



13 January 2023

Draft Revised Market Definition Notice Commission Consultation

BUSINESSEUROPE is pleased that the Commission is evaluating whether its 1997 Notice on market definition is fit for the modern economy. Market definition is a core element of EU competition policy allowing the calculation of market shares in the enforcement of the rules regarding competition and merger control to identify the competition constraints that companies face. The current Notice on market definition has given important guidance to stakeholders about the Commission's application of the concept of relevant product and geographic market and, as such, has contributed greatly to transparency.

BUSINESSEUROPE welcomes the new and additional guidance on the principles of market definition and the clarifications on various key market definition issues. As a general comment, BUSINESSEUROPE regrets though that the draft revised guidance can be rather open-ended leaving the option open that alternative criteria may be applied whilst no examples or indications are given why and how. This undermines legal certainty for businesses and complicates compliance. At some instances, the proposed market definition is also too narrow.

Legal certainty is very important for businesses. There is a real risk that companies will refrain from cooperating, for example in cases where enhanced coordination is necessary (typically when projects are very big in scope, requiring different kind of competences and skills, possibly from different sectors) to develop market-based solutions and technologies, if they have undue fear that they could be infringing competition rules. To avoid such legal uncertainty – and potential underinvestment – the Commission should take a pragmatic approach to business' needs. To stay ahead with the dynamic reality of current markets, the Notice should be continuously amended or supplemented when authorities' practices and case law becomes a source of legal uncertainty.

BUSINESSEUROPE particularly welcomes the clarifications regarding the forward-looking application of market definition although it regrets that potential entry is still not to be considered when defining the relevant market but only at the substantive stage of assessment. In rapidly evolving markets, entry can be easy and quick so the Commission should take potential competition into account when defining the relevant market. Therefore, the market temporal dimension should come to the fore. The relevant market is determined by applying the concept of substitution to different market dimensions. To this extent, in the EU only two dimensions are essential: the product and the geographical one; other jurisdictions tend to take account of other dimensions, such as the temporal one and we would encourage the Commission to do likewise.

BUSINESSEUROPE also welcomes the additional guidance on geographic market definition although it suggests emphasising more strongly that markets more and more often stretch beyond national borders and the internal market. For example, in cases where there are cross-border activities in a given region or in cases where merging parties compete outside the EU and where third country competitors do not (yet) have business activities or revenues in the EU, sufficient consideration should be given to the



global market environment. Also, when the non-European business of the merging companies is vital to support their European activities, in times when EU demand is low and technical development is mainly driven by demand from outside, the EU should not focus predominantly on the market conditions in the internal market, notwithstanding the importance of a proper consideration of the conditions in the internal market. This is even more valid if there is an indication, following a proper economic analysis, that non-European competitors might become active in the EU after a longer period within the foreseeable future (see also above). In such circumstances, the Commission should consider adopting a more dynamic analysis and long-term view of the markets.

As regards the threshold for considering the supply substitution (cf. para 34 ff.), which seems to be lifted to some extent, we welcome that the guidance of the draft revised Notice gives more guidance than before on this. However, given that it is still somewhat unclear how this test is to be carried out in practice, we suggest that the Notice elaborates further on this.

As regards aftermarkets, the guidance of the draft revised Notice explains well what an aftermarket is and the various possibilities for market definition. However, BUSINESSEUROPE believes that when elaborating on the factors that are relevant to determine when the definition of a system market may be more appropriate, the draft Notice gives the impression that the four factors referred in paragraph 101 must be simultaneously met, in particular because of using the conjunction “and” instead of “or” and when indicating that “when these circumstances are less likely to be met”. However, not all those factors have to be met simultaneously to determine or exclude the existence of a system market. Therefore, the four factors should be reformulated to include only the first three, and those three factors should be listed not as cumulative factors, but as alternative ones. The factor currently numbered as (iv) should be formulated as the “existence of”, not as “non-existence” and be moved to the part that deals with criteria that could be relevant to define the market as dual markets, particularly if combined with other factors.

Lastly, BUSINESSEUROPE suggests that the market definition also includes “services” even in the case such services are provided by public bodies. This would be especially relevant when situations change and the purchase of products or services is externalised or (re)-internalised (and services can then be defined, or not, as SGEIs).
