

# COMPETITION & REGULATORY NEWSLETTER

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## European Commission updates market definition guidance to reflect new market realities

On 8 February 2024, the European Commission adopted a [revised version](#) of its Market Definition Notice, updating it for the first time since its adoption in 1997. The purpose of the Notice is to provide guidance on how the Commission applies the concept of relevant market to EU competition law.

Although, as noted in the Commission's [press release](#), the 1997 version was still “*relevant*” and “*generally fit for purpose*”, the Commission has updated the Notice in order to “*address new market realities, such as digitalisation and increasingly interconnected and globalised commercial activity*”. Over the years, the Commission has adapted its enforcement practice to these new market trends, and the revised Notice codifies these developments, bringing the Commission's guidance in line with its practice. This article considers some of the key points contained in the revised Notice.

### Non-price parameters of competition

The 1997 Notice focused on the importance of price when defining a product market, examining how customers would react to a relative price increase in respect of the product in question.

But this approach has become less relevant in a world in which digitalisation has led to a proliferation of “zero-price” products and highly innovative industries, and in which consumers are driven by a broader range of concerns and considerations than just a product's price - for example, looking to make sustainable choices. Recognising this, the revised Notice explains that, when defining markets, the Commission takes into account various parameters of competition that customers consider relevant, including not only price but also non-price parameters such as a product's sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate with other products, market image, the security and privacy protection afforded, as well as reliability and availability.

### Market definition in the digital era

Although the revised Notice applies to all sectors, it includes specific guidance relevant to digital markets, including guidance on how the Commission defines markets involving multi-sided platforms or (digital) ecosystems, and on possible bases for calculating market shares in zero-price markets. For more detail on the digital aspects of the revised Notice, see our recent [blog post](#).

### Market definition in highly innovative industries

The revised Notice recognises that innovation is often a key parameter of competition, and that the features of highly innovative industries may be relevant for market definition. The

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outcome of innovation efforts can be uncertain in terms of final products, and the revised Notice clarifies that the Commission may factor in various potential outcomes of research and development processes when defining a market.

One example given of when the Commission may take these specificities into consideration in market definition is with respect to “pipeline products”, that are not yet available to customers but where there may be sufficient visibility to establish with which other product(s) they are likely to be substitutable. In these circumstances, the Commission may either conclude that the pipeline product belongs to an existing relevant product market or to a new product market.

On the other hand, the revised Notice recognises that in some cases, the research and development process may not be closely related to any specific product, but instead in the early stages and with the potential to serve multiple purposes and feed into various products. In these circumstances, the Commission considers it may still be relevant to identify the boundaries within which undertakings compete in such early innovation efforts, in order to assess whether a merger or behaviour could lead to a loss of innovation competition.

## Market definition in the wake of globalisation

Commissioner Vestager [noted](#) that trends such as cross border trade and the disappearance of barriers have led the proportion of geographic markets defined as worldwide in EU merger investigations to increase over the years. Recognising this increased globalisation, the revised Notice includes additional guidance on geographic market definition and, in particular, when markets can be global: the revised Notice clarifies that markets are likely to be global when customers around the world “*have access to the same suppliers on similar terms regardless of the customers’ location*”.

It also recognises that markets may be global yet exclude specific areas due to high entry barriers or other obstacles to global sourcing by customers - by way of example, the revised Notice cites previous cases in which the markets were defined as global but excluded, for example, China.

The revised Notice also acknowledges the importance of imports, explaining how geographic market definition can factor in competition from importers that compete for business on the market. The mere possibility of switching to imports in a geographic area does not necessarily extend the geographic market to include the area from which goods could be exported. However, if customers face “*sufficiently homogeneous*” conditions of competition in two areas, the competitive pressure from imports can be considered in the geographic market definition.

## Conclusion

The revised Notice has been much anticipated and is a much more detailed piece of guidance than its predecessor. The Commission hopes that the guidance will enhance legal certainty and predictability, help companies comply with EU competition law and lead to higher procedural efficiency for the Commission and European national competition authorities (NCAs). With that in mind, it will be interesting to see how the Commission, NCAs and companies balance the expanded list of factors relevant to market definition in practice.

## OTHER DEVELOPMENTS

### MERGER CONTROL

#### European Commission conditionally approves Korean Air/Asiana merger following Phase 2 investigation

On 13 February 2024, the European Commission [announced](#) its decision to grant conditional clearance under the EU Merger Regulation to the proposed €1.31 billion acquisition of a majority stake in Asiana Airlines by Korean Air Lines. Korean Air and Asiana are the first and second largest airlines in the Republic of Korea (Korea), operating air passenger and cargo services on domestic routes, short-haul routes in Asia and long-haul routes between Korea and the rest of the world.

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The Commission initiated an in-depth Phase 2 investigation in February 2023 after the proposed transaction raised initial competition concerns that it may reduce competition in the markets for passenger and cargo air transport services between the EEA and Korea. Following its in-depth investigation, the Commission found that the proposed merger would harm competition in the markets for air cargo transport services between the EEA and Korea, and passenger air transport services on routes between Seoul and four European cities (Barcelona, Paris, Frankfurt and Rome).

To address the Commission's concerns, Korean Air offered the following remedies:

- **Cargo commitments:** The divestment of Asiana's global cargo freighter business to a suitable purchaser. Korean Air can only implement the acquisition following the Commission's approval of a suitable buyer for Asiana's cargo business; and
- **Passenger commitments:** Making available to rival Korean airline T'Way the necessary assets (including slots, traffic rights and access to the required aircraft) to enable it to start operating on the four overlap routes between Seoul and EEA destinations. Korean Air has committed not to complete the transaction until T'Way has commenced operations on the four routes.

Following market testing, the Commission concluded that the remedies fully address its competition concerns.

The proposed transaction, which was entered into in November 2020, has received regulatory antitrust approvals in numerous other jurisdictions globally, including conditional clearance in the UK and China (for details, see previous editions of the newsletter [here](#) and [here](#), respectively). Approval in the US is still pending.

## SAMR issues guidance handbook on merger filings

On 31 January 2024, State Administration for Market Regulation (SAMR) [issued](#) a guidance handbook on merger notifications, following the recent amendment of the filing thresholds in China (see our [previous newsletter](#) and [client briefing](#)).

The handbook, which contains 23 questions and answers, provides a comprehensive overview of the merger control regime in China. It covers a wide range of topics, including the newly amended merger filing thresholds, which party (or parties) would have the obligation to make a filing, when a filing should be submitted, how to determine who the parties to the concentration are, the definition of turnover, the documents required for a filing, when the simplified procedure is applicable, the duration of the merger review period and the consequences of violating the merger control rules under the Anti-Monopoly Law. Whilst the content of the handbook mainly sets out existing laws, regulations and guidance, it provides a helpful summary of the merger control regime in China, which will be beneficial for companies navigating the regime.

SAMR also recently [announced](#) that, of the 797 merger cases it concluded in 2023, 328 (41%) of these involved sectors closely related to people's livelihood, such as pharmaceuticals, heating and gas supply, supermarket retail, food manufacturing, real estate, construction and textiles. SAMR stated that, in two of the cases, conditions such as guaranteeing supply and lowering prices were imposed to protect the interests of SMEs and consumers. It is likely that cases involving sectors related to people's livelihood will continue to be under the regulatory spotlight in 2024.

## GENERAL COMPETITION

### European Commission finds Microsoft and Apple are not gatekeepers for certain services

On 13 February 2024, the European Commission [announced](#) that it has closed four market investigations launched in September 2023 to assess submissions by Microsoft and Apple that some of their core platform services do not qualify as gateways under the Digital Markets Act (DMA). The Commission found that Apple and Microsoft should not be designated as gatekeepers for Apple's messaging service iMessage, Microsoft's online search engine Bing, web browser Edge and online advertising service Microsoft Advertising. The Commission will continue to monitor the developments on the market with respect to these services, should any substantial changes arise. The

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Commission's market investigation to further assess whether Apple's mobile operating system iPadOS should be designated as a gateway is still pending - the Commission has another six months to reach a decision.

The Commission's decision does not affect its earlier designation of Apple and Microsoft as gatekeepers for other "core platform services". For further details on these designations, see a [previous edition](#) of this newsletter.

In a related development, on 9 February 2024 the European General Court (GC) [rejected](#) an application for interim measures launched by ByteDance seeking the suspension of the Commission's September 2023 decision designating ByteDance as a gatekeeper under the DMA in relation to its social network TikTok. ByteDance had argued, amongst other things, that by implementing the Commission decision, the disclosure of highly strategic information concerning TikTok's user profiling practices, which is not otherwise in the public domain, is at risk. By doing so, TikTok's competitors and other third parties would be able to obtain insight into TikTok's business strategies in a way that would significantly harm its business. The GC however concluded that ByteDance has not shown that there is a real risk of disclosure of confidential information or that such a risk would give rise to serious and irreparable harm.

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