



## REVIEW OF THE COMMISSION NOTICE ON THE DEFINITION OF RELEVANT MARKET FOR THE PURPOSES OF COMMUNITY COMPETITION LAW

**Public consultation**  
**08.11.2022 to 13.01.2023**

- (1) McDermott Will & Emery<sup>1</sup> welcomes the opportunity to participate in the public consultation of the European Commission (**‘Commission’**) on the draft revised Market Definition Notice (**‘draft Notice’**).
- (2) Overall, McDermott Will & Emery endorses the draft Notice and appreciates the additional clarifications and guidance set forth therein. We believe that the draft Notice is a major improvement of the 1997 Market Definition Notice, as it addresses new market realities which have taken place since then.
- (3) We have provided our comments to the draft Notice below by reference to the relevant sections and paragraphs of the draft Notice.

### **I. SECTION 1: INTRODUCTION**

- (4) McDermott Will & Emery welcomes the new structure of the introduction, including the additional guidance on the role and use of market definition. Furthermore, we consider that the new sub-section 1.3 on ‘General principles of market definition’ is very useful.
- (5) With regard to the sixth general principle, we note that the Commission is expected to take into account **“short-term or medium-term” structural market transitions** (paragraph (16) of the draft Notice). However, the rationale for excluding “long-term” structural market transitions is not clear, especially when (i) these transitions would lead to effective changes in the demand and

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supply of the relevant segments and (2) the projected structural changes will take place with sufficient probability.

## II. SECTION 2: CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY

- (6) Concerning Section 2, McDermott Will & Emery welcomes the clarifications provided by the new subsections regarding the general methodology for defining product or geographic markets. However, we consider that certain topics can still be clarified further.
- (7) With regard to the general methodology for defining product markets, we note that paragraph (32) of the draft Notice discusses **non-price competition** and the difficulty of applying the SSNIP test in such cases. In this respect, paragraph (32) mentions two examples: zero monetary price products (see also below (15)) and highly innovative industries. We consider that it would be useful to clarify the approach the Commission will adopt and the relevant parameters used to define product markets when undertakings compete on parameters other than price. What methodology will the Commission use if it cannot apply the SSNIP test, and how will it look at non-price competition in practice?
- (8) With regard to **supply substitution**, paragraph (38) of the draft Notice provides: *“When only some of the suppliers meet the above conditions for supply substitution, it is not appropriate to include the product range in the same relevant market.”* We question where the Commission will, in practice, draw the line between analysing competitive constraints exercised by other suppliers in the market definition or in the competitive assessment. We query whether inclusion in the same relevant market will require (almost) all of the other suppliers to meet the conditions for supply substitution. Therefore, we consider that paragraph 38 could benefit from more precise guidance.

## III. SECTION 3: PROCESS OF DEFINING MARKETS

- (9) We appreciate the extension and clarification of Section 3 on the process of defining markets and the evidence relied on. In particular, the introduction of the notion of “imports” when defining the geographic market is welcomed (paragraph (42) of the draft Notice). However, we believe that certain paragraphs could benefit from additional clarifications.

- (10) In particular, we note that paragraph (76) of the draft Notice provides “*The Commission does not apply a rigid **hierarchy of different sources of information or types of evidence.***” While we believe this provides the Commission more flexibility, we consider that businesses could benefit from more guidance in this respect, especially in cases where different sources of information or types of evidence present conflicting views. How will the Commission approach such situations in general?
- (11) Furthermore, we note that in paragraph (82), the draft Notice states the following: “*Where appropriate, the Commission may also carry out informal visits or formal inspections at the premises of the undertaking(s) involved, their customers and/or their competitors, in order to better understand how products are manufactured or supplied.*” We believe that the power for the Commission to carry out **formal inspections** at the premises of the undertaking(s) involved, their customers and/or their competitors in the context of market definition is far-reaching. For example, in complex merger cases, the exercise of such powers by the Commission can create additional burdens for the undertaking(s) involved. Therefore, we ask the Commission to use such powers only where this would be strictly necessary and proportionate. We suggest to adjust the wording as follows: “*Where strictly necessary and proportionate, the Commission may also carry out informal visits or formal inspections at the premises of the undertaking(s) involved, their customers and/or their competitors, in order to better understand how products are manufactured or supplied.*”

#### IV. SECTION 4: MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES

- (12) McDermott Will & Emery welcomes the new section on market definition in specific circumstances. In particular, this section provides useful clarifications regarding new market situations, which were not yet addressed in the 1997 Market Definition Notice.
- (13) With regard to **price discrimination**, we note that paragraph (88) of the draft Notice sets three conditions for the definition of a distinct product market for a distinct group of customers. According to the third condition, the price discrimination must be of a lasting nature. We question what can actually be understood as ‘of a lasting nature’? Therefore, we consider that the Commission could provide additional guidance in this respect.
- (14) With regard to **multi-sided platforms**, we note that paragraph (94) of the draft Notice states that “*the Commission may define a relevant product market for the products offered by a platform*

*as a whole, in a way that encompasses all (or multiple) user groups, or it may define separate relevant product markets for the products offered on each side of the platform.”* We believe that the Commission could be more explicit in its guidance regarding the analysis of two-sided markets and the interactions between the two facets of a two-sided market, which may lead in some occasions to errors in the definition of the relevant market and errors in law (see Case C-67/13 P Groupement des Cartes Bancaires).

- (15) Moreover, we note that paragraph (97) of the draft Notice discusses **zero monetary price products** and provides that *“the fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product.”* As already mentioned before in paragraph (7) of our contribution, we believe that it would be useful if the Commission clarifies the precise approach it will take to define markets in such cases.
- (16) While this new section provides additional guidance for very specific types of markets, it seems to call for regular updated notices on market definition in order to reflect appropriately market developments. Hence, we would welcome frequent updated versions of the Notice that would also reflect recent Commission’s decisions.

## V. SECTION 5: MARKET SHARES

- (17) With regard to Section 5, it is our understanding that the draft Notice also pays attention to **alternative metrics** instead of market shares based on sales. We note that paragraph (107) of the draft Notice provides: *“In addition to sales or purchases, depending on the specific products or on the specific industry in question, other metrics can offer complementary or more useful information to determine market shares.”* To emphasize the possibility for the Commission to look at other metrics, we suggest the following linguistic changes: *“~~In addition to sales or purchases,~~ depending on the specific products or on the specific industry in question, other metrics can offer ~~complementary or more~~ useful information to determine market shares.”*

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