

# The European Commission's Revised Market Definition Notice: A New Approach to Digital Markets

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

## Ingrid Vandenborre

Partner / Brussels  
32.2.639.0336  
ingrid.vandenborre@skadden.com

## Aleksandar Leshev

Associate / Brussels  
32.2.639.2130  
aleksandar.leshev@skadden.com

## Maria Roussi

Associate / Brussels  
32.2.639.2135  
maria.roussi@skadden.com

## Fabian D.F. Uebele

Associate / Frankfurt  
49.69.74220.183  
fabian.uebele@skadden.com

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One Manhattan West  
New York, NY 10001  
212.735.3000

Avenue Louise 480  
1050 Brussels, Belgium  
32.2.639.0300

On February 8, 2024, the European Commission (EC) adopted a revised Market Definition Notice (revised Notice). The revised Notice confirms the EC's and EU courts' existing approach to understanding dynamic and innovative markets and specifically addresses multisided platforms and digital ecosystems.

The revisions to the Notice are the first since its adoption 27 years ago. They reflect new market realities. While they confirm **the importance of factors other than price — such as innovation, quality, reliable supply and sustainability — in defining the boundaries of competition**, they leave many factors open for assessment on a case-specific basis.

## Background

Market definition helps illuminate the competitive environment in which market players operate. The definition is a crucial tool in merger review and many antitrust cases. First adopted in 1997, the EC's Notice offers guidance on the EC's approach to defining markets. Market definition requires the EC to identify two dimensions of the relevant market: the relevant product market comprises all the products/services that are to a sufficient degree substitutable; and from a geographic perspective, all substitutable products in a specific area belong to the same market if the competitive conditions in that area are sufficiently homogeneous. The EC uses market definition to assess companies' market power.

Traditionally, the main question EU regulators consider is whether a hypothetical monopolist of the product could profitably sustain prices at a small but significant amount above competitive levels (the so-called hypothetical monopolist, or SSNIP (small but significant non-transitory increase in price), test). Following a small price increase, customers may switch some of their purchases to other products, which would then belong to the same product market (demand-side substitutability). Similarly, if prices rise, companies that do not currently supply a product might be able to supply it without incurring substantial sunk costs (supply-side substitutability).

## Key Updates to the EC's Guidance on Market Definition

### Nonprice Dimensions of Competition

The revised Notice underscores the importance of competitive parameters other than product characteristics, prices and intended use and refers to parameters such as the degree of innovation and quality. **Differences in the resource efficiency, durability, the value and variety of uses, the possibility to integrate the product with other products, the image conveyed or the security and privacy protection afforded may also be relevant.** The revised Notice also refers to the relevance of behavioral biases in customer choices, such as a tendency to choose the default option provided (see the reference to customer inertia identified by the EC in its recent [Booking.com/eTraveli merger decision](#)).

### Forward-Looking Assessment

The revised Notice provides that the EC can take into account “expected transitions in the structure of a market” when the EC is making a forward-looking assessment.

- The EC can examine short-term and medium-term changes in market structure, where “there is sufficient probability that new types of products are about to emerge.”

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- The revised Notice indicates that, in its forward-looking assessment, the EC will consider the internal documents of market participants that are particularly relevant to support considerations on changes in market structure.

The revised Notice also refers to the specificities of highly innovative industries.

- The EC may consider that a pipeline product belongs to an existing market or identify a new product market comprising just the pipeline product and its substitutes (*e.g.*, where several companies develop similar pipeline products).
- The EC may also assess a company's innovation efforts in order to identify the boundaries within which innovation competition takes place.

## Multisided Platforms

In analyzing multisided platforms, 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 (*e.g.*, both job seekers and recruiters using the same platforms), 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 differences in products for different user groups, differences in substitution patterns, or factors like the extent of multi-homing and the nature of the platform.** Where multisided platforms may offer their products or services to a user group for free while monetizing the same product or service on the other side of the platform, the revised Notice indicates **the EC will focus on nonprice parameters such as product functionalities, intended use, interoperability with other products and data portability,** among others.

## Digital Ecosystems

The revised Notice highlights that, in certain scenarios, digital ecosystems can be conceptualized as comprised of a primary product and several related secondary products linked to the primary product through technological links or interoperability. The revised Notice leaves the market definition of ecosystems flexible, and notes that the EC may define them as either involving a single "system" market of primary and secondary products, or multiple separate and distinct markets. The revised Notice also distinguishes the concept of "dual markets" involving the market for the primary product and the market for the secondary product.

## Role and Calculation of Market Shares

The revised Notice also notes that market shares are not the sole indicator of a company's position in the market and the competitive pressure exerted by other players, and that **market share calculations can be based on a company's share of sales or capacity, or based on usage metrics such as the number of active users** or website visits. The revised Notice also clarifies that in markets undergoing structural transitions, such as regulatory or technological changes, or where a forward-looking assessment may be appropriate to capture the market dynamics, market shares may be estimated for the future to reflect those expected changes.

## Conclusion

The revised Notice confirms the EC's and EU courts' approach to market definition as reflected in recent decisions and case law, but leaves many important factors open for assessment on a case-specific basis when complex issues, including digital ecosystems and two-sided platforms, are involved. The updated guidance identifies the possibility for system markets, or dual markets, and for distinguishing between different sides of the same platform. The revised Notice also confirms the EC's approach to assessing innovation competition in the absence of directly competing pipeline projects.

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Competition/Antitrust Knowledge Strategy Lead  
**Caroline Janssens** contributed to this article.