

Draft Revised Market Definition Notice

Cleary Gottlieb's Submission to the European Commission's Consultation

1. We welcome the opportunity to comment on the European Commission's draft revised Market Definition Notice (the "Revised Notice") which follows the Commission's evaluation of the Market Definition Notice of 1997.
2. The Revised Notice is an important update of the Commission's best practices and will promote greater rigor, transparency, and predictability in market definition. We agree with its affirmation of the core principles adopted in the 1997 Notice and value the expanded guidance on methodology and evidence for defining markets. We also welcome the useful analyses of specific market situations. The Revised Notice covers many of the questions raised by new market realities such as multi-sided markets and digitalization, and promises to be a valuable resource for businesses and the antitrust community. In this contribution, we focus on a few issues that would benefit from further clarity and discussion.
3. **Accounting for future market developments in market definition.** The Revised Notice elaborates on the Commission's approach to future market developments. It distinguishes between "structural market transitions", which can affect the market definition, and market entry by potential competitors ("potential competition"), which is only taken into account during the competitive assessment (¶16).
4. Impending changes to the commercial landscape should be taken into account in the market definition assessment where they affect the immediate competitive constraints on a business. The Revised Notice should recognize that this may include changing patterns of demand and provide guidance on when shifting demand could be considered "structural" as opposed to affecting only individual undertakings or consumers. Finally, the Revised Notice suggests that only certain cases call for a "forward-looking assessment" and it would be beneficial for the Notice to expressly confirm this includes merger assessments given their prospective nature.
5. **Defining markets for products in development.** The Revised Notice provides guidance on how the Commission evaluates possible markets for precommercial offerings (¶89-93). In this context, credibility, scope, timing and the prospective impact of potential entry in an existing product market (the market for products to be replaced by the prospective product) or future product markets are key, and the Revised Notice would benefit from specific guidance on how to do those assessments.

6. The Revised Notice seems to suggest that markets may be defined, albeit “*not in a strict sense*”, for R&D areas that are not yet associated with any given product (§91). However, the Revised Notice does not discuss when such an assessment would be appropriate. Given the potentially broad applications and speculative nature of research activities, particularly in their early stages, it would improve certainty to provide guidance in this regard.
7. The Revised Notice does list a number of factors the Commission would consider in drawing the boundaries of competition for R&D efforts (such as “*the nature and scope of the innovation efforts*”, their objectives, the specialization of the teams involved, and the relevant undertakings’ past results), but it should also consider that temporal elements and R&D maturity may be relevant. The Revised Notice should include guidance on how these factors could be used to distinguish between sufficiently credible R&D projects that exert a genuine immediate competition constraint on the parties and more nascent or speculative efforts that do not. Lastly, the guidance focuses on supply-side factors but recognizes that a continuum may exist between R&D processes which are closely related to a specific (pipeline) product and earlier innovation efforts which are not (§92). It would be useful to provide guidance on how R&D efforts and pre-commercial products are placed on this continuum and when demand-side factors would become relevant.
8. **Defining markets for digital ecosystems.** The Revised Notice establishes a conceptual framework to analyze products whose consumption are linked in some manner. Such products may be viewed as competing in a system market, in multiple markets, or in dual markets (§§99-101). The Revised Notice considers the same principles may be applied to defining markets for digital products. However, this approach could mean that digital products which are designed to interoperate within the same “ecosystem” would rarely be found to compete in a system market, since there is frequently ease of switching between (secondary) digital products and these products are available at zero cost (§103). At the same time, it has been recognized that different “digital ecosystems” may exert a competitive constraint on each other, and that firms operating in separate but interconnected markets may also exert competition on each other (*see*, for example, paragraph 116 of the General Court judgment in *Google v Commission* (T-604/18) cited at footnote 123 of the Revised Notice). The Revised Notice should address this dynamic for connected products, as it does for multi-sided platforms (§95).
9. **Evidence gathering and evaluation practice.** The Revised Notice offers helpful guidance on the reliability and probative value of different types of evidence. The Notice affirms that evidence will have a higher probative value if it can be shown not to have been influenced by the Commission’s investigation (such evidence would include documents predating plans for the concentration) (§77). Given the Commission’s frequent reliance on market test surveys (§78), it would be helpful for the Notice to discuss how their probative value would be assessed relative to other forms of evidence.

10. When relying on multiple sources of evidence, the results from the investigation may often be inconclusive. The Revised Notice should include further guidance on how the Commission would approach contradictions or ambiguities in the different categories of evidence collected. Without seeking to establish a strict hierarchy of evidence, the Revised Notice could consider when more weight should be given to certain types of evidence or analytical methods, such as expert reports and professional studies compared to Commission market test survey data.

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11. The Revised Notice delivers detailed, flexible, and practical guidance for a wide range of situations and brings market definition practices up to date with current competitive realities. At the same time, certain aspects of the Revised Notice merit further review and clarification. We appreciate the opportunity to comment and look forward to the results of this consultation.