



# Market Definition Revisited: a discussion of the draft new notice

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\* The opinions expressed are those of the author(s) only and should not be considered as representative of the European Commission's position.

# Context of the review

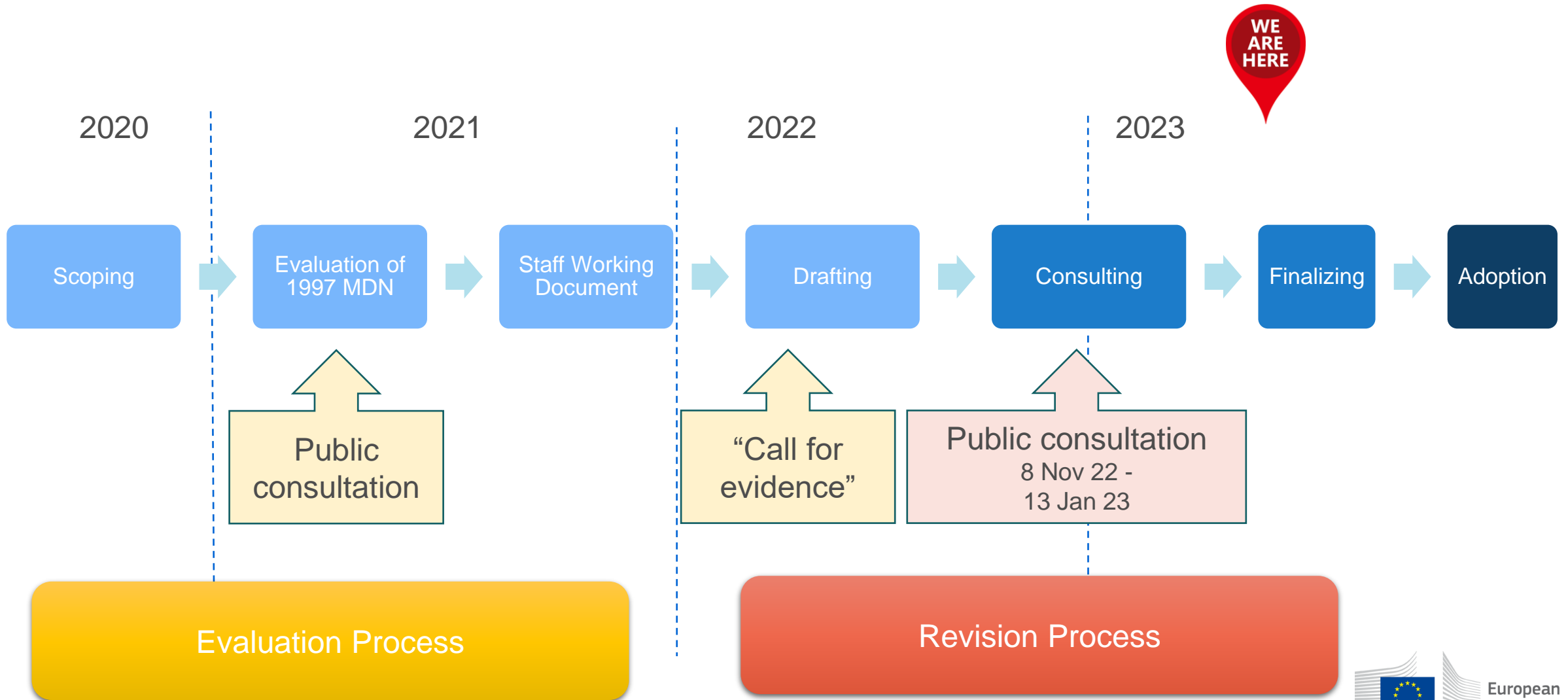
- The current Market Definition Notice dates back to 1997

*“We want to be sure that the guidance it gives is **accurate and up to date**, and sets out a **clear and consistent approach** to both antitrust and merger cases across different industries, in a way that’s **easily accessible**.”*

(EVP Vestager, 9 December 2019)

- Provide a comprehensive compendium of the Commission’s approach to market definition:
  - Re-draft of those parts that need clarification or up-dating (added guidance, increased use of examples)
  - Make no or limited changes to those parts of the Notice that have worked well
  - Provide new or additional guidance on various key issues of market definition (digital, innovation, global markets, role of imports, forward-looking assessments...)

# Timeline



# Market definition

- A tool to identify the boundaries of competition between companies
- It provides a **framework to structure and facilitate the competitive assessment**, in particular the assessment of the level or change in market power of the company/ies involved
- **Important for facts-based and rule-based competition enforcement**
- **A first step** in the assessment of mergers and of most antitrust cases – mainly where it is necessary to assess whether a company holds or increases its market power
- MD follows a **robust and transparent economic methodology**
- MD **increases predictability and thereby legal certainty**

# Structure of the new Notice

## 1. INTRODUCTION

1.1 Purpose of the notice; 1.2 Role of MD; 1.3 General principles of MD

## 2. CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY

2.1 Concept of relevant product market and geographic market

2.2 General methodology for market definition: product and geographic markets

## 3. PROCESS OF DEFINING MARKETS

3.1 General approach to market definition in practice

3.2 Evidence to define product markets (DS and SS)

3.3 Evidence to define geographic markets

3.4 Gathering and evaluating evidence

## 4. MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES

MD in the presence of: 4.1 significant differentiation; 4.2 price discrimination; 4.3 significant investments in R&D; 4.4 multi-sided platforms; 4.5 after-markets, bundles and digital ecosystems

## 5. MARKET SHARES

## 6. CONCLUSIONS

# 1. Introduction

## **Purpose of the Notice (1.1) and Role of MD (1.2) [expanded]:**

- A tool to identify the boundaries of competition between companies and to **structure and facilitate the competitive assessment**

## **General principles (1.3) [expanded] include:**

- MD is a **facts-based** exercise. Precedents are a starting point, but not binding
- **Parameters of competition other than price** can be relevant.
- MD is **one step in the assessment** and does not prejudge the outcome.
- Only **immediate competitive** constraints will be accounted for at MD stage.
- The **outcome of market definition can differ** depending on the parameters of competition, the undertaking(s) involved and the time period.
- MD can take into account **expected transitions in the structure of the market** in forward looking assessments (when sufficiently substantiated)
- **Relevant markets** are not necessarily the same as **markets defined in other contexts**
- MD can be left open.

# 2. Concept and general methodology

[new sub-headers, expanded and clarifications added]

## Product market definition (2.2.1)

- **Demand substitution (DS)** remains is the main criterion for PMD
- **SSNIP** is a *useful conceptual framework* for DS but with *clear limitations*
  - No obligation to apply SSNIP test for MD
  - “Cellophane fallacy” and its consequences, e.g. antitrust vs merger cases
- **Supply substitution (SS)** is relevant when it is as effective and immediate as DS
  - Range of products produced with same assets leading to *similar conditions of competition*
  - Necessary conditions include that “most, if not all” supplier can engage in SS
- **[Potential competition** is not relevant for MD]

## Geographic market definition (2.2.2)

- The GM comprises the area in which **conditions of competition are sufficiently homogeneous (HCC)**.
- Customers in the GM should also **face similar effects** in order for the relevant market to provide a useful framework for the competitive assessment.
- Substitution (DS and SS) can lead to such sufficient HCC, but does not necessarily do so.
- The **presence of imports** as such (even when significant) **does not necessarily imply a wide market**, as conditions of competition can still differ between regions of origin and destination of imports

# 3. Process of defining markets

[restructured and consolidated with some new elements]

## General approach in practice (3.1)

- Start from **readily available information** to form initial hypotheses on plausible relevant markets.
- “In many cases, a cursory examination of the alternative plausible market definitions is sufficient to structure and facilitate the competitive assessment in the Commission’s decision, without the need to carry out a detailed analysis [...]”

## Evidence to define product markets (3.2) and geographic markets (3.3)

- Expanded and updated guidance with examples on types of evidence.
- New paragraphs on:
  - SSNIP and CLA
  - Evidence of past substitution for SS
  - Catchment areas for GMD

## Gathering and evaluating evidence (3.4)

- Open approach to evidence with no rigid hierarchy
- Evidence needs to be reliable and verifiable
- Different available sources of evidence  
(e.g. RFIs, internal documents and market studies, ad hoc surveys)



# 4. MD in specific circumstances (1/2)

## Significant differentiation (4.1) [new]

- Often **no clear dividing line**. Can define:
  - narrow markets within continuum of products OR
  - broad market (possibly with different segments)
- **Market shares become less reliable** for assessing market power. (More detailed assessment of substitutability during competitive assessment.)
- **Chains of substitution arguments** usually do not lead to broad markets

## Price discrimination (4.2) [expanded]

- Different markets for **customer groups that face different *conditions of competition***
  - Groups are identifiable; no arbitrage; lasting price discrimination
- Also relevant for geographic markets definition (discrimination by customer location)

## Significant investments in R&D (4.3) [new]

- **Pipeline products**: not on the market but sufficient visibility on likely existing or new product market (intended use, projected substitutability)
- **Innovation efforts at earlier stage** for which specific product market cannot yet be identified.
  - Assessment may require defining **boundaries along which companies compete** (objectives of research, specialisation of R&D teams, past R&D results)
- Continuum between **pipeline products** and **innovation efforts** – the assessment will be closer to either depending on status of R&D
- Alignment with ongoing reviews, especially R&D BER and HGL

# 4. MD in specific circumstances (2/2)

## Multi-sided platforms (4.4) *[new]*

- Importance of **indirect network effects**
- PMD for either
  - (i) the products offered by a **platform as a whole**, or
  - (ii) **separate markets on each side** of the platform
- Focus on **substitution possibilities** (and competitive constraints) rather than platform characteristics
  - Indicative elements to assess substitution possibilities on the different sides of the platform (e.g. product differentiation, homing decisions)
- **Zero monetary products**: non-exhaustive list of non-price elements and alternatives to the SSNIP

## After markets, bundles and digital ecosystems (4.5) *[update]*

- **After markets**: highlights the possibility to define a:
  - (i) system market, (ii) multiple markets, or (iii) dual markets.
- Guidance on the scenarios where each of the three market configurations are most likely
- **Bundles**: possibility, in certain circumstances, to consider bundles as a separate relevant product market
- **Digital ecosystems as after markets or bundles**: primary core product and secondary (digital) product(s) whose consumption is connected to the primary product – aftermarkets and bundles principles may apply

# 5. Market Shares

[expanded]

- Market shares are can be a **useful indicator for market power** but are **not the sole indicator**.
- Market shares usually based on value or volume of sales but **other metrics** can offer complementary or more useful information to determine market shares:
  - capacity, production, number of suppliers, tenders, users, volume of transactions, patents etc.
- Market shares may be less informative when there is significant differentiation within the relevant market
- Market shares can be based on different sources and may need to be estimated
- Market shares are usually computed over one year reference periods for the last three years, but this

# 6. Conclusions

Thank you!