

12 January 2023

**DAVIS POLK & WARDWELL LLP****COMMENTS ON THE DRAFT EC MARKET DEFINITION NOTICE.****1. Introduction**

- 1.1. We appreciate the opportunity to participate in the public consultation launched by the European Commission (“EC” or the “**Commission**”) on the draft revised Market Definition Notice (the “**Draft Notice**”).
- 1.2. Overall, we think that the Draft Notice achieves its purpose of reflecting developments in best practices that have taken place since 1997 as well as helping companies in assessing the compliance of their activities with competition rules, thereby contributing to legal certainty and to a reliable business environment.
- 1.3. While we welcome the EC’s willingness to amend the Draft Notice to bring it in line with modern market practices, there are a few points where we think that further clarifications and guidance from the EC would be beneficial. These points relate to the following sections of the Draft Notice:
  - (a) Section 1.3 General principles of market definition;
  - (b) Section 4.1 Market definition in the presence of a significant differentiation;
  - (c) Section 4.3 Market definition in the presence of significant investments in R&D;
  - (d) Section 4.4 Market definition in the presence of multi-sided platforms;
  - (e) Section 5 Market shares; and
  - (f) Section 6 Conclusions.

**2. Section 1.3 General principles of market definition**

- 2.1. Section 1.3, paragraph 11 of the Draft Notice states that “*the Commission is not bound to apply the definition of a relevant market from its past decisions in future cases*”. While we understand that the EC is not legally bound by its previous decisions, we encourage the EC to rely on the market definitions given in its past decisions to the extent relevant. The EC’s approach to market definition should, of course, take into account decisions where the market definition has been left open or where the EC has a solid basis for departing from past

decisions. However, the EC should ensure that the flexibility it is given with regard to market definitions in previous decisions does not result in legal uncertainty for companies.

- 2.2. Section 1.3, paragraph 16 of the Draft Notice states “*the Commission may take into account expected transitions in the structure of a market when the case calls for a forward-looking assessment [...] Structural market transitions can affect the definition of the relevant product market [...] or the definition of the relevant geographic market, for example when there are impending technological changes or impending changes in the regulatory framework [...]. The Commission takes 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. For the Commission to be able to do so, there must be strong indications that the projected structural changes will take place with sufficient probability. The evidence must be reliable and needs to go beyond mere assumptions that observed trends will continue or that certain undertakings would change their behaviour*”. We would appreciate the EC’s guidance on what is meant by “*structure of the market*” or “*structural market transitions*”. This seems to mean a change that “*would lead to effective changes in the general dynamics of demand and supply*”; however, further clarification and the inclusion of specific guidance would benefit from examples. We would further appreciate the EC’s guidance on what is meant by “*short-term or medium-term structural market transitions*” as such appears subjective in nature. In particular, we would welcome guidance as to whether the assessment of whether a transition is “*short-term or medium-term*” in nature will vary by market.

### 3. **Section 4.1 Market definition in the presence of significant differentiation**

- 3.1. We would welcome the EC’s guidance on some of the specific terminology employed in this section, specifically, what is meant by:
- (a) “*differentiated markets*”; and
  - (b) “*significant differentiation*<sup>1</sup>”.
- 3.2. We encourage the EC to include concrete examples of such terms in its guidance. This would ensure that companies understand whether these are applicable in a certain case.

### 4. **Section 4.3 Market definition in the presence of significant investments in R&D**

- 4.1. We would be grateful for guidance on determining whether some of the key terms used in this section are applicable to a certain case. In particular we would appreciate guidance on:
- (a) How to determine whether an industry is “*highly innovative*”. Is a market “*highly innovative*” because it is characterised by frequent and significant R&D investments, or can a market be “*highly innovative*” for other reasons (and if so, which ones)?
  - (b) How to determine what constitutes “*frequent and significant investments in R&D*”. We understand frequency and significance to be relative concepts which may vary significantly depending on the size of the market (e.g., niche tech market with start-

<sup>1</sup> We understand this concept is introduced in the title of Section 4.1.; however, it is not discussed in the following paragraphs 84-87 of the Draft Notice.

ups v. big pharma). Guidance including thresholds, e.g., “frequent” means that “more than [X] % of total costs are R&D costs” would help bring clarity to this area.

- (c) The difference between “*innovation*” and “*R&D processes*” in the context of defining markets. Is innovation measured on amount of investment, likelihood of success or some other measures? More detailed guidance on what constitutes innovation for the purpose of defining markets may be particularly helpful given the context of the EC’s increasing use of Article 22 of the EU Merger Regulation 1/2003 to catch acquisitions where the theory of harm is centred around “*loss of innovation*”.

## 5. Section 4.4 Market definition in the presence of multi-sided platforms

- 5.1. Section 4.4, paragraph 98 of the Draft Notice states “[t]he Commission may also consider alternatives to the SSNIP framework, namely by assessing the switching behaviour of customers in response to a small but significant non-transitory decrease of quality (‘SSNDQ’).” We would appreciate guidance regarding situations involving multi-sided markets. Would it be appropriate to use the SSNDQ test on the zero-monetary product side only, or also when assessing the side where companies hope to attract users to monetized products? Alternatively, is the SSNIP test still appropriate for this side of the market? It would be helpful to companies if the EC would provide further guidance on how exactly it will use the new SSNDQ test in relation to multi-sided markets and if it will use the SSNDQ and SSNIP tests in tandem, in the same assessment.

## 6. Section 5 Market Shares

- 6.1. The Draft Notice states, at Section 5, paragraph 105, “market shares are not the sole indicator of an undertaking’s strength in the market. Other factors [...] may also be relevant, depending on the specific nature of the case”. We would appreciate some examples of the types of cases and/or sets of circumstances where other factors would play an important role. For instance, paragraph 86 notes that: “[w]hen products are differentiated, market shares may provide a less reliable indicator of market power [...] although market definition remains an important step, analysing how closely suppliers compete may become more relevant in the competitive assessment of differentiated markets”. However, it would be helpful to have additional examples of markets where this may be relevant, and also for paragraph 86 to fall or be reiterated under Section 5 “Market Shares”.

## 7. Section 6 Conclusions

- 7.1. We would be grateful if the EC could clarify that the statement in Section 6, paragraph 113, “[t]he Commission’s interpretation of the concept of ‘relevant market’ in this notice is without prejudice to the interpretation given to the concept by the Union Courts in individual cases” means that to the extent there is any contradiction between case law from the Court of Justice of the European Union and the Draft Notice, the case law will take precedence.