

**EUROPEAN COMMISSION CONSULTATION ON DRAFT REVISED MARKET DEFINITION  
NOTICE**

**RESPONSE OF HERBERT SMITH FREEHILLS LLP**

**1. INTRODUCTION**

- 1.1 Herbert Smith Freehills LLP welcomes the opportunity to provide comments to the European Commission in relation to its consultation on the draft revised Market Definition Notice (Draft Notice). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of our individual clients.
- 1.2 We agree that updates and clarifications are necessary to reflect new market realities, in particular the impact of digitalisation, and to bring the Market Definition Notice in line with developments in the Commission's practice and the EU courts' case law. We support the Commission's objectives of offering more guidance, transparency and legal certainty to facilitate compliance, and we welcome the inclusion of examples and relevant case law citations in the Draft Notice.
- 1.3 However, we consider that there are a number of areas where further clarification and/or more detailed explanation is required in order to increase transparency and predictability for businesses.
- 1.4 We have set out below our comments relating to each of the key areas in the order they are covered in the Draft Notice.

**2. CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY**

**Use of an SSNDQ assessment as an alternative to the SSNIP framework**

- 2.1 The Draft Notice acknowledges the difficulties which can arise when applying the SSNIP test when undertakings compete on parameters other than price, in particular in the context of zero monetary price products. However, it does not currently make sufficiently clear when the Commission will consider the alternative test of assessing the switching behaviour of customers in response to a small but significant non-transitory decrease of quality (SSNDQ), either in the context of the general discussion of methodology for defining product markets or in the subsequent section specifically focussed on market definition in the presence of multi-sided platforms.
- 2.2 Footnote 47 of the Draft Notice refers to the use of an SSNDQ test in Case AT.40099 *Google Android* by way of an example of such an assessment. However, a single case example without further elaboration of general principles is of limited value to businesses seeking to self-assess how competition laws may be applied. The statements in footnote 47 regarding how the Commission will "*normally*" apply an SSNDQ test "*in general*" appear to leave open the possibility of a different approach being taken in some circumstances, but no explanation is provided as to what such circumstances might be. In addition, the footnote makes reference to an SSNDQ test being "*subject to several difficulties*", but only identifies one of those difficulties ("*in relation to the quantification of quality*") and does not explain this further.
- 2.3 The possibility of using an SSNDQ test as an alternative to the SSNIP framework is also subsequently briefly referred to in paragraph 98 of the Draft Notice, in the context of market definition in the presence of multi-sided platforms. However, no principles-based explanation is offered as to when this approach will be taken, and the relevant footnote (117) simply refers back to the earlier footnote 47.
- 2.4 In the interests of transparency and legal certainty, we would encourage the Commission to provide a more detailed and principles-based explanation of the circumstances in which

an SSNDQ assessment may be used as an alternative to the SSNIP framework in the final revised Notice.

### 3. **PROCESS OF DEFINING MARKETS**

#### **Differences between distribution channels as relevant parameters for customer choices**

- 3.1 When discussing the evidence the Commission will consider in respect of demand substitution, the Draft Notice states in paragraph 51 that differences between distribution channels, including online and offline channels, may be relevant parameters for the choices of customers. However, guidance on how the Commission will establish whether online and sales channels fall into the same product market is currently limited to a footnote, with reference to just one case (footnote 64).
- 3.2 In light of the significant growth of e-commerce and the increased likelihood that products are made available through both online and offline channels, we would welcome more prominent and detailed guidance on this point, including consideration of "hybrid" channels such as "click-and-collect". It would also be helpful for businesses to understand how the Commission will consider recent data on substitution between online and offline channels during lockdowns imposed in response to the Covid-19 pandemic, which significantly limited access to bricks-and-mortar stores.

#### **Obtaining customer and third party views**

- 3.3 The Draft Notice states in paragraph 78 that the Commission gathers evidence by addressing written requests for information to market participants and/or by interviewing them, asking main competitors and customers to provide factual evidence and their views of the boundaries of the product and geographic markets. It would be useful to set out in more detail in the final revised Notice how the Commission formulates its inquiries, what weight the evidence is given and how the Commission tests the reliability of responses.
- 3.4 We would also encourage the Commission to clarify in the final revised Notice how the parties will be given an opportunity to respond to evidence obtained from customers and third parties, including commenting on its reliability, in particular in Phase 1 merger inquiries or prior to the issue of a Statement of Objections in an antitrust context.

### 4. **MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES**

#### **Market definition in the presence of price discrimination**

- 4.1 We would encourage the Commission to expand the guidance currently set out in paragraph 88 of the Draft Notice regarding its approach to market definition where different customers or customer groups are charged different prices for the same product, for reasons unrelated to costs. In particular, we consider that it would be helpful to include the following points:
  - 4.1.1 price discrimination markets may also be relevant in cases involving similar products (where those products are all reasonable substitutes even if they are not entirely the same product) or a basket of products;
  - 4.1.2 price discrimination which occurs to meet price competition, or in response to changing market conditions or the nature of the products – for example, due to perishability – should not be a ground for defining a narrower product market (in line with price discrimination for reasons related to costs); and
  - 4.1.3 when defining geographic markets in the context of price discrimination, it may be appropriate to have regard to suppliers' locations or delivery warehouses, as well as customers' location.

- 4.2 We would also welcome clarification of what is meant by the requirement that the price discrimination must be of a "*lasting nature*" in order for a narrower, distinct market to be defined: this phrase is open to significant differences in interpretation and may not apply equally across different industries or capture emerging pricing trends.
- 4.3 Finally, in addition to the guidance on price discrimination markets, we suggest that it would be helpful to include specific guidance on the Commission's approach to market definition where there is discrimination between customer groups based on non-price factors.

**Market definition where there is significant investment in R&D**

- 4.4 With regard to market definition in highly innovative industries where there is significant investment in R&D, we consider that there are a number of areas where the guidance currently set out in the Draft Notice needs to be clarified and/or expanded further in order to increase transparency and predictability for businesses, and thereby facilitate compliance with competition laws.

*Analysis of innovation competition*

- 4.5 In relation to innovation competition, the reference in footnote 107 of the Draft Notice to Case M.7932 *Dow/Dupont* implies that the Commission may rely on the concept of an "innovation space" in future cases to identify the boundaries within which undertakings compete, rather than identifying a particular product market or indeed an innovation market per se. However, there is very limited explicit consideration of the Commission's analysis of innovation competition in the current Draft Notice, and we would encourage the Commission to include more detailed guidance in the final version, particularly in light of the considerable commentary and debate surrounding the novel theory of harm relied upon in *Dow/Dupont*.
- 4.6 We also note that the Draft Notice does not currently make any reference to identifying competing "research and development poles" as a way of analysing innovation competition without reference to an existing product or technology market related to the R&D in question. This approach is explicitly referred to in the Commission's Guidelines on Technology Transfer Agreements (2014),<sup>1</sup> the Guidelines on Horizontal Co-operation Agreements (both the 2011 version and the draft revised version published for consultation in March 2022)<sup>2</sup> and the draft revised block exemption regulation for R&D agreements (2022).<sup>3</sup> Given that the Draft Notice is intended to increase transparency in relation to the Commission's policy and decision-making when applying EU competition law, it would be helpful to include discussion of this approach in the final revised Notice and explain how this fits with the references to "innovation spaces".

*Continuum between R&D processes*

- 4.7 The Commission states in paragraph 92 of the Draft Notice that "*a continuum may exist between R&D processes which are closely related to a specific product or pipeline product and earlier innovation efforts which are not*", but does not go on to clearly explain how it will determine where a particular R&D process stands on that continuum, and where the

<sup>1</sup> Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (OJ 2014/C 89/03), paragraph 26.

<sup>2</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ 2011/C 11/01), paragraph 120; Draft Revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (as published by the Commission for consultation on 1 March 2022), paragraph 86.

<sup>3</sup> Draft Revised Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (as published by the Commission for consultation on 1 March 2022), Article 1(18).

relevant "tipping point" lies in terms of the assessment of market definition. It would be helpful to address this in the final revised Notice.

### **Market definition in the presence of multi-sided platforms**

#### *Single vs multi-market approach*

- 4.8 The Draft Notice includes a welcome new section on the Commission's approach to multi-sided platforms, which recognises that the Commission may define the relevant product market for the products offered by a platform as a whole or as separate relevant product markets for the products offered on each side of the platform, depending on the facts of the case.
- 4.9 In this regard it would be helpful for the final revised Notice to expand on the various relevant factors the Commission takes into account when deciding whether to take a single market or a multi-market approach. Paragraph 95 of the Draft Notice lists some of the factors the Commission may take into account, but in light of the increase in the number of digital platforms and the challenges they raise in a competition assessment context (as recognised by, for example, the UK Competition Appeal Tribunal in the *Compare The Market* case),<sup>4</sup> more detailed guidance and worked examples would be welcome.
- 4.10 The Draft Notice refers to case M.8124 *Microsoft/LinkedIn* as an example of a single-market approach (footnote 110) and case AT.34579 *Mastercard* as an example of a multi-market approach (footnote 111). However, whilst these case references are helpful we would like to see more analysis and guidance in the final revised Notice, setting out the key factors leading the Commission to reach these opposing conclusions.

#### *SSNDQ test as an alternative to the SSNIP framework*

- 4.11 Given that multi-sided platforms often supply products at zero monetary price the use of the SSNIP test becomes less relevant in this context and the Commission will consider alternatives to the SSNIP framework, such as an SSNDQ test. As set out in paragraphs 2.2- 2.4 above we would encourage the Commission to provide more detailed guidance on the application of such a test.

### **Market definition in the presence of after markets, bundles and digital ecosystems**

#### *Market definition for primary and secondary products*

- 4.12 The Draft Notice describes three alternative ways in which the Commission could define relevant product markets in the case of primary and secondary products: as a systems market, as multiple markets or as dual markets. Whereas the Commission does provide some guidance on the relevant circumstances for deciding which of the approaches it may take, we would welcome a more detailed explanation of the criteria used for analysing, defining and assessing the existence and competitiveness of distinct secondary markets.

#### *Digital ecosystems*

- 4.13 In the context of digital ecosystems the Commission recognises these can, in certain circumstances, be seen as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product. Where the secondary products are offered as a bundle, the Commission may assess the possibility of the bundle constituting its own relevant market.
- 4.14 We would welcome more detailed guidance with some worked examples of digital ecosystems that fit such a secondary market or bundle market approach.

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<sup>4</sup> *BGL (Holdings) Limited and others v Competition and Markets Authority* [2022] CAT 36.

## 5. MARKET SHARES

### *Other indicators of an undertaking's strength in the market*

- 5.1 We welcome the recognition in paragraph 105 of the Draft Notice that market shares are not the sole indicator of an undertaking's strength in the market. However, in the interests of transparency and legal certainty we would encourage the Commission to explain more explicitly in the final revised Notice how it determines when other factors may also be relevant, and the relative weight given to these, rather than simply cross-referring to the Commission's guidelines on substantive assessment in competition proceedings and citing relevant sections thereof in footnote 126.

### *Use of market shares based on alternative metrics*

- 5.2 It would be helpful to expand the guidance regarding the Commission's use of market shares based on metrics other than the value and volume of sales or purchases. A list of other potentially relevant metrics is currently included in paragraph 107 of the Draft Notice, with a series of case examples cited in the accompanying footnotes. However, whilst this is a useful starting point, it provides limited insight for businesses seeking to predict the approach the Commission would be likely to take in a particular case, especially given that for many of the alternative metrics listed in paragraph 107 only a single case example is given (and for some there is currently no case example at all).
- 5.3 To address this, we would request that further case examples are added in the final revised Notice, as well as drawing out a more principles-based explanation of the Commission's approach to the use of such alternative metrics.

### *Assessment of evidence relating to market shares*

- 5.4 Given the importance of market shares to the Commission's assessment of market power and the application of EU competition laws, it is critical that clear guidance is available to businesses explaining how the Commission will assess evidence relating to market size and market shares. Against this backdrop, there are a number of areas where we consider that it would be helpful to expand the guidance currently set out in the Draft Notice.
- 5.5 With regard to the use of sales value and sales volume metrics, it would be helpful to set out more clearly how the Commission determines when it will give more weight to market shares based on sales volume in the context of differentiated markets. Paragraph 108 of the Draft Notice indicates that the Commission will "*usually*" consider sales values to better reflect the heterogeneity between the different products in such circumstances but leaves open the possibility that sales volumes may in some instances better reflect the competitive strength of undertakings. However, only one case example is given in footnote 138 at the end of this paragraph, and that is expressly stated to relate to private label products which are not differentiated. This provides limited insights and predictability for businesses, and more detailed guidance would be welcomed.
- 5.6 It would also be useful to set out more clearly how the Commission assesses evidence relating to the relevant value of sales, especially in cases which involve competition between online and offline retailers, and the extent to which ancillary services such as delivery should be taken into account in the evaluation of market shares.

### *Segmentation of the relevant market*

- 5.7 With regard to the possibility of relying on shares for segments of the relevant market, as envisaged in paragraph 109 of the Draft Notice, we would encourage the Commission to explain how it decides when sub-segmentation of the relevant market is appropriate, including setting out relevant criteria and referring to additional relevant case precedents.

### *Use of alternative sources of market data*

- 5.8 Paragraph 110 of the Draft Notice explains that the Commission may additionally or alternatively use other sources of information on market size and market shares beyond

the figures provided by the undertaking(s) involved. However, it does not make clear how the Commission will determine when it is appropriate to do so, for example by setting out the criteria on the basis of which the Commission will treat figures provided by the undertaking(s) as unreliable. It would also be useful to explain in the final revised Notice how the Commission assesses the relative probative value of other sources of market data, and how the Commission approaches the difficulties which can arise when different sources of market data conflict with each other.

*Calculation of future market shares*

- 5.9 In relation to the Commission's general approach of looking at market shares computed over one year reference periods for at least three years, it would be helpful to expand the guidance currently set out in paragraph 111 of the Draft Notice to explain when this general rule will not be treated as being indicative for future market shares, for example in dynamic markets, or where there is evidence of committed future market entry or other foreseeable developments in the market. This is particularly relevant in the context of digital markets.

*Assessment of captive consumption*

- 5.10 Finally, we would welcome specific guidance in the final revised Notice on the Commission's approach to the assessment of captive consumption, which may be determinative of whether market shares indicate market power, particularly in capacity-constrained intermediate markets.

**Herbert Smith Freehills LLP**

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