COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON A DRAFT REVISED MARKET DEFINITION NOTICE

January 2023

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and International Law Section (the "Sections") of the American Bar Association ("ABA") respectfully submit these comments in response to the public consultation (the "Consultation") by the European Commission (the "Commission") on a draft revised Market Definition Notice (the "Draft Notice").[1]

The Antitrust Law Section ("ALS") is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The ALS provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the ALS have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the ALS has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section ("ILS") focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total more than 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.[4]

I. Executive Summary

[1] *EU Market Definition Notice – consultation*, EUR. COMM'N, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6528.

[2] Past comments can be accessed on the ALS's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

[3] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about/.

[4] Past comments can be accessed on the ILS's website at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

The Sections congratulate the Commission on its initiative to update the existing Market Definition Notice (the "1997 Notice") to reflect economic developments and case law since 1997. In their comments at an earlier stage of the review process (the "2020 Comments"), the Sections noted the following areas for further review: economic principles and tools; relevant evidence; platforms and multi-sided markets; price discrimination markets; technology, R&D and innovation markets; online/e-commerce and offline/brick and mortar competition; and secondary markets and aftermarkets.[5] This response follows a similar structure, and the Sections respectfully refer the Commission to the 2020 Comments for further detail.

The Sections commend the Commission for including additional guidance on the topics recommended for further consideration in the 2020 Comments. As a general observation, the Sections respectfully recommend that the final Notice include more detailed consideration of the principles and tools discussed in the Notice, with examples illustrating how these principles and tools may be used for different purposes.

More specifically, the Sections would welcome a more detailed discussion of the economic principles and tools underlying market definition. Additional guidance, and examples, would be especially useful in relation to the mechanics of the SSNIP test, the quantification of diversion ratios and price elasticities, the use of price correlation and stationarity analyses, economic models and simulations, and market shares and alternative metrics.

With respect to the evidence the Commission considers relevant for market definition purposes, the Sections respectfully encourage the Commission to provide more systematic guidance on how the Commission evaluates the evidence it gathers from customers and competitors to avoid giving undue weight to views that may not be fully informed and/or may reflect the biases or incentives of respondents. Given the importance of market shares in the Commission's analysis, clarification of certain evidentiary issues relating to market shares would be helpful. On a practical note, the Commission may wish to review its practices for collecting such evidence, and the possibility that the use of extensive digital questionnaires may facilitate analysis but discourage participation by third parties lacking a strong interest in the outcome of the analysis.

With regard to specific market definition categories, the Sections welcome the inclusion in the Draft Notice of discussions of platforms and multi-sided markets; price discrimination markets; technology, R&D and innovation markets; online/e-commerce and offline/brick and mortar markets; and secondary and aftermarkets. The Sections consider, however, that additional guidance would be helpful, for instance a fuller discussion of how alternatives to the SSNIP test will be applied in situations where the SSNIP test is difficult to apply or inappropriate. In addition to these market definition categories, the Sections would welcome additional guidance on the role of two increasingly important competitive factors, access to data and sustainability, in market definition.

The Sections also encourage the Commission to provide guidance on the interplay between the revised Notice and other legislative acts and guidance, in particular the Commission's guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between

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[5] AM. BAR ASS'N, ANTITRUST AND INTERNATIONAL LAW SECTIONS, COMMENTS ON EUROPEAN COMMISSION'S CONSULTATION ON REVIEW OF THE MARKET DEFINITION NOTICE .HT5789 October 9, 2020, available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v2/antitrust-comments-on-eu-commissions-consultation-on-review.pdf [hereinafter, ABA 2020 Comments].

undertakings[6] and the Commission's guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.[7]

II. General Topics Meriting Additional Discussion

A. Economic Principles and Tools

The 1997 Notice contains only general discussions of economic principles and tools relevant to product and geographic market definitions. In line with the 2020 Comments, the Sections encourage the Commission to include in the new Notice additional discussion of these tools, including examples of how the Commission envisions the application of these tools. General observations on economic principles and tools are set out in this section, while observations relevant to specific contexts are discussed in other parts of this response.

1. The SSNIP Test and Critical Loss Analysis

The Commission identifies the SSNIP test as the central concept of market definition[8] and provides "critical loss analysis"[9] as an example of the quantitative implementation of this test. The Sections recommend including a more detailed explanation of the mechanics of this analysis, as well as examples highlighting how this may differ depending on the focus of the analysis (e.g., homogeneous versus differentiated products or single-product versus multi-product firms[10] or product versus geographic market definition[11]).

2. Diversion Ratios and Price Elasticities

The Draft Notice notes that diversion ratios are "quantitative measures on the substitutability of different products,"[12] particularly in the presence of significant differentiation,[13] and thus can be relevant "for the application of the SSNIP test."[14] However, the Draft Notice does not explain how diversion ratios should be quantified, an exercise that often requires econometric estimation of own- and cross-price elasticities.[15] In fact, the Draft Notice suggests that the Commission considers diversion ratios and price elasticities as two alternative economic tools (e.g., "derive diversion ratios or to estimate own-price elasticity and cross-price elasticity";[16] "diversion ratios or (cross-price) elasticities of demand;"[17]

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6 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, available here.

7 Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal cooperation agreements, OJ C 11, 14 January 2011, available here.

8 Draft Notice ¶31.

9 Draft Notice ¶59.

10 Economists recognize that this is a relevant distinction. See, for instance, Peter Davis and Eliana Garcés, "*Quantitative Techniques for Competition and Antitrust Analysis,*" Princeton University Press, 2010 [hereinafter Davis and Garcés (2010)], ¶4.6.

11 For example, Notice ¶42 and footnote 57 suggest that the application of the SSNIP test would require considerations of customers switching to imports, which, in practice, may potentially require the use of additional tools from economics such as the econometric estimation of import elasticities.

12 Draft Notice ¶53.

13 Draft Notice footnote 98.

14 Draft Notice footnote 72.

15 See, for instance, Davis and Garcés (2010), ¶ 4.4.1.

16 Draft Notice ¶53.

17 Draft Notice footnote 72.

"diversion ratios or estimated demand elasticities"[18]), and mentions the use of "econometric techniques"[19] only for the quantification of price elasticities. To offer more clarity in this respect, the Sections recommend providing a case-by-case (e.g., homogeneous versus differentiated) description and examples of the application of the economic tools the Commission would use for the quantification of diversion ratios and own- and cross-price elasticities.

In the context of geographic market definition, "import elasticities"[20] is a key concept in the Draft Notice, but the Draft Notice does not distinguish between import demand and import supply elasticities, or explain how the Commission would use these elasticities for market definition purposes (e.g., how import elasticities would be used for the implementation of the SSNIP test). The Sections recommend that the new Notice include more details not only in this respect but also regarding the various tools the Commission would consider using for "econometrically estimating"[21] these import elasticities.

3. Price Correlation and Stationarity Analyses

Other economic tools proposed for the assessment of substitutability are "price correlation or stationarity analyses,"[22] but the Draft Notice does not describe the mechanics of these analyses or areas to which they may apply. Moreover, the Draft Notice's phrasing suggests that the Commission views correlation and stationarity analyses as two alternative approaches, when in actuality they are complementary. For instance, to avoid a spurious measure of price correlation and thus a wrong inference about the size of the geographic market, the prices used in the correlation analysis must be stationary—a property of the price series which should be analyzed prior to the correlation analysis.[23] The Sections recommend clarifying this distinction and providing more details regarding practical application of these analyses.

The Sections further note that economists have long recognized co-integration analysis as a more formal and rigorous approach to testing co-movements in prices.[24] The Sections recommend discussing this economic tool in the new Notice.

4. Economic Models and Simulations

As in the 2020 Comments, the Sections respectfully encourage the Commission to consider the use of economic models and model-based simulation as alternative economic tools for market definition.[25] The Sections continue to believe that not only are these alternative economic tools, but they could also be suitable for cases where the standard tools are not applicable.

5. Market Shares

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18 Draft Notice footnote 98.
19 Draft Notice ¶53.
20 Draft Notice ¶75.
21 Draft Notice ¶75.
22 Draft Notice footnotes 61 and 79.
23 For more details, see for instance, Davis and Garcés (2010), ¶4.2.3.
24 See, for example, Walter Enders, *Applied Econometrics Time Series* (John Wiley & Sons, Inc., 4th ed. 2014) ¶6; Davis and Garcés (2010), ¶4.
25 For more details, please see ABA 2020 Comments § III.A.2.

The Draft Notice reflects that market shares are a – but not the only – tool to assess the relative position of suppliers on the market and, as such, can be indicative of market power.[26] The Sections suggest that the Commission provide guidance on how it determines that other metrics for quantitative analysis (*e.g.*, number of suppliers, R&D expenditure) are more appropriate than market shares for the assessment of market power, and provide examples when and how the Commission has relied on such non-market share-based metrics to determine market power.

The Draft Notice lists potential alternative metrics to shares based on sales or volume (*e.g.*, capacity or production volumes; number of tenders awarded),[27] but for many metrics only one decision is cited or example given as to when it might be relevant, and little or no explanation is provided. This approach provides limited insight into the Commission's practice and consequently little predictability. The Sections encourage the Commission to include more principles-based explanations of when and how it is likely to determine that a specific alternative share metric appears to be a complementary or the best indicator of firms' future competitive significance in a relevant market, and additional examples of when it has done so (if available). To maximize transparency, examples should cover a range of different industries based on the Commission's decisional practice (including digital markets where relevant).

Observations relating to market shares in other contexts (e.g., relevant evidence) are set out below.

B. Relevant Evidence

1. Customer and Third-Party Testimony

The Revised Notice states that

> Where appropriate … the Commission gathers evidence by addressing written requests for information to market participants and/or by interviewing them. In that context, the Commission seeks to obtain from the main competitors and customers in the industry factual evidence and their views of the boundaries of the product and geographic markets.[28]

The Sections encourage the Commission to describe its methods for obtaining the views of industry participants, how it formulates those inquiries, what views or evidence carry more or less weight with the Commission, and how the Commission tests the reliability of those views.

In addition, the Sections encourage the Commission to indicate how it evaluates the evidence that it gathers. For example, the 2010 U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines ("US-HMG"), which are currently being revised, acknowledge that customers may have divergent views, and note that the U.S. agencies evaluate the likely reasons for those divergent views.[29] In gathering customer evidence, the U.S. agencies are "mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger."[30] The US-HMG also note that U.S. agencies credit the "conclusions of *well-informed and sophisticated* customers," [31] implicitly acknowledging that some customer views might not be well-informed.

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26 Draft Notice ¶105 and Notice ¶107.
27 Draft Notice ¶107.
28 Draft Notice ¶78.
29 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.2.2 (2010) (emphasis added), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf [hereinafter, US-HMG].
30 *Id.*
31 *Id.*

This approach is consistent with the approach of the U.S. courts, particularly as it relates to market definition. Although customers might have "preferences" for one product over another, preferences do not necessarily inform interchangeability, and the relevant question under the hypothetical monopolist test is how customers could respond in the event of an anticompetitive price increase.[32] Several examples may be instructive. First, in the case of a market involving long-term contracts or relationships, a top customer might not have shopped recently for products, and therefore might not be well informed about alternatives.[33] Second, a particular customer may have needs that are unique, or at least atypical, either with respect to the substitutes it will consider or the geographic location of suppliers it will purchase from, which will lead it to consider only a subset of alternatives from which a large group of other customers might choose. In other cases, some customers might not be able to consider products made by particular suppliers for regulatory reasons.[34] Where only a subset of customers choose to provide detailed responses to the Commission's requests for information, the Commission may wish to consider what motivated certain customers to invest the sometimes significant effort required to respond to questionnaires, and why others chose not to do so, in assessing whether the views of the customers that responded are or are not likely to be shared by those that chose not to do so.

With respect to the views of competitors, the US-HMG note that while information from rivals may be illustrative about marketplace conditions generally, the interests of competitors might diverge from those of consumers.[35] Moreover, a rival company might have an incentive to foment opposition to a merger if it believes that its rival might be a more efficient or effective competitor post-transaction. In other cases, a rival might believe it will have an opportunity to acquire the target if the antitrust authorities successfully block a transaction.

More generally, the Sections consider that the Commission may wish to review its practices for collecting evidence from customers and rivals. While the existing practice of relying on extensive digital questionnaires may facilitate analysis of market definition and market power, it may discourage participation by third parties without a strong interest in the outcome of the analysis. If the population of respondents is not representative of the broader population of customers and rivals, there is a risk that the resulting assessment will be biased.

2. Evidence related to market shares

The Draft Notice reflects that market share information may often be incomplete, and that in such cases the Commission may rely on partial or full market reconstruction.[36] However, the Draft Notice is silent on the criteria that the Commission uses to determine that market share estimates submitted by the undertaking(s) are unreliable. In particular, the Sections encourage the Commission to reflect in the Draft Notice how it assesses the probative value of different sources of (possibly conflicting) market data, such

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32 U.S. v. Oracle, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) ("Customer preferences towards one product over another do not negate interchangeability"); U.S. v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001) ("What is significant is not whether the companies that currently use internal solutions have the capacity to enter the market as vendors for others, but whether the customers that currently use shared hotsites would switch to an internal hotsite in response to a SSNIP.")

33 *See, e.g.*, Ken Heyer, Predicting Competitive Effects of Mergers by Listening to Customers, EAG Discussion Paper 06-11 (Sept. 2006), https://www.justice.gov/sites/default/files/atr/legacy/2007/09/28/221883.pdf ("The cost to customers of becoming fully informed about their marketplace alternatives (and the terms on which these alternatives can be obtained) is nonzero. At some point, rational economic agents will likely find that the expected benefits of obtaining additional information exceeds the cost.").

34 US-HMG ¶2.2.2.

35 *Id.* ¶ 2.2.3.

36 Draft Notice ¶110.

as independent and commissioned third-party reports, contemporaneous and non-contemporaneous internal estimates, and, potentially, market reconstructions, including examples of the respective advantages and disadvantages.

Additionally, the Draft Notice makes reference to the consideration of sub-segmentations of the relevant market and indicates that such sub-segmentations may be relevant to the assessment of closeness of competition, especially in cases of substantial product or geographical differentiation.[37] Given the substantial work that can be required to produce market share segmentations, in particular when reliable third-party data is lacking, the Sections would welcome further guidance from the Commission on its approach to determining when such segmentations are required (including the technical assessment of whether the simplified procedure should apply). Such guidance, where possible, should make reference to a wide array of case precedents across industries to assist practitioners in determining when such segmentations will be required. This is of particular importance when requested segmentations may not align with segmentations reported by trade associations, recorded in internal data in the ordinary course of business, or contained in industry reports.

Finally, the Sections would welcome additional guidance from the Commission on how it assesses the evidence related to the relevant value of sales, especially in cases related to competition between online and brick-and-mortar retailers, and the extent to which ancillary services (e.g., delivery, etc.) should be considered in the evaluation of market shares.

3. Other common issues in preparing market shares

The Sections note that the Draft Notice partially addresses their suggestion in the 2020 Comments to outline particular issues that may arise in framing the relevant market for the purpose of preparing market shares,[38] and they encourage the Commission to address additional issues that arise frequently in calculating market shares. These issues include:

- **Treatment of differentiated markets**. The Sections suggest that the new Notice should indicate that the analysis of differentiated markets is not limited to market share analysis (irrespective of its basis) and that market shares, while important, need to be seen in the context of other factors indicative of the nature and level of competition in the relevant market. The Sections also note that the Commission has indicated that it usually considers value shares to be more informative in the context of differentiated product markets, but will, on occasion give more weight to volume shares. The Sections would encourage the Commission to provide further guidance on how it determines when more weight will be given to volume shares, and in doing so provide a wider array of case precedents to support the guidance.

- **Evaluating shares of committed entrants and future competition.** The Sections continue to consider that more guidance on the Commission's evaluation of shares of committed entrants and future competition[39] would increase transparency, especially in digital markets. The Sections would also welcome guidance on when the general position of historical market shares for the

[37] Draft Notice ¶109.
[38] ABA 2020 Comments, ¶ B.3. page 8.
[39] ABA 2020 Comments, ¶ B.3. page 8.

preceding three years[40] may not be indicative for the future, for example, to reflect committed market entry, foreseeable developments in the market, or the dynamic nature of the market.

- **Markets with captive sales**. The proper assessment of captive consumption may be determinative of whether shares indicate market power, in particular in capacity-constrained intermediate markets, and the Sections encourage the Commission to include guidance on its treatment of such sales in the new Notice.

- **Shares based on metrics other than sales or volume.** The use of metrics other than sales or volume often presents practical challenges, in particular in R&D-intensive industries, and the Sections suggest that the Commission should provide additional citations to cases in which these have been used, in order to increase transparency about how such shares might be calculated in different industries.

III. Specific Market Definition Categories Meriting Additional Discussion

A. Platforms and Multi-Sided Markets

As mentioned in the 2020 Comments, multi-sided platforms involve multiple user groups with interdependent demand structures. Thanks to the explosive growth and use of the Internet as a medium to supply products and services, multi-sided platforms have become prominent in the digital world, rendering the guidance on market definition and competitive assessment more crucial than ever.[41]

The Sections recognize and agree with the Commission's emphasis on the consideration of indirect network effects between user groups on different sides of the platform for market definition and competitive assessment. As mentioned in the 2020 Comments, the Sections note that the strength of indirect network effects could be a primary factor affecting the decision to define a single relevant market that encompasses all sides of the platform versus the "multi-market approach" that defines separate markets for each side.[42]

The strength of indirect network effects could be affected by various factors, such as the nature of the platform (e.g., transaction vs. non-transaction platforms) and users' perception of the degree of product differentiation on the other sides (e.g., the extent to which social network platform users are indifferent to the type and volume of ads).[43] These factors are rightfully mentioned in the Draft Notice as relevant to the assessment of the single- vs. multi-market approach for defining the relevant market.[44] The Sections respectfully suggest that more details could be provided to help better inform how the various factors feed into the Commission's market definition decision. For instance, the Commission could consider briefly discussing what key factors led to the opposite conclusions with respect to defining single vs. separate relevant markets in cases M.8124 Microsoft/LinkedIn and AT.34579 Mastercard, the two examples mentioned in the Draft Notice. Notably, in Microsoft/LinkedIn, although the Commission

40 Draft Notice ¶111.
41 ABA 2020 Comments, ¶ IV.A
42 ABA 2020 Comments, ¶ IV.A
43 See Catherine Tucker & Alexander Marthews, Social Networks, Advertising, and Antitrust, 19 GEO. MASON L. REV. 1211, 1218 (2012).
44 Notice, ¶ 95.

defined a single market for online recruiting services encompassing both job seekers and recruiters, it assessed demand substitutability separately from the perspective of each of the two sides.[45]

The Sections also note that the degree of competition between multi-sided platforms and platforms that only serve one side of the users, could also be relevant to the multi-market vs. single-market approach for market definition.[46] This issue has drawn particular attention in the recent review (and, in the U.S., subsequent court challenge) of the Sabre/Farelogix merger. In the U.S., the District Court judge denied the government's alleged relevant market of "booking services" where both parties belong. The District Court cited the U.S. Supreme Court's Amex decision[47] to conclude that the merging parties did not compete in the same market because Sabre is a two-sided platform (serving both airlines and travel agencies), while Farelogix is a single-sided platform serving only the airlines.[48] The UK CMA reached the opposite conclusion, finding that Sabre and Farelogix compete in the market of "merchandising solutions" that allow airlines to provide ancillary services, as well as in the market of "distribution solutions" that encompasses the single-sided and two-sided platforms.[49]

The Sections agree with the Draft Notice's statement that the application of the SSNIP test to multi-sided markets is more challenging than in situations without the indirect network effects from the multi-sidedness of the platform. That said, at a minimum the SSNIP test can still be adopted as a thought experiment that clarifies the concept of demand substitutability for the purpose of market definition. In certain instances, the SSNIP thought experiment can be carried out via qualitative evidence such as market participant or customer surveys. For instance, in the Facebook/WhatsApp decision, the Commission found via its market investigation process that most advertisers would not be likely to switch between search and non-search ads in the event of a 5-10% price increase.[50]

Finally, the Sections agree that non-price elements are of great importance for the assessment of demand substitution for multi-sided platforms, especially when products or services on at least one side are free of charge. In addition to the small but significant non-transitory decrease in quality ("SSNDQ") framework that evaluates user switching in response to quality degradation, the Sections note that the small but significant and non-transitory increase in costs ("SSNICS") test has also been advocated[51] and therefore the Commission could consider mentioning it in addition to (or as a special case of) the SSNDQ test. SSNIC focuses on a particular type of quality degradation, namely the increase in certain types of costs such as users' attention to ads or users' cost of surrendering personal information. The Sections

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45 Commission decision of December 6, 2016 in case M.8124 Microsoft/LinkedIn, Section 3.7.1.2.

46 Presumably this is covered by "whether the undertakings offering substitutable products for each user group differ" in the Draft Notice; nonetheless, the divergence in the Sabre/Farelogix decisions made by the US court and the UK CMA illustrates the need to highlight this factor for market definition consideration.

47 Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018). The reasoning of the Amex decision has been debated in the U.S., *see, e.g.*, Herbert Hovenkamp, Platforms and the Rule of Reason: The American Express Case, Columbia Business Law Review, 2019(1), 34-92; *see also* CPI Competition Policy International, Ohio v. American Express: A Year Later, available at www.competitionpolicyinternational.com/antitrust-chronicle-ohio-v-american-express-a-year-later.

48 U.S. v. Sabre Corp. et al., 1:19-cv-01548 (D. Del. Aug. 20, 2019).

49 Anticipated acquisition by Sabre Corporation of Farelogix Inc. Decision on relevant merger situation and substantial lessening of competition, ME/6806/19 (2019).

50 Commission decision of October 3, 2014 in case M.7217 Facebook/WhatsApp, Section 4.3.2.2.

51 *See, e.g.*, Newman, John M., Antitrust in Attention Markets: Definition, Power, Harm (December 9, 2020). University of Miami Legal Studies Research Paper No. 3745839, Available at SSRN: https://ssrn.com/abstract=3745839.

caution that this test arguably has a narrow application and is prone to critiques of strong underlying assumptions.[52]

B. Markets in the Presence of Price Discrimination

The Draft Notice recognizes that a relevant market can be defined based on customer groups that "face materially different conditions of competition" and notes price discrimination as one example.[53] Since discrimination on non-price factors is feasible as well, the Commission should consider specifying it explicitly.

The Sections commend the Draft Notice for providing additional criteria and clarification on price discrimination markets, i.e., price discrimination is for the same product, should be for reasons unrelated to cost and should be of a lasting nature, and geographic price discrimination markets can also be determined.[54]

Price discrimination markets may, however, also be relevant in cases involving similar products[55] or a basket of products. A product market includes all reasonable substitutes, even though the products themselves are not entirely the same, as recognized by the US-HMG.[56] The OECD notes that price discrimination occurs when two similar products, which have the same marginal cost to produce, are sold by a firm at different prices.[57] Further, price differentiation based on cost should not be a ground for defining narrower markets, and the same is true of competition to meet price, price differences in response to changing market conditions or nature of products (e.g., perishability or distress sales), or when a different price is available to all. The Sections recommend extending the treatment of price discrimination markets to "similar" products and specifying non-cost legal defenses in the Draft Notice as well.

As to the duration of discrimination, the Draft Notice rightly acknowledges that relevant discrimination should not be a one-off instance, a promotional allowance, or of short duration. The phrase "lasting nature" could be clarified. For instance, this phrase may suggest a longer duration than warranted, or it may fail to capture effects of different durations in different industries, or emerging trends.

Further, the Draft Notice requires "trade among customers or arbitrage by third parties" to be "unlikely." While arbitrage can defeat discrimination, it must be of an adequate scale to do so; indeed, the US-HMG acknowledge that arbitrage on a "modest scale" that is "sufficiently costly or limited may

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52 *See, e.g.,* Franck, J & Peitz, M. (2021). Market Definition in the Platform Economy. Cambridge Yearbook of European Legal Studies, 23, 91-127. doi:10.1017/cel.2021.13 ("A SSNIC test is therefore only meaningful without further complications if demand on the advertising market is almost perfectly elastic, i.e. if many customers on the advertising market are willing to buy advertising space at the same price.").

53 European Comm'n, Draft Commission Notice on the definition of the relevant market for the purposes of Union competition law, ¶26.

54 European Comm'n, Draft Commission Notice on the definition of the relevant market for the purposes of Union competition law, ¶88.

55 Mark Armstrong, *Price Discrimination* (2008) In: Buccirossi, R, (ed.) Handbook of Antitrust Economics. MIT Press, *available at* https://discovery.ucl.ac.uk/id/eprint/14500/1/14500.pdf

56 US-HMG ¶3.

57 OECD, Background note on Price Discrimination for the 126th Meeting of the Competition Committee on 29-30 November 2016, DAF/COMP/WD(2016)15, ¶13, *available at* https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf

not deter or defeat a discriminatory pricing strategy." The Sections recommend that the new Notice provide additional detail on defining markets in the presence of price discrimination even in cases when arbitrage is "likely" but not of adequate scale, or is costly.[58]

The Sections suggest the Commission consider discussing how the presence of price discrimination impacts market shares and evaluation of likely competitive effects, as well as the evidence to be considered in such cases. U.S. agencies will consider evidence of price discrimination only "when they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers".[59]

Finally, the Sections highlight that price differences should be of sufficient magnitude to cause significant harm to consumers, and the customer groups should be of important size to merit defining a narrower discrimination market.[60] As noted by the OECD, there is nothing intrinsically wrong with price discrimination, and indeed it can be beneficial in many cases.[61]

C. Technology, R&D and Innovation Markets

In their 2020 Comments, the Sections urged the Commission to include in the updated Notice greater guidance on how it intends to define markets related to technology/intellectual property rights, and to research and development (R&D) or other innovation-focused business activities.[62] They also urged the Commission to elaborate on any criteria and tools it intends to use to define such markets.[63] Given their prior input, the Sections support the Commission's addition of Section 4.3 in the Draft Notice, entitled "Market definition in the presence of significant investments in R&D."[64] They respectfully offer the following comments concerning this section.

First, paragraph 91 of the Draft Notice addresses cases where "an R&D process may not be closely related to any specific product but related to earlier stages of research, which may serve multiple purposes or may not yet be targeted at any specific objective, and which in the longer term may feed into various products."[65] According to the Draft Notice, in such cases, "[a]lthough the fact that such earlier innovation efforts do not immediately translate into tradeable products may render it difficult to identify a relevant product market within a strict sense, it may still be relevant to identify the boundaries within which undertakings compete in such earlier innovation efforts."[66] Based on the citation to case M.7932 Dow/DuPont in footnote 107, the quoted sentence appears to indicate that the Commission may in

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59 US-HMG ¶4.1.4.

60 OECD, *Market Definition*, OECD Policy Roundtables (2012), ¶4.1, *available at* https://www.oecd.org/daf/competition/Marketdefinition2012.pdf.

61 OECD, Background note on Price Discrimination for the 126th Meeting of the Competition Committee on 29-30 November 2016, DAF/COMP/WD (2016)15, ¶3, *available at* https://one.oecd.org/document/DAF/COMP(2016)15/en/pdf.

62 ABA 2020 Comments ¶ IV.C, at 13.

63 *Id.* at 16.

64 Draft Notice ¶4.3.

65 *Id.* 33, ¶4.3, ¶ 91.

66 *Id.*

appropriate cases utilize the concept of an "innovation space," as opposed to an "innovation market" per se.[67]

If that is the case, then the Sections respectfully recommend that the Commission address the concept explicitly in the body of the Draft Notice, rather than relegating it to footnotes.[68] The Commission's introduction in Dow/DuPont of "innovation spaces" and the related theory of harm —"a significant impediment to effective innovation competition"[69] — has been the subject of much commentary,[70] and it would therefore be helpful for the Commission to provide more guidance on this approach to analyzing innovation competition than what is currently set forth in the Draft Notice.

Furthermore, both the Commission's 2014 guidelines on technology transfer agreements and its 2011 guidelines relating to horizontal co-operation agreements have described scenarios in which the Commission may analyze innovation competition without reference to an existing product or technology market,[71] by identifying competing "research and development poles."[72] The Draft Notice makes no mention of R&D poles as an alternative to defining a product (or technology) market related to the R&D in question. Since the Draft Notice is intended to provide updated guidance that "takes into account the significant developments of the past twenty years" and "to increase the transparency of [the Commission's] policy and decision making when applying Union competition law," the Sections respectfully recommend that it discuss this approach of identifying R&D poles generally and cross-reference the 2014 and 2011 guidelines.[73]

Second, paragraph 92 introduces the notion of a "continuum. . . between R&D processes which are closely related to a specific product or pipeline product and earlier innovation efforts which are not."[74] The consequence of this continuum is that "[t]he Commission's assessment of market definition in this

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67 Case M.7932 Dow/DuPont, 2017 O.J. (C 353) 9, https://bit.ly/3uBe2wW. *See id.* 10, ¶ 15 ("The Commission considered that innovation should not be understood as a market in its own right, but as an input activity for both the upstream technology markets and the downstream formulated product markets. This however did not prevent the Commission to assess the impact of the Transaction at the level of innovation efforts by the Parties and their competitors.").

68 Draft Notice ¶1.3, ¶ 15 n.25; 33, ¶4.3, ¶ 91 n.107 (2022).

69 Case M.7932 Dow/DuPont, 2017 O.J. (C 353) 11, ¶ 28 ("The Commission has reached the conclusion that the Transaction would lead to a significant impediment of effective competition . . . in relation to innovation competition in crop protection, including products in the discovery stage for herbicides, insecticides and fungicides.").

70 *See, e.g.*, Nicolas Petit, *Innovation Competition, Unilateral Effects, and Merger Policy*, 82 ANTITRUST L.J. 873 (2019); Michaela Wilson, *Innovation Effects in* Dow/DuPont*: A Patent Analysis*, 64 ANTITRUST BULL. 54 (2019); Mario Todino, et al., *EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation)*, 64 ANTITRUST BULL. 11 (2019).

71 European Comm'n, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014 O.J. (C 89) 3, 9, ¶ 2.3, ¶ 26 ("In a limited number of cases, however, it may be useful and necessary to also analyse the effects on competition in innovation separately."), *available at* https://bit.ly/3VKn5rk; European Comm'n, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. (C 11) 1, 27, ¶ 3.2, ¶ 119 ("The effects on competition in innovation are important in these situations, but can in some cases not be sufficiently assessed by analysing actual or potential competition in existing product/technology markets."), *available at* https://bit.ly/3Pc4din.

72 Guidelines on technology transfer agreements, 2014 O.J. (C 89), 10, ¶2.3, ¶ 26; Guidelines on horizontal co-operation agreements, 2011 O.J. (C 11), 27, ¶3.2, ¶ 120.

73 Draft Notice 3, ¶1.1, ¶¶ 2 & 3 (2022).

74 *Id.* 33, ¶4.3, ¶ 92.

case may be closer to that of pipeline products or of earlier innovation efforts, depending on where the relevant R&D process stands on this continuum."[75] The Sections respectfully suggest that the new Notice explain how the Commission will determine "where the relevant R&D process stands on this continuum." This determination would seem to be pivotal, since the Commission may proceed either to define a product market to which the relevant R&D process is closely related, or to identify competing R&D poles for the relevant R&D process.[76]

Third, paragraph 107 in the market shares section states that "[i]n markets where there are frequent and significant investments in R&D, the level of R&D expenditure or the number of patents or patent citations may be used as relevant metrics to assess the relative competitive position of companies."[77] As the Sections noted in their 2020 Comments, many patents have unique characteristics that make comparisons to other patents or technology rights challenging, especially for firms that own thousands of patents. Accordingly, to the extent that the Commission may use the number of patents or patent citations associated with a particular undertaking as a proxy for its relative competitive position vis-à-vis other undertakings holding patent or other technology rights, the updated Notice should describe such an approach more fully. More generally, it will be helpful for the Commission to elaborate more fully on the criteria and tools it uses to delineate the boundaries of innovation competition among certain undertakings and their relative competitive positions, regardless of whether the relevant R&D processes are closely related to an existing product or technology market or not.

D. Online/E-Commerce and Offline/Brick and Mortar Markets

The Sections welcome the additional guidance in the Draft Notice regarding the criteria the Commission uses and the evidence it typically considers when assessing the scope of markets relating to e-commerce business activities. The Sections recognize and agree with the Commission's assessment of whether the customers consider that these channels have different characteristics such as prices, service quality, delivery times and logistics costs, opening times, need to experience the product before purchase, and differences in product ranges offered between the two channels.[78]

The Sections note that the retail world has experienced dramatic changes since 2020, triggered by lockdowns of varying degrees that have restricted access to brick-and-mortar stores. In response, major brands shuttered storefronts and dove headfirst into a variety of omnichannel experiments, including services like curbside pickup; same-day home delivery; and buy online, pick up in-store ("BOPIS").[79] Experience during the Covid-19 pandemic suggests that it would be useful to include a discussion of how external shocks may affect market definition.

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75 *Id.*

76 *See* Guidelines on horizontal co-operation agreements, 2011 O.J. (C 11), 27, ¶ 3.2, ¶ 120 ("Competing R&D poles are R&D efforts directed towards a certain new product or technology, and the substitutes for that R&D, that is to say, R&D aimed at developing substitutable products or technology for those developed by the co-operation and having similar timing.").

77 European Comm'n, <Draft> Commission Notice on the definition of the relevant market for the purposes of Union competition law 38, ¶5, ¶ 107 (2022).

78 Draft Notice, ¶ 51.

79 See, for example, Michael Ketzenberg and Serkan Akturk, How "Buy Online, Pick Up In-Store" Gives Retailers an Edge (May 25, 2021, available at https://hbr.org/2021/05/how-buy-online-pick-up-in-store-gives-retailers-an-edge.

As mentioned in the 2020 Comments, providing hypothetical illustrations or relevant examples would also better enable interested stakeholders to take any general principles or considerations into account when making their own business plans and decisions. If this guidance were available, firms involved in e-commerce activities would be better able to evaluate whether transactions and commercial agreements that they are contemplating are likely to give rise to any potential competition law issues or risks.[80]

E. Secondary Markets and Aftermarkets

As stated in the 2020 Comments, the Sections consider that a more thorough examination of the criteria for analyzing, defining, and assessing the existence and competitive conditions of distinct aftermarkets (also known as secondary markets) would be beneficial. This could include additional details on (1) the kind of evidence that would enable the Commission to distinguish an aftermarket from its foremarket, (2) when such an aftermarket is likely to be limited to the aftermarket products (or services) provided by the manufacturer of the foremarket products (or services), and (3) how information of any related foremarkets may affect the Commission's assessment of the business conduct or practices under review. The Sections consider that by providing more information on these topics and principles, the Commission's recommendations will be more effectively applied to a variety of businesses and legal situations.

As mentioned in the 2020 Comments,[81] the Commission may wish to take into account the fact that U.S. agencies typically apply the hypothetical monopolist test to establish whether an aftermarket is a separate market from the associated foremarket. According to the U.S. agencies, "application of the hypothetical monopolist test to market definition very rarely leads to the conclusion that a relevant market is limited to the product of a single manufacturer."[82] The U.S. agencies estimate that courts would emphasize that the existence of an aftermarket is typically dependent on a change in policy after customers are locked in.[83] According to the U.S. agencies, even if the original equipment manufacturer has a monopoly in the aftermarket, harm is unlikely if the monopolist cannot "charge more in total than the buyer's reservation price for the services generated by the equipment over its lifetime," if switching costs are low, or if consumers engage in lifecycle pricing analysis.[84] In line with these views, successful private litigation challenges of aftermarket conduct have been uncommon in the United States.[85]

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80 ABA 2020 Comments, ¶IV.D.

81 *Id.*

82 *Competition Issues in Aftermarkets – Note from the United States*, at 6 (May 26, 2017), *available at* https://www.justice.gov/atr/case-document/file/979226/download [hereinafter Aftermarkets Report to OECD.

83 *Id.*

84 Joseph Farrell & Paul Klemperer, *Coordination and lock-in: Competition with switching costs and network effects*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION 3, 1967-2072 (2007) (noting that "with (large) switching costs firms compete over streams of goods and services rather than over single transactions. So one must not jump from the fact that buyers become locked in to the conclusion that there is an overall competitive problem. Nor should one draw naïve inferences from individual transaction prices, as if each transaction were the locus of ordinary competition. Some individual transactions may be priced well above cost even when no firm has (ex-ante) market power; others may be priced below cost without being in the least predatory.

85 Jonathan I. Gleklen, *The ISO Litigation Legacy of Eastman Kodak Co. v. Image Technical Services: Twenty Years and Not Much to Show for It*, 27 ANTITRUST 56, 63 (2012) (discussing lack of success of plaintiffs

The Sections respectfully suggest that the Commission consider any unexpected implications if it is considering introducing aftermarkets regulations that depart from the approach in U.S. law. For instance, where a product is purchased in a way that was compatible with lifecycle pricing, the Commission should consider any potential unintended economic effects. For instance, suppliers might increase prices in the foremarket to compensate for reduced expected returns in the aftermarket, or they might experience financial instability if they set prices based only on recovering expenses in the aftermarket.

Finally, the Sections recognize and agree with the Commission's emphasis on digital ecosystems[86] and acknowledge that giving more pertinent examples would make it easier for interested parties to take any underlying principles or factors into account when developing their own business strategies and judgments.

F. Other Specific Issues

In addition to the specific market definition categories discussed above, the Sections respectfully recommend that the Commission consider including in the revised Notice a more detailed discussion of the relevance to market definition of non-price competitive factors that have become more important in the Commission's recent decisional practice. Two such factors, which are addressed in the Commission's draft updated guidelines on the assessment of horizontal cooperation agreements, are the role of data and sustainability.

The ability to access and use data is of course key to competitors' success in numerous markets. Certain cases involve markets for the purchase and sale of data, in which case traditional approaches to market definition may apply. In others, data are an input in the production of other goods or services. In such cases, the Commission may consider the substitutability of datasets available to the relevant stakeholder(s) with data available to other stakeholders, even if the data themselves do not form a relevant market. The Sections submit that a specific discussion of the Commission's approach to assessing the substitutability of data as a product in its own right and as an input for other goods and services would be useful.

Another increasingly important non-price element of competition is sustainability. The Commission's draft guidelines on the assessment of horizontal agreements note that companies increasingly compete on the basis of the sustainability of their products and services. In extreme cases, more sustainable products may fall into different product markets from products that are similar in function. A discussion of how the Commission will assess the importance of sustainability as a competitive factor would likely be helpful in many future cases.

IV. Conclusion

The Sections appreciate the Commission's consideration of these comments and would be pleased to discuss any such comments in more detail if useful.

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bringing aftermarket claims after the Supreme Court's Kodak decision). For a seminal U.S. aftermarket case example, *see* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[86] Draft Notice, ¶103.