

Response to public consultation

Recipient: The European Commission
Sender: Dansk Erhverv / The Danish Chamber of Commerce

9 October 2020

Public consultation on the Market Definition Notice used in EU competition law

The Commission has published a public consultation on the Commission Notice on the definition of relevant market for the purpose of Community competition law (the “Notice”), for the purpose of assessing whether the Notice requires updating.

General remarks

The current Notice dates from 1997. The world, the markets and the business economy has developed scientifically in the years since 1997, becoming increasingly more digital and global. The Danish Chamber of Commerce therefore welcomes the Commissions initiative to evaluate whether the Notice is still fit for the digital and global reality in which European companies operate.

The Danish Chamber of Commerce believes that healthy and strong competition in the internal market is imperative for European companies’ ability to compete internationally: “*Competition starts at home*”.

By providing the basis for the application and interpretation of European – and to a great extent also national – competition law, the Notice has ensured the legal certainty and predictability necessary for businesses to operate and compete on both EU and national markets, and has established itself as a fundamental piece of competition law legislation.

The Notice, as well as the standard methodology offered by the Notice, has generally proven to be flexible enough to adapt to various markets and circumstances across sectors and geographies, from local to international, and from industry to services-based activities. It provides the necessary transparency to ensure trust in competition policy enforcement and by laying down the key criteria for assessing markets, it is central to appeal procedures.

The Notice is therefore still a very relevant and needed tool, and while we do not see a need for a fundamental overhaul of the Notice’s methodology, the Notice could benefit from being brought up to date, thereby ensuring it is able to meet the challenges of digitalisation, globalisation and technological growth.

The Notice is also very theoretical and consequently sometimes very difficult for companies to apply in practice. The Commission may consider expanding or supplementing the Notice with guidelines like those known from the existing block exemptions guidelines on vertical- and horizontal agreements.

It is however imperative, that an upcoming revision of the Notice does not introduce general exemptions to decision procedures or protocols, or any other initiatives, which fundamentally undermines existing competition law.

Furthermore, an upcoming revision of the Notice should avoid introducing rules generally defining specific sectors, products or services as belonging to a specific market, and should also take special care to avoid rules which may be used, interpreted or constructed in such a way, that it will de facto protect certain types of industries, sectors, technologies or business-models at the expense of others.

An upcoming revision of the Notice must tread a fine line between defining the market too narrow, whereby it prevents European companies from developing new ideas or technologies, and consequently from competing internationally, and defining the market too broad, whereby competition on the internal market is significantly reduced, or in worst case, destroyed.

It is therefore important that the conversation relating to a potential upcoming revision of the Notice, is both highly transparent, objective and participative.

Specific remarks

Relevance

The Notice, including the standard methodology, provides the basis for the application of all other competition law tools including Article 101 TFEU, Article 102 TFEU, the merger regulations and the existing block exemptions and guidelines on vertical- and horizontal agreements. As such, the Notice is fundamental for the use and interpretation of both European and national competition rules, as well as central to the companies' self-assessments for competition compliance.

Together with its flexibility, the general nature of the Notice is one of its core strengths. It has proven itself able to adapt to various markets and circumstances, across sectors and geographies, from local to international, and from industry to services-based activities. Furthermore, it provides the necessary transparency to ensure trust in competition policy enforcement and by laying down the key criteria for assessing markets, it is central to appeal procedures.

The Notice is therefore still very relevant and needed, and an updated and time reflecting Notice will contribute to its relevance, predictability and usefulness, which will in turn benefit authorities, companies and courts. We therefore encourage the Commission to ensure, that the general nature, flexibility and transparency of the Notice is maintained, even after a potential revision of the Notice.

While we do not see a need for a fundamental overhaul of the Notice's methodology, the Notice could benefit from being brought up to date, thereby ensuring it is able to meet the challenges of digitalisation, globalisation and technological growth. An example of a current and future challenge could be platforms, which do to a combination of strong network effects and significant economies of scale and scope, are to a certain extent able to control the market.

The Notice is also very theoretical and consequently sometimes very difficult for companies to apply in practice. The Commission may consider expanding or supplementing the Notice with guidelines like those known from the existing block exemptions guidelines on vertical- and horizontal agreements.

Effectiveness

The world has changed scientifically since the Notice was drafted in 1997, moving quickly towards a more global and digital economy.

As mentioned above, we do not see a need for a fundamental overhaul of the Notice's methodology, but the Notice – and the tests relevant when assessing the functioning of markets – must however reflect the increasing globalisation and digitalisation, as well as case law developed when the European Court of Justice and national competition authorities enforce the European competition rules. At the same time, the Notice must be able to adapt to technological progress, ideas and business models which are not yet known.

When assessing the relevant market, we recommend that the Notice take the integration within a given market into account, as well as the ecosystem the companies operate in. The assessment of the relevant market should take a broader view on the functioning of markets, moving away from purely vertical relations, to reflect the broader scope of collaboration within the ecosystem as well as competition between ecosystems.

Digitalization, globalization and the ever-growing expansion of e-commerce, has meant that for consumers today, there is little difference between buying a product in the consumers home country or in another country. As such, a company's closest competitor may be a company in a different country within the EU or a third country. This is a well-known phenomenon in B2B-markets but is relatively new in B2C-markets.

Assessing the relevant market

The relevant market changes from sector to sector, and from product to product, and may in fact also change within a specific market depending on buyer preferences. In some situations that market is local (e.g. driving school) or national (e.g. newspapers), while it is in other situations European (e.g. tulips) and in other situations global (e.g. windmills and even certain consumer products).

The current assessment of the geographical market builds on an antiquated idea of what constitutes the relevant market and needs to consider the new market circumstances which the digital and global expansion has produced.

One example is digital ecosystems, which are not always easily defined and may change quickly, but which may also have a significant impact on competition within a given market. This is increasingly the case for online sales, which is a non-physical geographic market and where the consumers often purchase from foreign sellers. In these cases, it can have severe effect on the assessment in e.g. a merger or acquisition case, if a global market on consumer goods is included when assessing the market.

Another example is the development on the assessment of the relevant market. Where the market was previously local, it is now national or even European, and in very specific situations global. While a global market will in the vast majority of cases be a step to far, it must in all cases depend on an individual and thorough assessment of the relevant market.

Assessing market share

When assessing any given market, the main elements are price and sales (turnover). While turnover remain an important factor, it may not always correctly reflect a company's importance and relevance on any given market.

The emergence of business models without monetary counterparts, including the provision of "free" services in exchange for customer time, data and/or attention, or where a service provider has grown so large, that it is effectively unavoidable for companies wishing to do business in the given market, are all examples of situations, where a company's turnover does not provide an adequate picture of that company's market share or influence.

Consequently, the Notice does not properly reflect e.g. the functioning and impact of multisided markets where the success of one side of the market depends on the success of other sides of the market, nor situations where large – but not dominant – companies leverage assets such as users, data and/or revenue, from one market or service, to another market or service, thereby making it possible for the large – but not dominant – company, to close off or limit the market for new or other companies in the market.

We recommend that the Commission considered introducing a new methodology to assess the relevant market, relying on other factors in addition to turnover, such as e.g. traffic share, the role or the possibility of cross-sales, as well as the amount of data accumulated or owned. Adjusting the methodology to take such factors into account may also be relevant when seeking to address the so-called "killer acquisitions".

Network Effects

It is not an unknown phenomenon, that in certain situations, companies which do not themselves met the standard criteria for dominance subject to art. 102 TFEU and therefore does not possess so-called "essential facilities", may still in fact, own or control a product or service, which is so significant and important, that the product or service itself may in reality imitate an essential facility.

One such example may be platforms, which do to a combination of strong network effects and significant economies of scale and scope, may be able to control the market. To our understanding, one such situation which is currently under review by the Icelandic Competition Authorities, are

hotel booking sites, where it is becoming increasingly important for tourism services providers to be present on those platforms¹.

We recommend that the Commission provide guidance on how to include network effects in the market definition process. This would help to ensure a more uniform application of this concept by national competition authorities. It may also help address some of the issues the Commission otherwise seeks to address via the proposed ex ante regulation of platforms, as it may be argued, that the “gatekeeper”-term introduced by the Commission is in fact a variation of the situation described above.

Substitution

The issue of substitution is relevant both from a demand and supply point of view, but also from a channel substitution point of view, e.g. buying versus leasing or renting, brick-and-mortar versus online.

There are certain products and services which – even though they may appear substitutional on the surface – are in fact not, e.g. hockey skates versus figure skates or snowboarding versus skiing.

In other situations, e.g. online versus offline, there is a higher degree of substitution, as digitalization, low switching costs and the development of the internet, has resulted in online shopping becoming much more common.

We recommend that the Commission consider the technological possibilities, including the ever-growing market for online shopping, as well as changes to consumer behaviour, when assessing the relevant market. Furthermore, we suggest that the Commission consider the possibility of integration and channel substitution, as part of the standard assessment of markets.

European Champions

Globalisation has led to significant changes and we are acutely aware of the increased pressure global international companies are putting on European companies, in particular the digital ecosystem, and especially when taking about competition and production possibilities.

It is tempting to say, that the solution is that we in Europe must have equally large European companies, which are then able to compete with large international players on the market. Among others, Germany and France have been pushing for the European rules to allow for the creation of – even very large – industrial companies (so-called “European Champions”, which will de facto be European monopoly companies).

We believe that a healthy and strong competition together with good framework conditions within the internal market, is imperative for European companies’ ability to compete globally. Competition from global competitors should not become an excuse for restricting competition in the internal market. We are consequently very critical of the concept of European Champions, as such companies in our view, will not improve the competition in the internal market, but instead distort competition and restrict innovation.

At the same time, we also acknowledge, that there are specific situations where the costs of establishing or offering new systems, products or services, as well as legislative barriers within the EU, may be so significant, that it requires companies of a certain scale. In such very limited

¹ Nordic Competition Authorities; Joint memorandum on digital platforms and the future of European policy, page 9 (<https://www.kfst.dk/media/ockjqzob/digital-platforms-and-the-potential-changes-to-competition-law.pdf>).

situations, we encourage the European, to take such costs and barriers into consideration when assessing the relevant market, thereby ensuring that European companies are not excluded from competing internationally.

Furthermore, we stress the importance of ensuring coherence between any new regulations, tools and the Notice, particularly in the context of the development of an Industrial Strategy for the EU.

Efficiency

By providing the basis for the application and interpretation of European – and to a great extent also national – competition law, the Notice has ensured the legal certainty and predictability necessary for businesses to operate and compete on both EU and national markets, and has established itself as a fundamental piece of competition law legislation. As such, the has fostered a common understanding across the internal market.

Coherence

The Notice, including the standard methodology, provides the basis for the application of all other competition law tools including Article 101 TFEU, Article 102 TFEU, the merger regulations and the existing block exemptions and guidelines on vertical- and horizontal agreements. As such, the Notice, is fundamental for the use and interpretation of not only the European but also national competition rules

Considering the ongoing consultations on the existing competition law tools, we are surprised that the Commission has simultaneously chosen to publish consultations on a proposal for ex ante regulation of digital platforms and a potential new competition tool.

The challenges which both these two new initiatives attempt to solve, are very closely connected to the Notice, being highlighted by the fact, that both initiatives make significant use of the definition of “dominance” and abuse of dominance. We therefore recommend that the Commission evaluate whether the identified issues can be addressed by adapting the Notice, or alternatively the guidelines on the vertical- and horizontal agreements, to the new digital environment, before introducing new tools.

For the purpose of ensure coherence, we expect that the replies to those two consultations, as well as the replies and input provided in connection with the ongoing consultations on the existing competition tools, including the horizontal and vertical block exemptions and guidelines, as well as the merger regulations rules, are included in this evaluation, to ensure continued consistence between European competition rules and the Notice.

The Notice should also reflect the latest case law developed when the European Court and national competition authorities enforce the European competition rules.

EU added value

Guidance at EU level is essential to ensure a consistent enforcement and a level playing field in the EU’s single market.

The Notice forms the basis for any competition assessment and is therefore vital to the interpretation of all other competition law tools; TFEU art. 101 and 102, the merger regulation rules, as well as the vertical and horizontal block exemption regulations and guidelines. Consequently, the Notice is in our view important and necessary in ensuring unified rules across the internal market.

The Danish Chamber of Commerce will of course be available for further consultations as the need may arise and will also be happy to elaborate on the points made or enter further discussion if needed.

Best regards,

Tina Buur
Senior Advisor