

# Comments on the Draft Notice on the definition of the relevant market

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## 1 Introduction

1. On November 8<sup>th</sup>, 2022, the European Commission ["EC"] published a call for contribution to the draft revised Market definition Notice ["Draft Notice"]. We appreciate the opportunity to respond to the consultation and the consideration of our comments and contributions with the aim of improving the current version of the Draft Notice.<sup>1</sup>
2. Overall, the current Draft Notice is already a helpful improvement over the version of 1997. The Draft Notice provides guidance based on recent case law from the European Commission and the European Court of Justice. It considers the latest market developments, in particular the development of digital and innovation-intensive markets, the competition for non-price elements (such as innovation and quality), and increasing globalisation.

## 2 Observations

3. We present our observations in the following order. First, we cover the topic of delineation of market segments and separate markets. Then, we ask guidance on the definition of the "level of innovation" as a product characteristic. The last section discusses present uncertainties regarding the proposed implementation of the SSNDQ test in zero-price markets.

### 2.1 Different competitive dynamics within a relevant market

4. For market definition to be meaningful, the competitive dynamics within the relevant market must be sufficiently homogeneous. The Draft Notice should therefore include guidance as to the

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<sup>1</sup> This document has been prepared by a working group consisting of Mariann Leskó, Benjamin Loertscher and Dr. Laura Robles. The opinions expressed in this document are those of the authors and cannot be assumed to represent the views of Competition Economists Group Europe ["CEG"].

circumstances in which different competitive dynamics may be expected within different segments of the same relevant market.

5. Referring to the General Court judgment of 18 May 2022 in *Wieland-Werke v Commission* [T 251/19] footnote 34 of the Draft Notice contains the following explanation:

*"In the context of differentiated product markets, the definition of an overall relevant market does not affect the possibility of identifying different competitive dynamics in some market segments while keeping the precise segment delineation open. The competition analysis of the notified concentration can lead to a finding that the concentration does not impede competition equally on all parts of the relevant market, without that affecting or calling into question the very definition of that market [...]."*

6. This statement stands in contrast the explanations at para. 62 of the Draft Notice relating to the delineation of the geographical markets for which the Commission *"investigates whether conditions of competition throughout the candidate market are sufficiently homogeneous and whether the candidate market can be distinguished from other areas because competitive conditions are appreciably different in those areas."*
7. To resolve this potential conflict, the Draft Notice could explain that observing homogeneous competitive dynamics between different firms, products or geographic areas may indicate that these are part of the same relevant market, but that the observation of different competitive dynamics in turn does not necessarily mean that the firms, products or areas considered belong to separate markets. Competitive dynamics can be different in different segments of a single relevant market when a competitive constraint identified in the market definition does not have equal relevance on all parts of the relevant market.
8. For market definition to be a meaningful tool, the analyses in the market definition exercise and the subsequent competitive assessment should not be contradictory. Market definition does not add value if the *"immediate competitive constraints that the undertaking(s) involved face when offering certain products in a certain area"*<sup>2</sup> identified in the market definition are found to be irrelevant in the competitive assessment. For example, in the *Wieland* case referred to above, supply substitution was the reason for a broader market definition. The competitive assessment, however, identified factors like capacity constraints and barriers to entry and expansion as preventing manufacturers in one market segment from exerting a sufficient competitive constraint on manufacturers mainly active in another segment.
9. The Draft Notice should note that there is a limit to the heterogeneity of competitive dynamics within a relevant market as it would otherwise rob the market definition of its meaning. If, because of different competitive dynamics, the competitive assessment only considers a segment of a market, either this assessment or the market definition previously undertaken must have been flawed. Either the competitive assessment erroneously ignored a competitive constraint, or the market definition was too broad.

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<sup>2</sup> Draft Notice, para 5.

## 2.2 Level of innovation as product characteristic

10. The explanations on innovation and its role for competition and on market definition in the presence of significant R&D investments are useful additions to the Draft Market Notice.<sup>3</sup>
11. While the Draft Notice includes helpful clarifications on innovation competition, more guidance also on the topic of product innovativeness influencing consumer choices would be welcomed. In particular, clarification on the measurement of a product's innovativeness, and how this differs from the quality dimension would be helpful. The Draft Notice does not shed light on "innovation" as a product characteristic, i.e., a characteristic of an existing [developed] product that consumers consider for substitution as outlined in para 51 of the Draft Notice.
12. The Draft Notice contains general references to "level of innovation" as a product characteristic that customers consider relevant, along with price, quality and availability.<sup>4</sup> While price is a well-established and measurable concept, and the Draft Notice contains explanations regarding quality and availability,<sup>5</sup> the meaning of "level of innovation" is not illustrated in a similar detail. However, the Draft Notice mentions of this possible product feature suggests that missing this characteristic from the framework may lead to an incorrect market definition in certain cases.<sup>6</sup>
13. If the level of innovation of a product is something separate from its quality, the Draft Notice might benefit from additional explanations what is meant with it and how it could be assessed. Moreover, the Draft Notice could discuss ways to assess the value of innovativeness of a product for consumers, either qualitatively, or if feasible, quantitatively.

## 2.3 SSNIP test and its conversion in competition for non-price elements

14. The Draft Notice recognises that the SSNIP test cannot be used in zero-priced market conditions.<sup>7</sup> Instead, it suggests the usage of the SSNDQ test,<sup>8</sup> referring to the EC's decision in the Google

<sup>3</sup> See Draft Notice, Fn. 25 and Section 4.3.

<sup>4</sup> Draft Notice, para. 12, 29, 32, 49 and 51.

<sup>5</sup> Para. 12 of the Draft Notice explains that quality is for instance characterised by "*the value and variety of uses offered by the product, the image conveyed or the security and privacy protection afforded.*" Availability on the other hand may be determined by "*lead-time, resilience of supply chains, reliability of supply and transport costs*".

<sup>6</sup> Consider a hypothetical market with several implementations of an "Old Product" using a given mechanism, into which a "New Product" is introduced. The New Product is made of materials of equal quality, has the same intended use, but implements a new solution to the intended use. The customers might enjoy this novelty, and in the event of disrupted supply conditions or price changes, they will substitute to the New Product without hesitation. However, the customers might as well dislike the novelty and may be less willing to switch to the New Product. In the latter case, the New Product may not represent enough competitive pressure on the market to be considered in the same market. Failing to account for customers' preferences on level of innovation may lead to too broad a market definition.

<sup>7</sup> Draft Notice, para 32. Also, in the case of Google Shopping, the EC refused to apply the SSNIP test in the absence of positive prices [para. 242-245]. Later on, the EC chose to opt for the SSNDQ conversion which was applied in Google Android [e.g., para. 267] and in the Google/Fitbit acquisition review [e.g., para 124].

<sup>8</sup> The SSNDQ test assesses how consumers would react in the event of a small but significant non-transitory decrease of quality.

Android case.<sup>9</sup> It is, however, not clear how the SSNDQ was operationalised in the case. Although the Draft Notice clarifies that the EC normally will not engage in a quantitative application of the SSNDQ test due to several difficulties (including the quantification of quality), there should still be some process the EC follows in selection of the qualities that are tested and the degree of quality degradation that should be assumed. Also, in the Google Android case these questions remain unanswered. This implies a shortcoming of the Draft Notice as it limits the predictability of the outcome for undertakings concerned in SSNDQ test assessments.

15. In our view, an adequate implementation of the conversion of the SSNIP test to the SSNDQ test in zero-price settings would require providing some framework. Unfortunately, the Draft Notice does not touch on this matter beyond pointing out that the SSNDQ conversion constitutes a possible tool when dealing with the market definition of zero-priced goods or services. Ideally, the final version of the Draft Notice will touch more on the framework of the implementation of the SSNDQ test.

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<sup>9</sup> Draft Notice, footnote 47.