

13 January 2023

REVISION OF THE MARKET DEFINITION NOTICE
OBSERVATIONS IN THE CONTEXT OF THE COMMISSION'S PUBLIC
CONSULTATION

1. Introduction

- 1.1 On 8 November 2022, the European Commission (the *Commission*) launched a public consultation on a draft Notice on the definition of the relevant market for the purposes of Union competition law (the *Draft Notice*), a revision of the current Notice of 9 December 1997 on the same subject (the *Current Notice*). Freshfields Bruckhaus Deringer LLP welcomes the opportunity to provide its observations on the Draft Notice.
- 1.2 Overall we believe the Draft Notice is a very helpful step towards updated and improved guidance in this area and our observations here focus on certain key aspects which we consider could be refined or further developed. In summary our comments are the following:
- (a) We welcome the updating and expansion of this essential guidance tool so as to take into account practice and market developments over recent years (Part 2 below);
 - (b) The fundamental importance of market definition in almost all cases should be more clearly recognised (Part 3 below);
 - (c) The conditions for recognising supply side substitution should not be made more limiting than they currently are (Part 4 below);
 - (d) Further explanation should be given of how the Commission ensures the reliability of customer and competitor views which it takes into account (Part 5 below);
 - (e) Additional guidance on the following is needed:
 - (i) Closeness of competition
 - (ii) Multi-homing
 - (iii) Ecosystems (Part 6 below); and
 - (f) Guidance on when and how captive sales should be included when calculating market share would be added (Part 7 below).

2. General comments

- 2.1 We welcome the useful new guidance provided by the Draft Notice, reflecting (i) the Commission's extensive experience in making market definition assessments, with helpful reference to many Commission decisions, (ii) evolution and refinements of economic methods, and (iii) case law from the EU Courts.



- 2.2 The Draft Notice provides significantly updated and expanded guidance, in particular recognising how differently many markets now operate as a result of innovation and changing consumer behaviour. To a great extent it takes into account developments such as digitisation, online commerce, a significant increase in global trade, and increasingly common structural market transitions spurred by innovative services.

3. Draft Notice: introduction (Section 1 of the Draft Notice)

Fundamental importance of market definition

- 3.1 The Draft Notice rightly describes the purpose of market definition as being “*to identify in a systematic way the immediate competitive constraints that the undertaking(s) involved face*” (para 5), but then appears to downplay the importance of market definition, when it says: “*Market definition is thus a tool to structure and facilitate the competitive assessment in appropriate cases and is not a mandatory step in all assessments under Union competition law*” (para 7).
- 3.2 Although we agree that market definition is not a goal in itself, it remains of fundamental importance in the assessment of concentrations, the existence of dominance and the effects of agreements/concerted practices.
- 3.3 In most situations it is legally required, and it should almost always be a first step. The Court of Justice held in *Continental Can* that “*the definition of the relevant market is of essential significance*”. Although this was said in the context of an abuse of dominance case, the reasoning applies more broadly.¹ More recently the Court of Justice affirmed the importance of market definition in establishing essential elements of an infringement in Article 101 cases². Likewise in merger review, market definition is generally necessary to establish “*the possibilities of competition*” referred to in *Continental Can*. We therefore suggest that the wording of the Draft Notice be adjusted to better reflect the fundamental importance of market definition.

¹ Case 6/72, *Europemballage Corp and Continental Can Co Inc v Commission*, Judgment of the European Court of Justice of 21 February 1973, para. 32: “...the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products”.

² C 179/16, *F. Hoffmann-La Roche and Others*, Judgment of the European Court of Justice of 23 January 2018, para. h 51): “In order to answer those questions, it should be borne in mind that the sole purpose of the definition of the relevant market, in the context of the application of Article 101(1) TFEU, is to determine whether the agreement in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the internal market...”.



4. Concept of the relevant market and general methodology (Section 2 of the Draft Notice)

Conditions for recognising supply side substitution

4.1 The Draft Notice applies a stricter wording regarding the assessment of supply side substitution, as compared with the Current Notice:

- Current Notice (para 20): “*Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices*”.
- Draft Notice (para 35): “*The necessary conditions for the market to be broadened based on supply substitution are that most, if not all, suppliers are able to switch production between products in the range of related products, while incurring only insignificant additional sunk costs or risks, have the incentive to do so when relative prices or demand conditions change, and can market them effectively in the short term*”.

4.2 This change of wording is not justified. It is sufficient for most³ suppliers to be able to switch production, to exert the necessary competitive pressure, so the words “if not all” should be deleted. And it may be worthwhile for the supplier to incur a reasonable level of additional costs, if it enables him to enter a profitable market.⁴

4.3 While the Draft Notice states that where alternative suppliers are not taken into account in market definition, they are considered as part of the competitive assessment (paras 38 and 39), in some situations it can make a crucial difference whether they are considered as part of market definition or rather as part of the competitive analysis; for example in the case of the application of rules based on precise market share thresholds, such as block exemption Regulations.

5. Process of defining markets (Section 3 of the Draft Notice)

Customer and competitor views

5.1 The Draft Notice recognises that, in the context of evidence of the impact of hypothetical substitution, the views of market participants have to be treated with caution. For example they may not be “*sufficiently reliable, complete or accurate*” to estimate price elasticities (para 54). It would also be desirable to

³ Case T-446/05, *Amann & Söhne and Cousin Filterie v Commission*, Judgment of 28 April 2010, para 79, cited at fn 53 of the Draft Notice.

⁴ In the United States the 2010 Horizontal Merger Guidelines accept that supply substitution can play a role in market definition and the FTC recently confirmed this as a matter of principle: *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020). See also [Supply Substitution and Market Definition: Lessons from FTC v. RAG-Stiftung](#), Randy Chugh, Andrew J. Ewalt, and Nicholas Hill.



make it clear that this caveat applies more broadly, for example also in the context of industry views on competitive constraints (para 56).

- 5.2 Similarly, in the context of gathering and evaluating evidence the Draft Notice states that “[e]vidence used by the Commission to define markets should be reliable” (para 77) and in this context it would be helpful for the Commission to set out how it ensures that customer and competitor views are representative. This is a particular concern given that those with complaints or negative views are more likely to respond to information requests than those with neutral or positive views.
- 5.3 Similarly, it would help to know how the Commission tests the reliability and relevance of the views given by customers and competitors, which may sometimes be informed by concerns unrelated to antitrust issues

6. Market definition in specific circumstances (Section 4 of the Draft Notice)

- 6.1 The Draft Notice to a significant extent takes into account the impact of increased digitalisation on markets, notably in its Section 4 which features new guidance on concepts such as multi-sided platforms, zero-price products, multi-homing and ecosystems. However, we believe that there is scope to provide additional guidance in some of these areas.

Closeness of competition where there is significant differentiation

- 6.2 The Draft Notice discusses the fact that in some markets products are differentiated, meaning that some are closer substitutes than others (para 84). It also refers to a need for a “*detailed competitive assessment*” of closeness of competition (para 86). In such cases the question whether the merging parties are or are not close competitors is an important factor in the competitive assessment, and more detailed guidance is therefore needed.
- 6.3 Such detailed guidance needs not only to state the relevant elements and types of evidence that should be used to assess closeness of competition but, most importantly, to set out the circumstances in which the test of closeness of competition can indicate that parties are or are not a competitive constraint on each other. Replacing a well understood market definition assessment with the concept of closeness, but leaving this concept vague and without clear definition, will seldom provide a sufficient basis for a finding of dominance, or a significant impediment of effective competition in merger cases.
- 6.4 Also, such guidance on assessing closeness of competition needs to be fully aligned with the Horizontal Merger Guidelines.

Multi-sided platforms and zero-price products

- 6.5 The dedicated section in the Draft Notice on multi-sided platforms (Section 4.4) is welcome and helpfully covers a number of issues. It would be useful in addition for it to be made explicit at the start of the section that an assessment of competitive effects in a multi-sided market should always consider all sides of the market, and that it is not sufficient to focus solely on one side of the market.



- 6.6 We note that the Draft Notice recognises the difficulty of applying the SSNIP test where competition takes place on parameters other than price, and in particular in the case of zero monetary price products (para 32) and already includes mention of a test focusing on quality rather than price (para 98). But it would also be helpful to have more guidance on defining markets in the presence of zero-price products, as these are a common feature of multi-sided platforms. In particular we would welcome further exploration of alternatives to the SSNIP test.
- 6.7 Other possible approaches could usefully be added in this section. It could for example be useful to consider the overall profitability of a rise in price on each side of the market in a two-sided non-transaction market, or to check the profitability of an increase in the sum of the prices paid for the transaction by both sides in a two-sided transaction market. Similarly, in a transaction market, it would be useful to receive further guidance on the impact of a price increase on the non-paying customer side of the market.

Multi-homing

- 6.8 The Draft Notice mentions multi-homing in the section on multi-sided platforms (para 95), but provides limited guidance on how to assess multi-homing. For example, it would be useful to know what are the key factors in establishing when products used in a multi-homing setting fall within the same relevant market.
- 6.9 Customers sometimes use multiple platforms because they offer different services, in which case platforms may constitute two distinct product markets. However, platforms can be used in parallel by customers because they offer similar services or functionalities, in which case these platforms are more likely to be part of the same market. Also, in multi-homing scenarios, customers, by using several platforms in the market, contribute to the reduction of the potential lock-in effect of network effects, thus reducing entry barriers for new entrants.

Ecosystems

- 6.10 The Draft Notice has only one paragraph (para 103) on ecosystems, where it simply refers to long-established principles on aftermarkets and bundling. More guidance on ecosystem assessment, such as how to assess whether two products are part of the same ecosystem, would be useful.
- 6.11 Another issue that should be addressed is whether an ecosystem can be a separate market, and if so, how lock-in effects may be relevant to identifying ecosystem-specific aftermarkets.

7. Market shares (Section 5 of the Draft Notice)

- 7.1 The question of the circumstances in which captive sales should be included when calculating market share, and how this should be done, is not covered in the Draft Notice, and would be a helpful addition.

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