that as regards products and services that are in the pipeline, relevant markets must be identifiable and not purely speculative. For example, it might be legitimate to define a relevant market for a product or service which has a real chance of coming to market (for instance, 2 - 3 years), but it is not appropriate to identify general R&D markets which are not attached to identifiable and specific future products and services. ERT further suggests that the Notice should provide a few examples to illustrate this.

3.13 Primary vs secondary markets: Even in the context of markets undergoing digitalisation, existing antitrust rules may still provide answers.¹¹ For example, market power measured by reference to conglomerate effects allows antitrust enforcement to focus on the primary market on which market power is exercised and subsequently leveraged in neighbouring secondary markets.

3.14 Lesser role for market definition? There is a growing view that the Commission should "put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies", e.g., with multi-sided platforms in digital markets.¹² Especially in the merger control arena, the focus on market definition should be reduced, allowing for a greater focus on the anti-competitive assessment, including the theory of harm, closeness of competition and identification of anti-competitive strategies. However, with respect to ex-post intervention, there should be no shortcuts. ERT invites the Commission to first explore whether current avenues of market power analysis provide a meaningful answer before dispensing of the traditional two-stage approach (i.e., first define the market, then embark on a market power review).

3.15 If the Commission is to adapt its market definition analysis in the digital context, in particular in relation to hyper-scalers and/or in circumstances where the market has tipped or risks tipping, the departure from generally applicable rules should be

¹⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5-18: "entry is normally only considered timely if it occurs within two years" (paragraph 74). See also Communication from the Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7-20: "what is a significant period of time will depend on the product and on the circumstances of the market in question, but normally a period of two years will be sufficient" (paragraph 11 and footnote 6).

¹¹ See Designing an EU Intervention Standard for Digital Platforms, Peter Alexiadis, Alexandre de Streel, RSCAS 2020/14.

¹² See Competition policy for the digital era, Final Report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer.

set out in a concrete framework that provides legal certainty. The framework of analysis regarding past conduct needs to remain robust and predictable, and broadly coherent and consistent with current EU guidance, as well as other policy reviews and potential initiatives, such as the proposed New Competition Tool and the ex-ante regulation proposed in the Digital Services Act.¹³

4. Geographic market alternatives: Member State, EEA or Global

4.1 Traditionally, the Commission's analysis of the relevant geographic market has focused at local, national and EU/EEA level depending on the sectors in question. This narrow approach was appropriate until quite recently but needs to adjust to the realities of the competitive pressure of global markets in many sectors of the economy. Paragraphs 28 - 32 of the Notice should take into account and reflect the context of:

- (a) Digitalisation that has been supported by digital single market integration initiatives;
- (b) The development of online marketplaces and business and consumers' online activity that increasingly operate across borders and act as a competitive restraint to traditional bricks-and-mortar operations;
- (c) Non-EEA imports and other potential entrants;
- (d) Increasing trends for regional and world-wide sourcing, and
- (e) Asymmetrical incentives of entry, and the related ongoing debate about the need for a global level playing field.¹⁴ The Commission's June 2020 White Paper on Foreign Subsidies that may distort the internal market attests to the interplay of global forces in the modern economy.

5. Gathering evidence

5.1 Engagement with business: ERT invites the Commission to engage at the evidence gathering stage in broader discussions with suppliers, customers and relevant industry associations on market definition. This should be reflected in Section III titled "Evidence relied on to define relevant markets".

5.2 More streamlined RFIs: The Commission should strive to reduce the burden of requests for information by making meetings and calls with the merging parties and third parties (followed by minutes) the norm. If a request for information is necessary, it should be short and self-explanatory, using clear and straightforward questions. Leading questions should be avoided and information required should be limited to what is strictly necessary. When the Commission relies on consumer surveys that were not conducted in the context of the investigation at hand, the Commission should carefully scrutinise the data and consider whether it can actually be relied upon for the present purposes.

5.3 It is sometimes still the case that the Commission sends questionnaires directly to business personnel with limited understanding of the full picture and/or who are not authorised to represent the company. ERT urges the Commission to ensure that all questionnaires are only sent to the company representative listed in the Commission's database to ensure a timely and authorised response. The Commission should also always ensure that market definition findings are supported by further facts and data that go beyond the answers to these questionnaires where appropriate.

5.4 Weighted evidence: The Commission does not intend to "follow a rigid hierarchy of different sources of information or types of evidence".¹⁵ The revised Notice should provide clarity by expressly recognising that pre-existing internal documents estimating market shares, particularly in the context of M&A activities, are often preliminary and sometimes inaccurate (as for example a unidirectional internal estimate), and that other more objective sources should be given due weight. More generally, ERT would welcome a commitment by the Commission in the revised Notice that it will provide adequate reasons for relying on some but not all evidence (particularly where there is inconsistent evidence).

¹³ Available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>

¹⁴ About the asymmetrical market definition, see the studies cited by Nicolas Petit in a presentation he offered us, available at https://www.linkedin.com/posts/nicolaspetit1_market-definition-ec-revision-china-activity-6679002832194072576-py1P

¹⁵ Paragraph 25 of the Notice.



The European Round Table for Industry (ERT) is a forum that brings together around 55 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

This response is submitted by the Competition Policy Working Group of the European Round Table for Industry.

For more information, go to: <https://ert.eu/focus-areas/competition-policy/>

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