

# “CHARTING COMPETITIVE LANDSCAPES”: EUROPEAN COMMISSION ADOPTS REVISED MARKET DEFINITION GUIDANCE TO BOOST ANTITRUST COMPLIANCE

After much anticipation, the European Commission has adopted its [revised Market Definition Notice](#) – the first revision of the Notice since its adoption in 1997. The revised Notice reflects significant developments in market realities over the intervening years – especially the impact of digitalisation and the increasingly interconnected and globalised nature of many commercial dealings.

The Commission's goal is to give companies more guidance so they can assess their own market position to support their compliance with EU antitrust rules. The revised Notice also consolidates the Commission's case practice and EU case law over many years of enforcement, to improve the efficiency of enforcement by the Commission and national competition authorities who can rely on the guidance.

## WHY CARE ABOUT MARKET DEFINITION IN PRACTICE?

In Executive Vice-President Vestager's [own words](#), defining markets is “*a rather technical exercise*”. But it is important in practice because the Commission (along with other authorities) uses market definition as the first step for its competitive assessment in merger and antitrust cases.

Defining the relevant product and geographic markets allows the Commission to assess the relative competitive strength of market players and – crucially – whether any of them has market power. As the [OECD](#) puts it: “*market power...can make the difference between procompetitive and abusive firm conduct, and the difference between beneficial and harmful mergers.*”

For market players, having a clear, transparent and therefore predictable methodology for defining markets allows them to self-assess their own market position with more certainty to ensure their commercial conduct is in line with the antitrust rules. For example, market shares are relevant for determining whether commercial agreements could fall within the scope of available block

exemptions, or whether a firm's unilateral conduct could be deemed abusive. Understanding the Commission's methodology also allows firms to assess the likely feasibility of any contemplated M&A activity.

## MAIN FEATURES OF THE REVISED NOTICE

The revised Notice has ballooned from nine to 44 pages, expanding and updating the Commission's guidance on its approach to market definition in enforcing EU competition law. Within this extensive new guidance, there are several features worth highlighting:

- **Emphasis on non-price factors, from surety of supply to sustainability.** The revised Notice recognises the importance of non-price parameters for market definition, including innovation, the quality and durability of products and services, and the reliability of supply. The revised Notice also explicitly acknowledges that environmental sustainability factors can play a role when defining markets, in line with the Commission's recent [case practice](#).
- **Particular importance of innovation competition.** The Commission acknowledges that innovation is a key parameter of competition. In addition to its general market definition principles applicable to all industries, the revised Notice provides standalone guidance on highly innovative industries characterised by frequent and significant R&D – which could impact competitive assessments in the pharmaceutical sector in particular. For obvious reasons, innovation is considered especially

important for new or pipeline products, which the Commission may include as part of an existing product market or a new market limited to the pipeline product and its substitutes, depending on the intended use and projected substitutability. The Commission has separately **made it clear** that while the updated guidance "does not by itself imply" that the Commission will increasingly intervene in R&D-intensive industries, investigating potential effects on competition in innovation is a "focus area" for the Commission.

- **Addressing the impact of digitalisation.** In the past, antitrust authorities have been criticised for struggling to keep up with fast-moving digital markets and the previous Notice was considered (perhaps understandably) out-of-date given how much they have evolved over the last three decades. Again, while the general principles set out in the revised Notice apply equally to all industries, the revised Notice includes additional, specific guidance on digital platforms to address issues pointed out by various stakeholders during the Commission's **2020 evaluation**. Regarding multi-sided platforms, the Commission confirms that it may define (1) one relevant product market for the products offered by the platform as a whole to encompass all (or multiple) user groups, or (2) separate (although inter-related) markets for the products offered on each side of the platform. Given the reality that many digital products and services are offered for free, the Commission makes clear that free products can still form part of a relevant market. In defining that market, the Commission will focus on non-price factors such as product functionalities, intended use, evidence of past or hypothetical substitution, barriers or costs of switching (e.g. interoperability, data portability and licensing features). The Commission also clarifies its approach to defining product markets for (digital) ecosystems: it may apply similar principles to those applied classically to after-markets or bundle markets and, where relevant, will take into account factors like network effects, switching costs and single- or multi-homing decisions.
- **Clarifications for dynamic and forward-looking assessments.** The revised Notice includes clarifications on the approach to dynamic and forward-looking assessments, especially in markets undergoing so-called structural transitions, such as new products emerging or impending technological or regulatory changes.

- **Expanded guidance on geographic market definition.** The revised Notice reflects the increasingly interconnected and globalised nature of many commercial dealings. It expands the Commission's guidance on geographic market definition in line with this reality, focusing on the factors that can justify defining markets as global, EEA-wide, national, or local, and how to assess the role of actual and potential imports when defining the relevant geographic market.
- **Extensive overview of use of evidence.** The Commission spends many pages setting out the various sources of evidence it uses and their relative probative value for product and geographic market definition analyses.

## PRACTICAL IMPACT OF THE REVISED NOTICE

The revised Notice reflects the Commission's latest thinking on markets and market dynamics, and will also be relied upon by national competition authorities. While the revised Notice applies to all sectors, it gives additional guidance for digital markets and other markets with high levels of innovation competition such as pharmaceuticals and life sciences. It also demonstrates the Commission's clear focus on these areas.

More clarity and legal certainty on the Commission's approach are welcome, and companies should take the opportunity to consider how the revised Notice may impact their perceived relative market positions. This will be particularly important for companies which could be considered to have market power on one or more relevant markets, and therefore subject to special rules around potential anti-competitive conduct. They should also apply the revised Notice when assessing the feasibility of their contemplated transactions and factor this into their deal strategy at the outset.

# FOR MORE INFORMATION

Our Antitrust team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:



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