

**Response by Linklaters LLP to the European Commission's Consultation
on the draft revised Market Definition Notice**

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I. Introduction

- (1) We welcome the opportunity to comment on the European Commission's ("EC") draft revised Market Definition Notice¹ ("**Draft Notice**").²
- (2) The Draft Notice usefully clarifies several questions that have arisen in relation to market definition in recent years and supports the EC's stated goals of improving guidance, transparency and legal certainty for businesses and enforcement efficiency.
- (3) When finalising the notice, we believe that the EC could offer more guidance on:
 - how the principles of market definition should take into account the impact of future developments on market definition (see Section II below).
 - the concepts of zero price, innovation, and data markets (Section III).
 - the procedural aspects of market definition when there are multiple parameters of competition (Section IV).
 - the definition of multi-sided markets, markets with significant investment in R&D and digital ecosystems and bundles (Section V).
 - the metrics used in innovation and bid markets (Section VI).

II. General principles of market definition: competitive constraints and the relevant time horizon (Section 1.3)

- (4) With regard to time horizons for the purposes of market definition in prospective analyses (primarily merger control), the Draft Notice is clear that the EC will generally take into account the competitive conditions existing at the time of the merger when establishing the relevant markets, however, the EC may in some circumstances take into account future changes to the market where such changes can reasonably be predicted.³
- (5) The Draft Notice helpfully elaborates on the EC's approach in the specific case of forward-looking market definition assessments, i.e. where the EC may account for relevant market transitions in the short and medium-term. This is a welcome clarification, particularly in light of the increasing timelines applicable to the EC's substantive assessment – i.e. the potential 20-year duration applied in the *Google/Fitbit* decision⁴ – which demonstrate that "*the Commission is ready to ensure long-term monitoring*" of commitments.⁵ This is also consistent with wider trends, with academics observing that EC case law has "*slowly moved towards a recognition of the importance of dynamic issues*", while "*the trend towards a more innovation minded doctrine is unmistakable*".⁶

¹ European Commission Communication, Commission Notice on the definition of the relevant market for the purposes of Union competition law, draft, November 2022.

² The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters.

³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) (Horizontal Mergers Guidelines), para. 9.

⁴ Commission decision of 17 December 2020 in Case M.9660 *Google/Fitbit*, para. 944.

⁵ C. Turgot, Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime, 2021, *European Competition & Regulatory Law Review*, Vol 5, No 2, p. 120, available at: <https://heinonline.org/HOL/Page?handle=hein.journals/core5&id=127&collection=journals&index=>

⁶ N. Petit and D.J. Teece, Innovating Big Tech firms and competition policy: favoring dynamic over static competition, *Industrial and Corporate Change*, 2021, Vol 30, No 5, p. 1192, available at: <https://doi.org/10.1093/icc/dtab049p>. Accessed on 28 December 2022.

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- (6) However, under the Draft Notice, the EC may consider market transitions in forward-looking assessments of market definition where there are “*strong indications...with sufficient probability*” of the relevant changes occurring.⁷ However, the EC should consider whether it would be more appropriate to use a “more likely than not” standard when considering how market definition is likely to evolve for a given investigation. This is so that the standard of proof for market definition is aligned with the standard of proof advocated by the EC for the substantive analysis in merger control cases.⁸

III. Concept of the relevant market and general methodology (Section 2)

- (7) The Draft Notice helpfully expands on the application of market definition to non-price products in the context of multi-sided markets and innovation markets consistent with the EC’s case law over the last decade.⁹
- (8) The Draft Notice could, however, usefully clarify the circumstances in which zero price markets exist. The Draft Notice stipulates that the supply of a product at ‘zero monetary price’ does not imply that there is no relevant market. However, the Draft Notice does not clarify when a potential service provided for zero monetary price is *not* a relevant market and hence set the boundaries of the market definition notice.
- (9) Is it, for example, necessary for there to be a non-monetary form of consideration to identify a relevant market (e.g. data which is often cited as a prominent example of valuable but non-monetary consideration)?¹⁰ Are such markets only relevant in the context of multi-sided markets comprised of a combination of a service free of charge with a revenue generating service?
- (10) The Draft Notice could usefully clarify these issues so that parties are clear on the circumstances in which different facets of their businesses could plausibly be examined as a “product”.

IV. Process of defining markets: Multiple parameters of competition (Section 3)

- (11) The Draft Notice helpfully expands on the need to consider parameters of competition beyond price, outlining specific examples of non-price elements that could be relevant in the EC’s competitive assessment.
- (12) The Draft Notice is, furthermore, clear on the specific circumstances in which non-price parameters are particularly important for assessing substitution. The Draft Notice stipulates, for example, the importance of non-price parameters and, in particular, quality, for assessing demand substitution in zero-price markets.¹¹ In a similar vein, the Draft Notice indicates that non-price parameters are critical for assessing market definition for innovation both where it is possible to identify pipeline products as well as earlier stage innovation (given the absence, in most circumstances, of price competition).¹²
- (13) However, it would be helpful for the EC to further elaborate on the circumstances in which non-price parameters of competition are relevant for assessing demand substitution for price-based products on the market. Prices are, in such circumstances, frequently likely to reflect quality-based facets of

⁷ Draft Notice, Section 1.3, para. 16.

⁸ See Opinion of AG Kokott delivered on 20 October 2022 in Case C-376/20 P *European Commission v CK Telecoms UK Investments Ltd.*, para. 61, Case T-219/99 *British Airways*, para. 293 and Case T-286/09 RENV, *Intel v Commission*, paras. 523-526.

⁹ See Draft Notice, para. 32, 97, 98.

¹⁰ Commission Decision of 27 June 2017 in Case AT.39740 *Google Search (Shopping)*, para. 158; Commission Decision of 18 July 2018 in Case AT.40099 *Google Android*, para. 326, 327.

¹¹ *Ibid*, Section 4.4, para. 98.

¹² Draft Notice, Section 4.3, para. 93.

competition in the context of vertical differentiation and enable an assessment of those products which are sufficiently close substitutes in the context of horizontal differentiation.

- (14) Accordingly, to avoid confusion, it would be helpful if the Notice stressed the importance of price as a key determinant of demand substitution in such circumstances. This would not impinge on the Commission's ability to assess the effects of a concentration, conduct or an agreement on all parameters of competition nor its ability to define and assess distinct markets for innovation competition (whether that is specific pipeline products or wider innovation spaces).

V. Market definition in specific circumstances (Section 4)

A. Multi-sided markets

- (15) We agree that indirect network effects must be considered for multi-sided markets (both in defining the relevant market as well as in the competitive assessment) and welcome the Draft Notice's helpful clarification on this point.
- (16) We also welcome that the Draft Notice stipulates that the SSNDQ test may act as an alternative to the SSNIP test in case of products offered at a zero monetary price.¹³ The Draft Notice could however additionally elaborate on the role of the SSNDQ test as providing the conceptual framework for delineating zero-price markets (consistent with the endorsement of the SSNIP test in paragraph 31 of the Draft Notice as the "theoretical criterion" for identifying the sufficiently close substitutes making up the relevant market).
- (17) The Draft Notice could, more practically, give more insight into the potential selection of quality parameters that will drive an SSNDQ test.¹⁴ Degradation in quality could take a variety of different forms and we respectfully suggest that the Draft Notice could usefully clarify that the use of the SSNDQ test should adopt the most competitively relevant parameters from the perspective of consumers (otherwise the use of SSNDQ tests risks being too abstract to produce meaningful empirical insights into appropriate market definitions).

B. Market definition in the presence of significant investments in R&D

- (18) The Draft Notice sets out the factors the EC will consider when making early-stage R&D competitive assessments. The EC helpfully distinguishes between R&D processes which relate to a specific product and those innovation efforts which are less targeted and may serve multiple purposes. It would, however, also be helpful if the Draft Notice specifically outlined how R&D efforts not linked to a specific product are sufficiently close to exercise a competitive constraint against those which are not (i.e. how to identify a firm exercising a sufficiently close competitive constraint to form part of the relevant "market").
- (19) The Draft Notice could, for example, clarify that the SSNIP principles apply to the relevant R&D activities, namely whether firms would consider different activities sufficient substitutes for their relevant downstream activities (i.e. using a hypothetical merchant market for such R&D). Further, the EC could account for factors such as the specialisation of the teams involved as well as past innovation efforts when determining the barriers to entry in the innovation space (and, i.e. whether the innovation in question is replicable by third parties without similar attributes). These clarifications in the Draft Notice could

¹³ Draft notice, section 4.4., para. 98 'The Commission may also consider alternatives to the SSNIP framework, namely by assessing the switching behaviour of customers in response to a small but significant and non-transitory decrease of quality ('SSNDQ').

¹⁴ Initially, the OECD's view was that the SSNDQ 'is [...] probably more useful as a loose conceptual guide than as a precise tool that courts and competition authorities should actually attempt to apply'. The Commission noted that 'although quality considerations play an important role in the definition of relevant markets or closeness of competition, the difficulties with a precise definition and quantification of quality do not speak in favour of using quality parameters instead of price in economic-driven tools such as the SSNIP test'. OECD (2013) The Role and Measurement of Quality in Competition Analysis, p. 15.

usefully help market participants understand the circumstances in which they would be competitors in innovation with third parties.

- (20) Once a relevant innovation product market is identified, the question arises as to its concrete delineation. It appears that the primary concern related to innovation markets, especially in the realm of merger control, is the reduction of innovation.¹⁵ In order to assess possible reduction of innovation one needs to identify the relevant area where the innovation efforts compete. Market players active in (highly) innovative industries would particularly benefit from further guidance as to which innovation projects, in which areas and at what stages, need to be taken into account when defining a separate relevant innovation product market.

C. Digital eco-systems and bundles

- (21) The Draft Notice specifies that the EC may assess whether bundles of “secondary” digital services constitute a single relevant market. The Notice could usefully clarify when it would be appropriate to define such single bundled markets, e.g. where in response to a SSNIP or an SSNDQ in relation to zero-price products, consumers would still be unlikely to be “break” the bundle and source one or more of the relevant products from rivals.

VI. Metrics for market definition (Section 5)

A. Metrics in “innovation markets”

- (22) In relation to “innovation markets” (i.e. markets where there are frequent and significant investments in R&D as set out in paragraph 9 above), the Draft Notice helpfully includes examples of metrics that can be useful to assess market power along with or instead of value or volume of sales.
- (23) The Draft Notice refers to two such metrics: (i) the level of R&D expenditure and (ii) the number of patents or patent citations.¹⁶ The latter would amount to counting the number of times each patent has been cited in subsequent patents to compute a citation-based index as a measure of innovative output. This approach is preferred to the number of patent applications, since simple patent counts do not consider the quality dimension of patents.
- (24) The Draft Notice has not however made express mention of R&D headcount in terms of full time equivalent (FTE) personnel dedicated to relevant R&D programmes, used in M.7278 *GENERAL ELECTRIC | ALSTOM (THERMAL POWER - RENEWABLE POWER & GRID BUSINESS)* (p. 387). We think it would be useful to also include this metric, in case data on the level of R&D expenditure (value) is not available or for any reason it is a less reliable proxy in a given market.
- (25) The Draft Notice could also usefully explain under which circumstances the EC would rely on R&D expenditure or alternatively on far more complex citation studies.

B. Metrics in “bid markets”

- (26) In relation to bid markets, the Draft Notice refers to two metrics: (i) the number of suppliers (in particular in markets with formal tenders) and (ii) the number of tenders awarded. In relation to the former, the Draft Notice clarifies that the number of tenders awarded may be a more relevant metric than other proxies which offer a rather static image of the market (i.e. installed base for wind turbines), due to a time lag between award and exploitation in the market (i.e. installation)¹⁷.

¹⁵ Commission Decision of 17 December 2020 in Case M.9660 *GOOGLE / FITBIT*, para. 398.

¹⁶ Draft Notice, Section 5, paragraph 107.

¹⁷ Draft Notice, Section 5, paragraph 107 and footnote 128.

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- (27) However, this does not address a point that logically precedes which metric is most relevant in bid markets: whether or not we are faced with a bid market. Indeed, while there are precedents where the EC has relied on the bidding nature of the markets to discount the competitive significance of high market shares, in other cases the EC has disregarded the bidding nature of the markets due to “persistently high” market shares. Accordingly it would be helpful to codify the existing case law and provide further guidance on the circumstances in which the EC will rely on the bidding nature of the markets.

Linklaters LLP – 13 January 2023¹⁸

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¹⁸ The Linklaters lawyers who contributed to this paper are, in particular, Will Leslie, Miguel Andreu, Joost Dibbits, Lukas Solek, Alba Gubia, Sudheera Koduru, Thibault Henry.