

Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law

Fields marked with * are mandatory.

Public questionnaire for the 2020 Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law

Introduction

Background and aim of the public questionnaire

Market definition is a tool to identify and define the boundaries of competition between undertakings. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors that are capable of constraining the commercial decisions of the undertakings concerned (such as their pricing decisions). It is from this perspective that the market definition makes it possible, among other things, to calculate market shares that would convey meaningful information for the purposes of assessing market power.

The Commission Notice on the definition of relevant markets ([‘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 Community competition law [...]’. 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.* (Excerpts of paragraphs 1 and 4 of the Notice)

This public questionnaire represents one of the methods of gathering information in the evaluation of the Notice, which was launched on 3 April 2020. Among other steps, the Commission will also carry out research, exchange views with the EU national competition authorities and may hold a conference or workshop with technical experts as well as representatives from the main stakeholder groups.

The purpose of this questionnaire is to collect views and evidence from the public and stakeholders on how the current Notice works for them. The Commission will evaluate the current Notice, based on the following criteria:

- Relevance (Do the objectives of the Notice match current needs or problems?)

- Effectiveness (Does the Notice meet its objectives?)
- Efficiency (Are the costs involved proportionate to the benefits?)
- Coherence (Is the Notice internally coherent? Does the Notice complement other actions or are there contradictions?)
- EU added value (Does the Notice at EU level provide clear added value?)

Please note that the purpose of this questionnaire is to evaluate the guidance described in the Notice and not to evaluate the requirement of defining a relevant market for the purpose of application of EU competition law or of having to comply with EU competition law.

The collected information will provide part of the evidence base for determining whether and how the Commission should change the Notice.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. **Please note that your replies will also become public as a whole, see below under section 'Privacy and Confidentiality'.**

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

Submission of your contribution

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we kindly ask you to keep your answers short and concise. You may include documents and URLs to relevant online content in your replies.

We invite all respondents to provide answers to all the questions in the questionnaire. In case a question does not apply to you or you do not know the answer, please choose the field 'Not applicable' or 'Do not know'.

You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey. Please note that without this new link you will not be able to access the draft again.

The questionnaire is available in English, French and German. You may however respond in any EU language.

In case of questions, you can contact us via the following functional mailbox: COMP-MARKET-DEFINITION-EVALUATION@ec.europa.eu.

In case of technical problems, please contact the Commission's CENTRAL-HELPDESK@ec.europa.eu.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- Gaelic
- German
- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority

- Trade union
- Other

* First name

Edward

* Surname

Rarity

* Email (this won't be published)

edward.rarity@shearman.com

* Organisation name

255 character(s) maximum

Shearman & Sterling (London) LLP

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

* Country of origin

Please add your country of origin, or that of your organisation.

- | | | | |
|-------------------------------------|--|-------------------------------------|--|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |

- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom

- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

* The main activities of your organisation

Text of 1 to 250 characters will be accepted

Corporate law

* Please describe the sectors where your organisation or your members are conducting business, if applicable

Text of 1 to 250 characters will be accepted

Corporate law

* The 2 digit NACE Rev.2 code(s) referring to the level of "division" that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, [available here](#)):

If you cannot provide the information, please write "Do not know" or "Not applicable", as the case may be.

M69.1

* Mark the countries/geographic areas where your main activities are located

at least 1 choice; multiple choice is possible

- | | | | |
|---|--|--|--|
| <input type="checkbox"/> Austria | <input type="checkbox"/> France | <input type="checkbox"/> Lithuania | <input type="checkbox"/> Slovenia |
| <input type="checkbox"/> Belgium | <input type="checkbox"/> Germany | <input type="checkbox"/> Luxembourg | <input type="checkbox"/> Spain |
| <input type="checkbox"/> Bulgaria | <input type="checkbox"/> Greece | <input type="checkbox"/> Malta | <input type="checkbox"/> Sweden |
| <input type="checkbox"/> Croatia | <input type="checkbox"/> Hungary | <input type="checkbox"/> Netherlands | <input checked="" type="checkbox"/> United Kingdom |
| <input type="checkbox"/> Cyprus | <input type="checkbox"/> Iceland | <input type="checkbox"/> Norway | <input type="checkbox"/> The Americas |
| <input type="checkbox"/> Czech Republic | <input type="checkbox"/> Ireland | <input type="checkbox"/> Poland | <input type="checkbox"/> Asia |
| <input type="checkbox"/> Denmark | <input type="checkbox"/> Italy | <input type="checkbox"/> Portugal | <input type="checkbox"/> Africa |
| <input type="checkbox"/> Estonia | <input type="checkbox"/> Latvia | <input type="checkbox"/> Romania | <input type="checkbox"/> Australia & Oceania |
| <input type="checkbox"/> Finland | <input type="checkbox"/> Liechtenstein | <input type="checkbox"/> Slovak Republic | |

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

I agree with the [personal data protection provisions](#)

I. General Questions on the Notice

* I.1. In the last five years, have you or your company / (business) organisation been required to assess the relevant product and geographic market for competition law purposes?

- Yes
- No
- Do not know
- Not applicable

* I.2. If your reply to question I.1. was 'yes', please specify the type of competition law assessment

at least 1 choice; multiple choice is possible

- Assessment of a concentration between undertakings under Council Regulation N° 139/2004 (the EU Merger Regulation)
- Assessment of concerted practices and agreements between companies under Article 101 of the Treaty
- Assessment of abuse of dominance by an undertaking under Article 102 of the Treaty
- Assessment under the national competition law of one of the 30 states of the European Economic Area
- Assessment under the national competition law of a jurisdiction outside of the European Economic Area
- Other
- Not applicable

* I.3. How often do you consult the Notice?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Rarely (once every couple of years)
- Never
- I do not know

* I.4. Do you consult the Notice for any purpose other than competition law assessment?

- Yes
- No
- I do not know
- Not applicable

II. Relevance (Do the objectives of the Notice match current needs or problems?)

In this section, we would like to understand if the objectives pursued by the Notice, namely to provide correct, comprehensive and clear guidance on market definition in EU competition law assessments, are relevant.

* II.1. Is there still a need for a Notice to provide correct, comprehensive and clear guidance on market definition?

- Yes
- No
- I do not know

* II.1.1. Please explain your reply

Text of 1 to 5000 characters will be accepted

The Notice remains an important resource that formalises the principles of market definition. These principles are frequently consulted and applied in practice. Without the Notice, there would be significantly more legal uncertainty for practitioners when advising clients

III. Effectiveness (Does the Notice meet its objectives?)

The Notice in light of its aim to provide correct, comprehensive and clear guidance

The Notice aims at streamlining the process of assessing the relevant markets for competition law purposes by companies and (business) organisations by providing correct, comprehensive and clear guidance to increase transparency and predictability.

In this section, we would like to have your opinion on the extent to which the Notice meets its objective of providing correct, comprehensive and clear guidance on market definition by the EU.

Please take the following definitions into account in your answer:

“Correct” guidance adequately reflects the case law of the EU courts, the best practices applied by the Commission and other leading competition authorities as well as the mainstream findings of high-quality academic research.

“Comprehensive” guidance is materially complete by summarising all the broad principles applicable in market definition as well as the main specific criteria applicable in the most important case constellations.

“Clear” guidance is easy to understand and follow.

III.1. Have the following aspects within “Definition of relevant market” (paragraphs 7-12) provided correct, comprehensive and clear guidance?

	Yes	Partially	No	I do not know
* Definition of relevant product market and relevant geographic market (7-9)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Concept of relevant market and objectives of Community competition policy (10-11)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Differences between market definition in assessing past behaviour (antitrust) and in assessing a change in the structure of supply (merger control) (12)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

* III.1.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Text of 1 to 5000 characters will be accepted

Geographic market definition:

The definition of relevant geographic market in para 8 of the Notice and taken from Regulation does not clearly allow for the possibility of including the market imports from an area where the conditions of competition are materially different. By way of example, conditions of competition for selling a certain product in China for are often markedly different from the conditions of competition in Europe (e.g. price differences, regulatory barriers on imports into China) but this does not restrict in any way Chinese companies selling into the European market. Erroneously disregarding or undervaluing the role of import competition could have negative consequences on European markets in the long run as it overvalues the competitive pressure from European players which are as a result overregulated in comparison to Chinese players and other players exporting to Europe. We therefore propose inserting a clear statement on how competitive imports should be treated, either as a constraint from outside the market, or as part of the market.

Competition from outside the market:

Following on from the last point, as a matter of practice, the Commission routinely undervalues the competitive constraint from products or services that it has considered not part of the relevant market. This is an issue as much for the competitive assessment and the role that market definition plays in the overall assessment, as much as an issue of the Notice. We would propose a clear statement in para 9 of the Notice that the relevant market is the starting point from which to assess a given competition problem, rather than the boundaries and an explicit recognition that considerable competitive pressure can come from outside the market e.g. because of converging markets,

SIEC test:

An obvious but important change – these paragraphs and other instances throughout the document need to be updated to reflect the revised Merger Regulation adopted in 2004 and that the Commission may intervene not only in relation to concentrations that may result in the creation or strengthening of a dominant position but also those that may result in a significant impediment to effective competition.

Time as a parameter of market definition:

Para 12 identifies the important point that a market definition can and should vary depending on whether past conduct or the future effects of a concentration is being assessed. This notion needs to be significantly

expanded; there is currently a fundamental disconnect between the requirement to define the market today at a static point in time and the forward-looking nature of merger control. It is critical that the role of the merging parties and their competitors be put in the correct context. While the Commission projects the role that market participants will play in the future in its competitive assessment, the Notice consistently limits the process of defining the market as of today.

The issue is particularly acute when considering markets that are under-going rapid change, both digital but also traditional markets are in decline. Failing to bake a prospective look at market definition into the Notice risks undervaluing the potential increase in competitive pressure from converging markets or markets which are being subsumed.

The issue is not adequately dealt with by either: (i) supply-side substitutability which looks at whether someone could enter the market as it looks today; or (ii) potential competition which is equally measured against the market as it looks today.

The Commission does in practice undertake an assessment of how the market will look in the future but generally does so in the competitive assessment. As a result, the Commission focusses too narrowly on what impact the market changes will have on the competition between the current players in a given market, not the constraints on all the players which will play an increasing role in the competitive dynamics. This means that the degree to which there is a loss of competition is not taken into context properly – while it may seem huge when looking at the narrow market, if that market will be obsolete, a decrease in competition would in fact have a minimal impact on consumers. It is therefore important to start from the most relevant definition of the market.

We understand that this brings an added level of complexity to the investigation and potentially even more discretion to the Commission, but in reality it is already undertaking this exercise in many cases. The Notice therefore needs to be updated to reflect this with clear guidance about how the assessment will be undertaken – what evidence will the Commission rely on? What the standard of proof will be? What sort of timeframes it will consider? When will the current circumstances not be considered as the most appropriate counterfactual?

III.2. Have the following aspects within “Basic principles for market definition” (paragraphs 13-24) provided correct, comprehensive and clear guidance?

	Yes	Partially	No	I do not know.
* Competitive constraints (13-14)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Demand-side substitutability (15-19)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Supply-side substitutability (20-23)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Potential competition (24)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

*** III.2.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear**

Text of 1 to 5000 characters will be accepted

We consider that the guidance on determining demand side substitutability in the Notice is too focused on price alone and is resulting in overly narrow market definitions. In line with the case law of the ECJ, in the definition of a relevant product market in the Form CO and para 7 of the Notice, the Commission identifies the products’ characteristics, prices and intended use as all being relevant factors. Equally, para 15 notes

that one way to look at product market definition is by using the SSNIP test. However, the Notice is then largely silent on how the Commission will consider intended use and the products' characteristics in defining the market and focusses too narrowly on price. This has been an issue since the drafting of the Notice but has taken on new importance in the age of Google, Facebook et al where "price" for consumers is no longer a monetary amount and digital services with their blurred functionalities are a fundamental part of life. A number of changes are therefore required to the Notice.

Codifying existing practices:

In practice, the Commission routinely considers the intended use and a products' characteristics in defining relevant markets more than relying on the SSNIP test (as is indicated as a starting point in para 36) however this is not reflected in paras 15 - 19 the Notice. In the majority of cases, it is very difficult to run a SSNIP test – simply asking market participants what they would do in response to the 5 – 10% price increase leads in no small part to confusion and mixed responses being caveated and based on unexplained assumptions. We would therefore propose including more guidance on when and how a products' characteristics and intended use will be taken into account and/or more practical ways of implementing the hypothetical monopolist test. This further guidance should include how the Commission identifies the relevant characteristics and the extent to which one may be more important than the other for example, when the intended use of two products is exactly the same but the product characteristics are slightly different.

Customer groups:

Para 43 of the Notice indicates that distinct customer groups may be evidence of different markets. All too often however, the Commission takes the existence of different customer groups in and of itself as grounds for defining separate markets (business and private customers for telco operators being a salient example). If this is to be the case, it should be recognized in the Notice accordingly and guidance provided on how this rule will be implemented. Otherwise, commission practice should be reviewed to ensure compliance with the Notice.

SSNDQ test:

As noted above, the Notice highlights the SSNIP test as an appropriate tool for defining markets in certain instances however it is not appropriate in markets where on the consumer demand is not directly related to a monetary payment. Much airtime has been devoted in recent months and years to the concept of a SSNDQ test. To the extent that the Commission considers including such a methodology, we request that it be made clear that this is a suggestion suitable only for certain markets and it does not become the be all and end all of market definition. This is important given the obvious difficulties in consistently applying this test, stemming from the lack of empirical measurements and the fact that decreases in quality (e.g. in the privacy rules or terms and conditions of use) go unnoticed by the end-user.

III.3. Have the following aspects within “The Process of defining the relevant market in practice” (paragraphs 25-35) provided correct, comprehensive and clear guidance?

	Yes	Partially	No	I do not know.
* Product dimension (25-27)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Geographic dimension (28-31)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Market integration in the Community (32)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* The process of gathering evidence (33-35)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

* III.3.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Text of 1 to 5000 characters will be accepted

Leaving markets open:

Para 27 of the Notice allows the Commission to leave the market definition open in situations when a concentration will not result in competitive harm under any conceivable market definition in order to reduce the burden on the parties to provide evidence. This does not currently reflect the Commission's practice of routinely leaving the market open in all but the most extreme situations. Moreover, leaving the market open rarely results in a reduce workload for the parties in a notified deal – since the decision to leave it open happens at the end of the process after the parties have done all the work anyway. It also increases the workload for subsequent notifying parties as data needs to be provided on each prior open market permutation.

The result of leaving a market open in a case that warrants a full competitive assessment results in a de facto definition of a market. If the Commission is going to routinely leave all markets open, the Notice needs to be updated to reflect that. This change also needs to be dovetailed to the amendments suggested regarding the role of precedent decisions. Moreover, leaving a market open – as the Notice suggests – should result in a decreased information burden on the parties, which itself requires a much earlier case team determination on whether the case can be resolved in that way.

Internal documents:

The investigatory process relating to internal documents has been revolutionized in the last 10 years, let alone since 1997. Internal document requests are an integral part of a Phase II investigation and increasing common in Phase I; however, they are not referred to once in the Notice, being a glaring omission in paras 33 - 34 – this clearly needs to be rectified. The Commission should codify its practice of using internal documents when defining the market, using the opportunity to elaborate and clarify the way in which internal documents will be used for example – what sort of documents will be considered most relevant to the assessment? What is their weight compared to e.g. customer testimony or empirical evidence? Will it differ between pre-notification, Phase I and Phase II?

III.4. Have the following aspects within “Evidence to define markets – product dimension” (paragraphs 36-43) provided correct, comprehensive and clear guidance?

	Yes	Partially	No	I do not know.
* Introductory paragraphs (36-37)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Evidence of substitution and quantitative tests (38-39)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Views of customers/competitors and consumer preferences (40-41)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Barriers and costs of switching (42)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Different categories of customers and price discrimination (43)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

*

III.4.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Text of 1 to 5000 characters will be accepted

Role of previous decisions:

In assessing a merger, the Commission relies heavily on its previous decisions to define the product and geographic market. This is understandable given the volume of cases that are notified each year and brings with it a certain administrative efficiency. Being able to simply rely on a previous definition would also have the benefit of reducing the length of market investigation eQuestionnaires which may improve response rates.

On the other hand, previous decisions do not have precedential value and it is important to recall the findings of the ECJ in T-125/97 and T-127/97 Coca-Cola vs the Commission (albeit in relation to Article 102) that: “the Commission must define the relevant market again and make a fresh analysis of the conditions of competition which will not necessarily be based on the same considerations as those underlying the previous finding of a dominant position”. This indicates that the burden of proof is on the Commission to demonstrate that its previous market definition is still valid, not on the notifying parties to demonstrate that the previous definition must be updated. This is however often not how the process of market definition works in practice.

If the Commission intends to continue its practice of very rarely departing from its previous findings the Notice should accurately reflect that. This will give more transparency to Parties and will allow them to avoid wasted time and expense on seeking to update a market definition that the Commission will automatically reject.

First, the Notice should be clear that the burden of proof lies on the Commission in each case to show that a precedent market definition is still valid and whether or not there is a presumption that the Commission can rely on its previous findings.

Second, the Notice should provide detail on when the Commission will depart from previous market definitions and/or when it will depart from the presumption that a previous definition is still valid e.g. by detailing the applicable evidentiary threshold, suggesting a use-by date, or by providing useful examples.

Third, as noted above, it needs to be made clear what the impact of an open market definition means for future decisions and whether the burden of proof on the Commission and the parties is different if the market is left open or defined.

Role of eQuestionnaires and customer testimony:

We invite the Commission to consider how it uses eQuestionnaires to collect evidence on market definition. At paragraph 40, the Notice states that in order to be taken into account, the views of customers and competitors must be “backed by factual evidence”. Fundamentally we agree with this and think no change is required to the Notice. Frequently however, the Commission relies on an unsubstantiated show of hands to either blunt or byzantine questions in eQuestionnaires to support its pre-held hunches. The Commission should take this opportunity to consider whether the Notice as currently drafted is being correctly applied.

Evidentiary Approach Annex:

Given the level of detail currently missing from this section, and the importance of this section to defining the relevant market, we query whether it would be useful to have an Annex setting out further detail on the Commission's evidentiary approach informed by recent practice. In particular, we'd hope to see summaries of i) the quantitative tests frequently relied on by the Commission as referred to in paragraph

39, and ii) the methodology for assessing the views of customers and competitors.

III.5. Have the following aspects within “Evidence for defining markets – geographic dimension” (paragraphs 44-52) provided correct, comprehensive and clear guidance?

	Yes	Partially	No	I do not know.
* Evidence of diversion to other areas (45)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Demand characteristics and views of customers and competitors (46-47)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Geographic patterns of purchases and trade flows (48-49)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Barriers and switching costs (50)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
* Examples from Commission practice and relevance of different factors (51-52)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

- * III.5.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Text of 1 to 5000 characters will be accepted

Please see above at III 4.1 for our suggestions as to how the Commission could codify its approach to evidence.

- * III.6. Have paragraphs 53 to 55 on the “Calculation of market share” provided correct, comprehensive and clear guidance?

- Yes
- Partially
- No
- I do not know

- * III.6.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Text of 1 to 2000 characters will be accepted

Para 54 provides a list of alternatives to sales when calculating market share. Additional metrics that could be added to update the Notice to cover digital services include number of subscribers, number of unique hits or number of views. We do not consider that volume of data can be considered as suitable proxy for calculating market shares in the way perhaps factory capacity can given the vast heterogeneity of data, the importance of the data analytics tools to monetize the data and the role of data pools which are indivisible by service.

Para 53 states that if reliable market data is not available then the Commission will undertake a market reconstruction exercise. The Notice needs to be amended to make it clear that this will only be done in exceptional circumstances and that the Commission will give the results due weight depending on the rigorousness of the process to collect the input data from market participants. Market research companies spend years perfecting methodologies for collecting accurate and consistent market data while in contrast, the data that the Commission is able to collect from a market investigation is far from complete and not collected on a consistent basis between each of the participating entities which can lead to misleading results (often against the merging parties which are the only parties likely to have provided fulsome input data).

Para 55 states that “As a rule of thumb, both volume sales and value sales provide useful information.” This provision does not need amendment. Case teams however need to be aware of this rather than slavishly demanding that both are necessary to ensure completeness, especially in non-heterogenous markets where the Notice indicates that both metrics are less likely to be relevant.

* III.7. Have paragraphs 56 to 58 on the “Additional considerations” provided correct, comprehensive and clear guidance?

- Yes
- Partially
- No
- I do not know

* III.7.1. Please explain your reply, including, if applicable, how the guidance may be incorrect, incomplete or unclear

Text of 1 to 2000 characters will be accepted

We have no comments on this section.

The Notice in light of major trends and developments since its publication

In this section, we would like to understand if the Notice is up-to-date considering the developments that have taken place since its publication.

* III.8. Do you consider that there are any major points of continuity (for example legal, economic, political, methodological, or technological) that have not changed since 1997 and that you consider should continue guiding the principles of the Market Definition Notice going forward?

- Yes
- No
- I do not know

III.9. If yes, please identify in the following table the major points of continuity that have not changed since 1997 and that you consider should continue guiding the principles of the Market Definition Notice going forward.

Text of 1 to 1000 characters max. for each row

	Major points of continuity	Short explanation/concrete examples	Paragraphs of the Notice where those ideas are expressed
1	Please see our submissions above at III 1.1 – 6.1		
2			
3			
4			
5			
6			
7			
8			
9			
10			

* III.10. Do you consider that there are major trends and developments (for example legal, economic, political, methodological, or technological) that have affected the application of the Notice but are currently not reflected in it?

- Yes
- No
- I do not know

III.11. If yes, please identify in the following table the major trends and developments that you consider have affected the application of the Notice but are currently not reflected in it. Please describe the specific shortcomings of the Notice in this regard, including concrete examples.

Text of 1 to 1000 characters max. for each row

	Major trends/changes	Short explanation/concrete examples	Paragraphs of the Notice that may require an update	Specific shortcoming of the Notice
1	Please see our submissions above at III 1.1 – 6.1			
2				
3				
4				
5				
6				
7				
8				
9				
10				

* III.12. Is there any area for which the Notice currently does not provide any guidance but which would be desirable?

- Yes
- No
- I do not know

* III.12.1. Please explain your reply.

Text of 1 to 3000 characters will be accepted

Please see our submissions above at III 1.1 – 6.1

IV. Efficiency (Are the costs involved proportionate to the benefits?)

In this section, we would like to have your view concerning the efficiency of the Notice in the process of assessing relevant market definitions. In particular, we would like to understand whether the (possible) costs of following the guidance described in the Notice in the process of market definition (for example, increased legal fees or delays) are proportionate to the (possible) benefits of following the guidance described in the Notice (for example, decreased legal fees, transparency or legal certainty).

* IV.1. Are the net benefits – benefits net of costs - associated with following the guidance described in the Notice positive (compared to a situation without the Notice in place)?

- Yes, the net benefits are positive (the benefits of having the Notice in place exceed the costs thereof)
- No, the net benefits are negative (the costs of having the Notice in place exceed the benefits thereof)
- I do not know
- Not applicable

V. Coherence (Is the Notice internally coherent? Does the Notice complement other actions or are there contradictions?)

In this section, we would like to understand the extent to which the Notice is internally coherent as well as coherent with other EU rules or policies.

* V.1. How well do the different components set out in the Notice operate together?



The different components of the Notice work well together without apparent contradictions.

- There are some contradictions between different components of the Notice.
- I do not know

- * V.1.1. Please explain your reply, especially if you have identified any contradictions

Text of 1 to 2000 characters will be accepted

Please see our submissions above at III 1.1 – 6.1

- * V.2. Is the Notice coherent with other instruments that provide guidance on the interpretation of the EU antitrust rules (based on Articles 101 and 102 TFEU)?

- Yes
- No
- I do not know

- * V.2.1. Please explain.

Text of 1 to 2000 characters will be accepted

As far as we have seen in practice, the Notice is coherent with the other guidance on interpretation of EU antitrust rules.

- * V.3. Is the Notice coherent with the [Merger Regulation](#) and with other instruments that provide guidance on the interpretation of the EU merger control rules, such as the [Guidelines on the assessment of horizontal mergers](#) and the [Guidelines on the assessment of non-horizontal mergers](#)?

- Yes
- No
- I do not know

- * V.3.1. Please explain.

Text of 1 to 2000 characters will be accepted

As far as we have seen in practice, the Notice is coherent with the other instruments that provide guidance on the interpretation of EU merger control rules.

- * V.4. Is the Notice coherent with the case law of the General Court and the Court of Justice of the European Union?

- Yes
-

No

I do not know

* V.4.1. Please explain.

Text of 1 to 2000 characters will be accepted

As far as we have seen in practice, the Notice is coherent with the case law of the General Court and Court of Justice of the European Union.

* V.5. Is the Notice coherent with other existing or upcoming EU legislation or policies (including legislation and policies in fields other than competition law) ?

Yes

No

I do not know

VI. EU added value (Does the Notice at EU level provide clear added value?)

In this section, we would like to understand if the Notice at EU level has had added value (compared to a situation without such Notice at EU level).

In the absence of the Notice, undertakings would have had to, where applicable, self-assess the definition of relevant markets for the purposes of EU competition law with the help of the remaining legal framework at EU and possibly national level. This would include for instance the case law of the EU and national courts, the enforcement practice of the Commission and national competition authorities, as well as other guidance at EU and national level.

* VI.1. Has the Notice at EU level had added value in the assessment of relevant product and geographic market in the application of EU competition law (including application by national competition authorities)?

Yes

No

I do not know

* VI.1.1. Please explain your reply. If your reply differs between product and geographic market, please also explain that.

Text of 1 to 2000 characters will be accepted

Please see our submissions above at III 1.1 – 6.1

*

VI.2. Has the Notice helped in aligning the definition of the relevant markets by the national competition authorities of the EU member states and the European Commission?

- Yes
- No
- I do not know

VII. Specific questions

Final comments and document upload

VII.1. Please make any further comments you may have with regard to the Notice.

Text of 1 to 3000 characters will be accepted

N/A

VII.2. Please feel free to upload a concise document, such as a position paper, explaining your views in more detail or including additional information and data. **Please note that the uploaded document will be published** alongside your response to the questionnaire which is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

* VII.3. Please indicate whether the Commission services may contact you for further details on the information submitted, if required.

- Yes
- No

Contact

COMP-A2-MAIL@ec.europa.eu

