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# Market Definition in Online Markets: Mission Impossible?

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# Market definition is a relevant step in most competition law inquiries.



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- Market definition is used to identify the ‘relevant market’ which is then used to establish market shares and consequently, **market power** (and ‘dominance’).
- **Purpose:** to judge the **possibilities of competition** in the context of the market comprising the totality of products/services which are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products/services (*Deutsche Bahn; British Airways*).
- The **SSNIP test** is based on the significance (ie profitability) of an increase in price by a certain percentage.
- Some of the most popular services on the Internet are provided for free to users – there is **no price** which could be used to establish the relevant market.
- Swapping price with quality in SSNIP test may not necessarily work.

*When users do not pay, what determines substitutability?*

# Several factors complicate market definition in online markets.



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- They are usually **two-sided** and the platform sits between the two sides of this market (eg advertisers – search engine – users).
- There is no price for the service provided to one side of the market as this is funded by the other side of the market (eg advertisers pay search engine for the attention of users).
- Various companies offering very different services use advertising to fund their services (ie one side of the market is common to various different services which appear to be providing completely different products to users).
- Which – if any – side is the relevant market? Is the market the totality of both sides (ie **one market**)? Are the two sides **separate markets**? Is the relevant market a different market from the two sides altogether?
- **Innovative products vs static market definitions.**
- **Online vs offline** – are they in competition or not?

# The implication of defining markets incorrectly is to establish market power incorrectly.



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- ***KinderStart.com*** (US) – there cannot be a relevant antitrust market for something that is given away for free (eg Google Search). **Antitrust law does not apply.**
- ‘Search advertising’ or a combined market of ‘search and search advertising’ are not relevant antitrust markets either as they are too narrow.
- Cf ***Google Search*** (EC) – three relevant markets with Google being dominant on two: market for general Internet search; market for search advertising; market for comparison shopping services.
- Cf ***Microsoft/Skype*** (EC) – single market for ‘consumer communications services’.
- **Relevant questions:**
  - a- If Google reduced quality/started charging, etc would consumers use mobile apps, Facebook, Amazon, etc for the same purpose? If advertising on Google became more expensive/less successful, would advertisers go to Facebook, Amazon, etc? **Demand-side substitutability.**
  - b- Would/could Amazon, Facebook, etc start their own search engine? **Supply-side substitutability.**
- The ‘relevant market’ is likely to be **much broader** than that defined by the EC (eg Thépot; Gal and Rubinfeld; Ratliff and Rubinfeld; Lao; German Monopolies Commission).

# Different proposals have been made for market definition in online markets.



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- There is **no antitrust market** when the product is provided for free (*Kinderstart*).
- The relevant market is **limited to the side that pays** when the other side receives the product for free (Düsseldorf Higher Regional Court, *HRS*).
- There is an antitrust market on the free side as long as users provide **attention, data**, etc (Paal, 2013; Körber, 2015; Bundeskartellamt, 2016).
- Both sides should be taken into account but there might be **one or two relevant markets** depending on the type of the platform (transaction vs non-transaction platforms) (Filistrucchi et al, 2013)
- The relevant market is a **single, platform market for matching platforms** (where the platform provides an intermediary service) **but not for audience providing/advertising platforms** since in the latter the two sides may have different possibilities of substitution (Bundeskartellamt, 2016).
- There is **a single market** where strong indirect network effects occur between two sides (German Monopolies Commission, 2014).

# A principled and practical approach to market definition has to be found.



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- **Abandon market definition** altogether as the process is ‘useless’ and ‘incoherent as a matter of basic economic principles’ (Kaplow, 2010).
- Put more emphasis on **supply-side substitutability**?
- Supply-side substitutability may suggest a very different set of competitors – eg Amazon, Google, Facebook all have large numbers of users and all offer advertising space despite offering ‘different’ products.
- Need **empirical data** on consumers’ perspectives on substitutes.

*Does the complexity of market definition mean that the authorities should be more lenient in the finding of dominance or abuse?*

*Are we facing an oligopoly on a yet-undefined market?*