

ERT Response to the consultation on the revised draft of the Market Definition Notice



1. Introduction

- 1.1 The European Round Table for Industry ('ERT') welcomes the European Commission's (the '**Commission**') commitment to evaluating and refining its competition law 'toolkit' including its publication of the revised draft of the Market Definition Notice (the '**Draft Market Definition Notice**') on 8 November 2022.
- 1.2 ERT also very much appreciated the session held by the Commission on 5 December 2022 to further explain the additional details and new material in the Draft Market Definition Notice. Overall, ERT welcomes the introductory remarks of the Commission that recognises the new ways of offering services and the increasing globalised nature of competition, which in turn should lead to broader market definitions.
- 1.3 Having reflected on the Draft Market Definition Notice and that helpful discussion, ERT submits this note to highlight certain areas of the Draft Market Definition Notice that would benefit from further refinement / improvement.

2. Potential competition and supply side substitutability

- 2.1 ERT notes that paragraph 25 of the Draft Market Definition Notice excludes the consideration of potential competition at the market definition stage on the basis that the distinction between supply side substitutability and potential competition is whether the restriction of competition is immediate or not. In the first instance, ERT considers that the threshold of 'immediate' is too short term with respect to supply side substitutability. Undue and excessive focus on the 'immediacy' of supply side substitutability runs the risk of the Commission missing many ongoing transformative processes across transitions in various industries (e.g. the green energy transition and increasing digitalisation). Secondly and in any event, ERT has not seen in practice the implied lower standard for inclusion of supply-side substitution – in all its forms – being taken into account. It considers it essential that any market definition fully reflects both the demand and supply-side substitutions which operate to constrain behaviour, especially within the context of fast-moving markets.
- 2.2 This assessment should consider the market-specific factors at play including whether increases in demand could reasonably make a would-be competitor's entry more likely, timely and sufficient. In ERT's view the Draft Market Definition Notice should acknowledge the fact that, particularly in global or digital markets, constraints from supply side substitutability may emerge very quickly and at modest cost. Cutting-edge markets, from technology and digital markets to clean energy markets, are characterised by rapid innovation cycles and the potential for market entry / disruption in short time frames, especially by deep-pocketed

players in adjacent markets. Further, in some cases significant investment will not be necessary as it is possible to leverage common inputs into other markets, for example, because of data, analytics capabilities and technology already in the possession of a would-be new entrant. We note that ERT previously recommended in '*Competing at Scale: EU Competition Policy fit for the Global Stage*' a broader and more dynamic assessment of market definition, including by shifting away from static analysis, and by focusing more on competition from a forward-looking perspective. This should be explicitly reflected e.g. in paragraph 61 of the Draft Market Definition Notice.

- 2.3 ERT also notes the comments on evidence of past substitution in paragraph 60. ERT suggests that this should also reference consideration of past behaviour by specific market participants and their track record of having leveraged their strong positions from one market into a range of other (sometimes not obviously related) areas of business.
- 2.4 Additionally, ERT notes that the examples provided in section 2.2.1.2 of the Draft Market Definition Notice of situations where sufficiently strong supply substitution may or may not arise, are all from 'analogue industries' e.g. stainless steel, metallic coated steel, trains, gas turbines and cheese. For the reasons outlined above, the Draft Market Definition Notice would benefit from specific recognition that different analyses may be required in the context of digital markets.

3. Evidence relevant for demand substitution

- 3.1 Further, ERT considers that particular regard should be paid to fast moving digital and technology markets in the context of demand substitution. Section 3.2.1 of the Draft Market Definition Notice should account for the fact that in technology markets the fast pace of innovation means, as noted in paragraph 2.2 above, that new entry / supply-side substitution may be more likely in a short period of time. As a consequence, consumers' views on the interchangeability of products may not be well established thereby making demand-side substitutability more difficult to assess.
- 3.2 For these reasons, the Draft Market Definition Notice should make clear that historical switching behaviour may not always be a reliable basis on which to reach conclusions on demand side substitutability in fast moving markets. Rather, as the Draft Market Definition Notice itself acknowledges in paragraph 55, the Commission should not shy away from considering expected changes in substitution possibilities in rapidly evolving industries. In this spirit, the Commission should base product market definition on (i) recent and up-to-date information and (ii) expected future changes and thus avoid falling back on precedent or market definitions based out on outdated data from other contexts.

4. Market definition in the presence of significant differentiation

- 4.1 ERT notes that customer switching decisions may be based on non-price considerations (e.g. data, privacy, availability of services), particularly in technology markets where it has become more common for products and services to be offered for free. Further, whereas in traditional markets, market definition can more often be based around similar product characteristics, technology offerings may include a broader range of services, which mean that customers treat them as substitutes even if they can be used for other purposes as well. Market boundaries are therefore particularly unstable and are continuously re-shaped by new technologies.
- 4.2 For example, in the energy sector substitution can occur across different energy vectors (e.g. oil, gas, electricity and biomass) with potential for further substitutes as the green transition accelerates. Therefore, in the context of (i) technology disruptions in the energy industry; (ii) regulatory, environmental and corporate governance changes; and (iii) the resultant influence on consumer behaviour, competition between such energy sources could be based on factors such as the cost of service in a certain time period (e.g. the cost of kWh) as opposed to simple peer-to-peer price considerations / comparisons.
- 4.3 The Draft Market Definition Notice should explicitly recognise the need for a more functional assessment of substitution to ensure that market boundaries are properly defined and take into account that market boundaries for digital products and services in particular can quickly be re-shaped. Otherwise there is a risk that the Commission continues to fall back on the idea that markets should be defined narrowly based on an unduly prescriptive focus on the closeness of competition between suppliers in different differentiated markets per paragraph 86 of the Draft Market Definition Notice.
- 4.4 However such a functional assessment should not result in impractical and burdensome requests for parties, particularly where data may not be available.

5. Markets characterised by price differentiation

- 5.1 ERT notes that paragraph 88 of the Draft Market Definition Notice has set out further details on the extent to which a product market might be narrowed in the presence of distinct groups of customers who are charged different prices.
- 5.2 ERT welcomes the addition of the third condition that the price discrimination must be of a "*lasting nature*" in addition to the pre-existing conditions that (a) it is possible to identify clearly to which group an individual customer belongs at the moment of selling the relevant product to the customer, and (b) trade among customers or arbitrage by third parties is unlikely.

- 5.3 However, given that one of the aims of the Draft Market Definition Notice is to provide undertakings with greater certainty, the word “*usually*” has the opposite effect and leaves it unclear whether and when all three conditions must be met, and the scope of the Commission’s discretion to apply them.
- 5.4 Further, the Draft Market Definition Notice would benefit from further guidance on what time period of price differentiation would be considered as being of a “*lasting nature*” and what degree of price differentiation and other characteristics should render customer groups distinct. Offering different prices to different customers is a legitimate and standard business strategy and so ERT would welcome further detail on how the Commission intends to apply this in practice to ensure that such valid and commonplace business practices are not automatically treated as market-defining characteristics.
- 5.5 Finally, as a more general comment, ERT considers that an undue focus on price differentiation represents an inconsistency in light of the importance placed on the SSNIP test. Given that in practice, the Commission makes frequent avail of the SSNIP test (despite the welcome acknowledgement of its limitations as set out in section 6 below), absolute (rather than relative) price differentiation should not be a particularly important factor in assessing market definition compared to movements in relative price.

6. Market definition in the presence of multi-sided platforms

- 6.1 ERT welcomes the addition of a new section in the Draft Market Definition Notice on multi-sided platforms, including acknowledgment in section 4.4 that in cases involving multi-sided platforms the SSNIP test may not be appropriate and non-price elements will be particularly relevant, including the small but significant non-transitory decrease in quality (‘SSNDQ’) test. However, ERT recommends replacing ‘*namely*’ in paragraph 98 with ‘*such as*’, as the SSNDQ test may not be the only relevant test to apply, especially as multi-sided platform business models continue to evolve over time. Further, as noted in a previous ERT submission, where there is a free side of the platform, the Draft Market Definition Notice would benefit from noting that the substitutability logic of the SSNIP test should be adapted by using non-monetary indicators in addition to the SSNDQ test; examples include: attention (Attentional SSNIP), cost of goods (SSNIC - based on variation of costs) and privacy.
- 6.2 Given that different multi-sided platforms operate differing business models, ERT also suggests that the revised Notice include an express statement that there is no ‘one size fits all’ approach to market definition.
- 6.3 In terms of the specific non-price elements that may be particularly relevant, ERT suggests that the list in paragraph 98 should include actual (as well as hypothetical) switching behaviour, and the links between the core product market and other potential markets, for example, by looking at substitutability between

the core products/services and secondary products/services, and the common inputs used by the platform owner to develop the products/services in the core and secondary markets.

7. The SSNIP Test

- 7.1 The limitations of the SSNIP test are well understood, and ERT welcomes that the Draft Market Definition Notice acknowledges some of these limitations. ERT accordingly fully agrees that the SSNIP test should not be the only method available for defining relevant product or geographic markets as noted by the case law cited in footnote 49 of the Draft Market Definition Notice (see also comments in section 6 above).
- 7.2 ERT further welcomes that the Draft Market Definition Notice provides that alternate methodologies such as the SSNDQ test are “*equally valid*” and appropriate e.g. in zero priced markets or in the presence of multi-sided platforms as noted in paragraph 6.1 above.
- 7.3 However, given that paragraph 33 makes clear that the Commission is not under any obligation to apply the SSNIP test, greater clarity should be provided on when the SSNIP test *is* an appropriate tool to be used in market definition. The current drafting still gives the Commission considerable discretion as to when to use the SSNIP test.
- 7.4 The Draft Market Definition Notice would therefore benefit from setting out the circumstances in which the Commission is likely to use the SSNIP test. At present, undertakings face considerable uncertainty thereby undermining their ability to factor in SSNIP test analysis in their internal decision making.

8. Market definition in markets characterised by high R&D spending

- 8.1 ERT notes that with respect to “pipeline products” paragraph 90 of the Draft Market Definition Notice sets out that the Commission may find such pipeline products belong to (i) an existing relevant product or geographic market or (ii) to a new market limited to the pipeline product and its substitutes.
- 8.2 ERT would like to make clear its support for the approach outlined in (i). It is important that the Commission continues to be forward looking when defining existing markets, particularly in fast moving industries characterised by rapid innovation cycles and potential for market entry/disruption in short time frames, as discussed in paragraph 2.2 above.
- 8.3 However, ERT reiterates the point made in its previous submissions, that with respect to (ii), the relevant market should not be purely speculative.

8.4 Addressing this point could include setting out a threshold of uncertainty (and a consideration of relevant factors that contribute to such uncertainty, e.g. time horizon) beyond which the Commission will not define a new product market or innovation space. Setting out such a threshold will provide undertakings with greater legal certainty, which is of paramount importance to businesses.

9. Geographic market definition

9.1 As noted in previous ERT submissions, the Commission's approach to the definition of the relevant geographic market should acknowledge the reality of increasingly global markets in many sectors of the economy. In particular, ERT considers that the Draft Market Definition Notice would benefit from:

(A) Clarifying that the Commission should not be overly reliant on precedent to define a geographic market narrowly. As Executive Vice-President Vestager noted in December 2019 "*[c]hanges like globalisation and digitisation mean that many markets work rather differently from the way they did*" and "*we can find, when we return to a market after many years, that we need to update our ideas about where that market's boundaries lie.*"¹

(B) Acknowledging the broader macroeconomic trends causing geographic markets to become increasingly global, namely:

(i) The global nature of online marketplaces and the resultant facilitation of cross-border online activity by both businesses and consumers;

(ii) Increasing trends towards world-wide sourcing which persists notwithstanding geopolitical tensions; and

(iii) Non-EEA imports, other potential entrants and, in particular, related debates around the need for a global level playing field.

9.2 Just as is the case with product market definition, and as is made clear by the welcome updates in the Draft Market Definition Notice, it is crucial to ensure that geographic markets are not defined too narrowly.

¹ See here: "Defining Markets in a new age", Chillin' Competition Conference, Brussels, 9 December 2019 (available at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en)

10. Value placed on evidence from market participants

- 10.1 ERT acknowledges, as indicated in paragraph 77 of the Draft Market Definition Notice, that evidence from market participants should be considered as being particularly reliable.
- 10.2 ERT notes, however, that this should not be the unique preserve of third parties rather than e.g. merging parties (who are equally well-placed as market participants) in the context of merger reviews.
- 10.3 Accordingly, ERT would welcome clarification that evidence from the parties who are subject to the investigation is given the same probative value as evidence provided by market participants.
- 10.4 On a related note, when the Commission is gathering evidence for the assessment of market definition, ERT underscores the importance of targeted RFIs. These should be short and self-explanatory, while at the same time avoiding repetitive and inconsistent questions. The huge degree of detailed information requested in the RFIs is in many cases neither required nor helpful to get a realistic picture of the conditions on the relevant market. Indeed, RFIs are often identical for customers and competitors and therefore are not tailored to the specific market participant being questioned. Therefore, the burdens created by these RFIs are disproportionate to the additional value they provide.

11. Holistic assessment of internal documents

- 11.1 ERT understands the importance placed by the Commission on undertakings' internal documents, particularly those prepared in the ordinary course of business.
- 11.2 In practice, however, ERT has some concern with their practical experiences of the Commission selectively quoting evidence internal documents.
- 11.3 ERT considers that paragraph 79 the Draft Market Definition Notice would benefit from a clarification that evidence extracted from internal documents will be considered only on a holistic basis, the disclosing parties' accompanying explanations will be taken into account, and in any event all quotes should be assessed in context rather in isolation.
- 11.4 Holistic interpretation should involve a consideration of:
 - (A) **The seniority of an undertaking's employees.** When assessing the weighting given to a document, the Commission should place greater importance on documents that are either created by, or unambiguously reflect the thinking of, an undertaking's executives or senior employees. The Commission should therefore accordingly clarify that documents

created by more junior employees will generally be given less weighting in the determination of the insights to be gained from an undertaking's internal documents.

- (B) **The age of the document.** Inevitably views may change over time so it is important that the Commission takes care – including by discussing with disclosing parties – to ensure that it is basing its assessments on documents which are indicative of the party in question's (and in particular its senior decision makers') current views .
- (C) **The context of a document's creation.** The Commission should consider, for example, whether a document has been created in order to win internal backing for a project competing against other initiatives for investment and whether the author of a document's internal credibility is likely dependent on securing such investment. The probative value of such evidence should therefore be accordingly moderated as it is less likely to present an objective assessment of the relevant scenario.

11.5 ERT would welcome clarifications in the Draft Market Definition Notice that recognise the points raised above.

12. The broader approach to market definition by Commission case teams

12.1 ERT strongly welcomes the observation in paragraph 10 of the Draft Market Definition notice that market definition is "*based on the facts of the case*" and that accordingly the Commission may consider, but is not bound by, previous decisional practice.

12.2 ERT encourages the Commission to ensure that this case / fact-specific approach is actually employed in practice. In merger control, for example, the current Form CO, requires parties to the concentration to submit all plausible alternative product and geographic market definitions based on, if available, previous Commission decisions and judgments of the Union Courts, and in the experience of ERT members, case teams are too often speedy to apply past decisional practice that no longer reflects market circumstances.

12.3 Greater emphasis should therefore be placed on up-to-date information submitted by the undertakings involved in the investigation in question. This will increase the probative value of market definition exercises by the Commission moving forwards and help ensure the work put into revising the Draft Market Definition Notice actually has a meaningful impact in practice.

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

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