

# Strelia Competition Newsflash

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## The new Market definition Notice

### 1. INTRODUCTION

On 8<sup>th</sup> February 2024, the European Commission (the “EC”) Notice on the definition of the relevant market for the purposes of Union competition law published on 9 December 1997 (the “**Old Notice**”) was revised for the first time in twenty-five years (the “**Market definition Notice**”). The structure of the [new Market definition Notice](#) (the “**Revised Notice**”) is quite different from the old notice dating from 1997. The Revised Notice is also much more detailed (it is 35 pages long, whereas the previous text was 9 pages long) and it includes concrete illustrations to guide the practical application of the concepts (with 166 references to recent cases and numerous examples).

Competition law is mainly concerned with problems caused by a specific market failure: market power (i.e., the ability of a firm to charge a price above its marginal costs). This market power can be assessed on the basis of market shares as they reflect the relative position of suppliers on the market<sup>1</sup>. As it enables the EC to identify the suppliers and customers active on a relevant market and then calculate the total market size and the market share of each supplier<sup>2</sup>, market definition is a cornerstone in all aspects of competition law enforcement (merger control, abuse of dominance and agreements restrictive of competition). In this context, the Market definition Notice serves as a tool to determine the competition and the position of an undertaking on the market (notably through the calculation of market shares).

The purpose of the revision of the Old Notice is mainly to update the text in the light of several factors, such as the ecological transition, the digitalization of the economy and the globalization of trade. At the micro-economic level, the Revised Notice aims at guiding the undertakings in their internal decision-making (e.g., when contemplating acquiring other undertakings, creating joint ventures, concluding certain agreements, or engaging in certain behaviour unilaterally)<sup>3</sup>. At the macro-economic level, the Revised Notice aims at consolidating the case law with a view to harmonizing the EU market.

The Revised Notice consolidates the general principles of EC’s methodology (**Section 2**) and includes some novelties as to product substitutability (**Section 3**), assessment of geographic markets (**Section 4**), market definition in specific circumstances (**Section 5**) and calculation of market shares (**Section 6**).

### 2. CONSOLIDATION OF THE GENERAL PRINCIPLES

Unsurprisingly, the Revised Notice takes up the essential concept of relevant market, which definition remains unchanged. It is still composed of (i) a product dimension, comprising mainly all those products that customers regard as interchangeable or substitutable, and (ii) a geographic dimension, comprising the geographic area in which the undertakings involved supply or demand relevant products<sup>4</sup>.

Moreover, the Revised Notice provides further guidance on the concrete application of the general

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<sup>1</sup> Revised Notice, para. 106.

<sup>2</sup> Revised Notice, para. 105.

<sup>3</sup> Revised Notice, para. 5.

<sup>4</sup> Revised Notice, para. 12.

principles of market definition, based on its decisional practice, including the following elements<sup>5</sup>.

- The EC may take into account temporal considerations;
- The market definition is based on the facts of the case;
- The EC may take into account various parameters of competition that customers regard relevant in the territory and period under assessment (price, but also degree of innovation and quality in varying degrees – as detailed in Section 3);
- Market definition is an intermediate stage in the EC's competition assessment, which does not prejudice the finding of competition concerns;
- It is possible for the EC to distinguish between competitive constraints within the market and those originating outside the market;
- The EC may take into account expected transitions in the structure of a market where the case requires a prospective analysis.

### 3. BROADENED CRITERIA FOR ASSESSING PRODUCT SUBSTITUTABILITY

With respect to product substitutability on the demand side, the Revised Notice does no longer mainly rely on the “*small but significant and non-transitory price increase*” test (the SSNIP test), which only served as a conceptual framework for the interpretation of available evidence in most cases<sup>6</sup>. The Revised Notice now also takes into account new criteria with the same degree of importance in order to determine which products belong to the same market. Those criteria notably include (i) the product characteristics (product quality, level of innovation, functionalities and intended use, whether a product is manufactured using more or less sustainable technology, differences between distribution channels), (ii) the evidence of past or hypothetical substitutability, and (iii) the barriers and costs to switching to substitute products<sup>7</sup>.

The broadening of the EC's approach can be explained by the fact that the SSNIP test finds its limits when it comes to zero-priced markets, such as digital platforms<sup>8</sup>, or to negative prices as well as to highly innovative industries, where undertakings compete on parameters other than prices (such as quality or the level of innovation)<sup>9</sup>. For this reason, the Revised Notice asserts the possibility to assess the switching behaviour of customers of the zero-price product in response to a “*small but significant non-transitory decrease of quality*” test (SSNDQ test)<sup>10</sup> and provides concrete examples for its application<sup>11</sup>.

Finally, the EC has further specified the necessary conditions to be met for the market to be broadened on the basis of product substitutability on the supply side: (i) most, if not all, suppliers are able to switch production between products in the range of related products; (ii) suppliers incur only insignificant additional sunk costs or risks when they switch production; (iii) suppliers have the incentive to and would do so when relative prices or demand conditions change; and (iv) they can offer all products in the range effectively in the short term<sup>12</sup>.

With respect to this last condition, the EC changed its definition of the notion “short term”. While it was defined under the Old Notice as “*a period that does not entail a significant adjustment of existing tangible and intangible assets*”<sup>13</sup>, it is currently defined under the Revised Notice as a period within which “*the producer must be able to market the product to the customer in a timeframe that is not significantly longer than the timeframe the customer needs for switching to other substitutable product(s) in the candidate market*”<sup>14</sup>.

<sup>5</sup> Revised Notice, para. 13-21.

<sup>6</sup> Revised Notice, para. 29-31.

<sup>7</sup> Revised Notice, para. 48-59.

<sup>8</sup> See for instance, case AT.39740 *Google search (Shopping)*.

<sup>9</sup> Revised Notice, para. 30.

<sup>10</sup> Revised Notice, para. 97-98.

<sup>11</sup> Revised Notice, footnote 54, referring to the case AT.40099 *Google Android* in which the EC used the SSNDQ test as a conceptual framework.

<sup>12</sup> Revised Notice, para. 33.

<sup>13</sup> Old Notice, footnote 4.

<sup>14</sup> Revised Notice, footnote 58.

#### 4. GLOBALISATION OF TRADE: A NEW APPROACH TO THE DEFINITION OF GEOGRAPHIC MARKETS

The EC maintained its main approach according to which the relevant geographic market comprises territories where the conditions of competition are sufficiently homogeneous<sup>15</sup>.

When analyzing these territories, the Revised Notice sets out the various elements of evidence taken into account by the EC<sup>16</sup>. An identity of available suppliers, similar market shares and similar price levels constitute evidence of homogeneous conditions of competition. Conversely, differences in customer preferences, which may lead to different purchasing behaviour, have a strong potential to limit the geographic scope of the market.

The Revised Notice also clarifies how imports are taken into account<sup>17</sup>. The EC does not extend the relevant geographic market to the territory from which the goods are exported where trade between certain territories or other supply and demand conditions are insufficient to lead to sufficiently homogeneous conditions of competition.

The Revised Notice highlights how the EC also takes account of trade flows in forward-looking analyses, by examining whether they are likely to increase in the future<sup>18</sup> or by anticipating possible structural shifts in trade that may result from changes in the regulatory framework<sup>19</sup>.

The Revised Notice provides concrete examples of markets that are likely to be global in scope, based on the EC's practice, i.e., IT services<sup>20</sup> or civil aerospace products<sup>21</sup>.

#### 5. MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES

The EC added five sections related to market definition in the presence of five specific circumstances (i.e., (i) significant differentiation, (ii) discrimination between customers or customers groups, (iii) significant R&D, (iv) multi-sided platforms and (v) after-markets, bundles and (digital) ecosystems). While the EC has further specified in the Revised Notice the conditions under which it takes account of differentiation and customer discrimination compared with the Old Notice, we will focus on the three last specific circumstances, as addressing them constitutes an innovation compared with the Old Notice.

##### *R&D-driven markets<sup>22</sup>*

In a forward-looking approach, the EC may consider pipeline products and its substitutes to belong to an existing relevant product market or to a new product market where the R&D process provides sufficient visibility to establish with which other product(s) the pipeline product is likely to be substitutable to.

Regarding early stages R&D processes, the EC may consider factors such as the nature and scope of the innovation efforts, the objectives of the different lines of research, the specialization of the different teams involved or the results of the undertaking's past innovation efforts.

The geographic dimension of a relevant market containing pipeline products may need to reflect the geographic dimension of the underlying R&D effort.

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<sup>15</sup> Revised Notice, para. 38.

<sup>16</sup> Revised Notice, para. 63-69.

<sup>17</sup> Revised Notice, para. 41-44.

<sup>18</sup> Revised Notice, para. 43.

<sup>19</sup> Revised Notice, para. 21.

<sup>20</sup> Revised Notice, para. 21.

<sup>21</sup> Revised Notice, para. 69.

<sup>22</sup> Revised Notice, para. 90-93.

*Multi-sided platforms*<sup>23</sup>

The EC may define a relevant product market for the products offered by a platform in a way that encompasses all (or multiple) user groups, or it may define separate relevant product markets for the products offered on each side of the platform. The EC will define separate markets where there are significant differences in the substitution possibilities on the different sides of the platform, based on (i) the fact that the undertakings offering substitutable products for each user group differ, (ii) the degree of product differentiation on each side (or each user group's perception thereof), or (iii) behavioral factors such as the homing decisions of each user group and the nature of the platform (for instance whether it is a transaction or a matching platform). When zero monetary prices form an integral part of multi-sided platforms' business strategy, non-price parameters, such as product functionalities, intended use, interoperability with other products or data portability, are particularly relevant for the assessment of substitution.

*After-market*<sup>24</sup>, *bundles and digital ecosystems*<sup>25</sup>

There are generally three possible ways to define markets in the case of primary and secondary products: (i) as a system market comprising both the primary and the secondary product; (ii) as multiple markets, namely, a market for the primary product and separate markets for the secondary products associated with each brand of the primary product; and (iii) as dual markets, namely, the market for the primary product on the one hand and the market for the secondary product on the other hand. The EC explains which of these approaches it would take depending on the circumstances.

In some cases, digital ecosystems may consist of a primary core product and several secondary (digital) products that are connected to the consumption of the core product. Therefore, the EC may apply similar principles to those applied to after-markets to define the relevant product market.

When the secondary (digital) products are offered as a bundle, the EC may assess the possibility of that bundle constituting a relevant market of its own.

## 6. CALCULATION OF MARKET SHARES

The Revised Notice also notes that market shares are not the sole indicator of an undertaking's strength in the market and that other factors, such as barriers to entry or expansion, access to specific assets and inputs, as well as product differentiation and degree of substitutability, may also be relevant, depending on the specific facts of the case<sup>26</sup>.

Furthermore, the Revised Notice clarifies that market share calculation method can be based on other metrics than values and volumes of sales and can depend on specific products or industries<sup>27</sup>:

- The number of suppliers in markets involving formal calls for tender or in situations where innovative products are at the development stage;
- The capacity or production in markets characterized by the strategic importance of capacity;
- The number of contracts awarded, the usage metrics such as the number of (active) users, the number of website visits or streams, time spent or audience numbers, the number of downloads and updates, the number of interactions or the volume or value of transactions concluded over a platform in zero monetary price markets (i.e., digital markets or multi-sided platforms among

<sup>23</sup> Revised Notice, para. 94-98. Multi-sided platforms are defined as platforms supporting interactions between different groups of users, creating a situation where the demand from one group of users has an influence on the demand from the other groups, such as payment cards systems or advertising-sponsored platforms (Revised Notice, para. 94).

<sup>24</sup> The after-market covers situations where the consumption of a durable product (primary product) leads to the consumption of another connected product (secondary product) (Revised Notice, para. 99).

<sup>25</sup> Revised Notice, para. 99-104.

<sup>26</sup> Revised Notice, para. 106.

<sup>27</sup> Revised Notice, para. 108.

- others);
- The units of fleet, seat capacity, number of trips or access rights such as slots at specific airports (in transport markets);
- Reserves held (in the mining sector);
- The level of R&D expenditure or the number of patents or patent citations in markets where there are frequent and significant investments in R&D.

## 7. CONCLUSION

The Revised Notice provides comprehensive and clearer guidance on how to assess markets. The focus on specific circumstances, such as R&D-driven markets, multi-sided platforms or after-market, bundles and digital ecosystems is laudable. However, certain particular businesses may regret the lack of legal certainty when the conclusion to be deducted from certain specific criteria for assessing them remains open (e.g., as it is the case with non-monetary criteria, which the Revised Notice does not define nor hierarchize, to assess product substitutability on demand side).

Regarding the practical impact of the Revised Notice, we do not expect drastic changes in the EC's assessment of the markets as the Revised Notice is mainly a codification of the EC's practice. However, in view of the active participation of the national competition authorities in the review of the Old Notice, their assessment of market definition may be worth keeping an eye on in the coming months given that the Revised Notice is likely to be used as guidelines by them.

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**For any additional information, please do not hesitate to contact us or your usual Strelia contact person.**

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