

CONSULTATION RESPONSE:

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

1. Introduction

- 1.1 Baker McKenzie is grateful for the opportunity to respond to this consultation. We recognise that the Commission is seeking to address contemporary challenges including innovation, digitalisation/zero price, and globalisation.

2. Defining purchase markets

- 2.1 Paragraph 6 of the draft Notice explains that the same considerations apply when defining (i) supply and (ii) purchase markets. A number of EUMR clearance decisions are footnoted. However, these cases provide little to no guidance on how those markets were actually defined in practice. We think it would be useful for the Notice to provide more guidance on how to define purchase markets – for example in section 2.2.1. It is not in our view satisfactory to repeatedly state simply that the same considerations will apply. For example, footnote 45 in that section indicates again that the analysis is “equivalent” for purchasing markets but we do not think it is straightforward to apply notions of decreased product quality (paragraph 29), or indeed supply-side substitutability to define purchase markets. Given the recent focus on purchase markets in mergers and cartel cases, we think it would be an appropriate time to provide extra transparency on how the Commission defines these markets.

3. Market shares vs. other metrics

- 3.1 Paragraph 5 of the draft Notice acknowledges that market shares are not the only tool to assess the relative position of suppliers on the market. The draft Notice then provides in paragraph 107 a useful list of other metrics which may provide “complementary or more useful information to determine markets shares”. However, 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. We invite 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.

4. Evaluating customer views

- 4.1 Paragraph 78 of the draft Notice states that the Commission may seek 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. Given the range of views that might be expressed, we recommend that the Commission describes how the Commission would test the reliability of those views, and therefore what views or evidence might carry more or less weight with the Commission.
- 4.2 For example, the US Horizontal Merger Guidelines acknowledge that the customers may have divergent views, and note that the US agencies evaluate the likely reasons for those divergent views. In gathering customer evidence, the US agencies are therefore “mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger.”¹

¹ See para 2.2.2 of [Horizontal Merger Guidelines \(08/19/2010\) \(ftc.gov\)](#)

5. Differentiated markets

- 5.1 Paragraph 109 of the draft Notice refers to differentiated markets and explains that sub-segmentation may be relevant to assess closeness of competition. Given the substantial work that can be required to explore market share segmentations, especially when there is no reliable third-party data, we would welcome further guidance from the Commission on its approach to determining when segmentation is appropriate.

6. Markets with captive sales

- 6.1 We think it is important for the Section 5 of the Notice to provide guidance on when to take into account captive sales when assessing market power (which can be a critical factor in capacity-constrained intermediate markets).

7. Innovation spaces, R&D poles and the innovation continuum

- 7.1 Paragraph 91 and footnote 107 of the draft Notice explain that although the fact that "... 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."
- 7.2 Given the importance of such "innovations spaces", we think the Notice should explain when the Commission will be inclined to define innovation spaces and how this notion relates to the notion of "research and development poles". The latter is of course a concept employed in the Commission's 2014 guidelines on Technology Transfer agreements.² We would note that while R&D poles may be identifiable in the pharma sector, this is typically due to transparency from clinical trials. We consider that innovation spaces are not appropriate where the Commission is looking at basic research far from any identifiable end product.
- 7.3 Paragraph 92 of the draft Notice also 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." The draft Notice explains that "[t]he Commission's assessment of market definition in this 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."
- 7.4 In the light of this, it is important for the Notice to explain in more detail in paragraph 92 how the Commission will determine "where the relevant R&D process stands on this continuum."

8. Structural changes

- 8.1 Paragraph 16 of the draft Notice explains that the Commission will take expected short-term or medium-term "structural market transitions" into account where they would lead to effective changes in the general dynamics of demand and supply within the period that is relevant for the Commission's assessment.
- 8.2 The *Generics*³ judgment lays down some criteria but, given the importance of market definition on outcome, we think it would be useful to have some non pharma examples of when the Commission would be inclined to take short-term or medium-term "structural market transitions" into account in a way that differs from potential competition.

9. Impact of type of analysis on market definition

- 9.1 Footnote 20 of the draft Notice explains, while the criteria for defining the relevant market are applied generally for the purposes of Article 101, 102 and the EUMR, market definition may lead to different results depending on the type of analysis carried out. In particular, the immediate competitive constraints that market definition seeks to identify may differ depending on whether the focus is on the change in market power relative to prevailing conditions, or whether the focus is on whether the current or past situation reflects a position of market power relative to a competitive situation.
- 9.2 But aside from describing the cellophane fallacy (later in footnote 48), there is no explanation of when the theory of harm may inform market definition. We recommend that the Notice clarifies when and how the Commission may seek to define the market in a different way or take different considerations into account depending on whether it is looking to enforce Article 101 and 102 TFEU or to apply the EU Merger Regulation. This should go further than explaining that Articles 101 and 102 is retrospective while merger control is prospective (especially as the draft Notice introduces a forward-looking approach in the sense that certain expected structural transitions will be relevant for market definition analysis – see section 8 above).

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² 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> .

³ Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraph 131.