

**RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON THE
COMMISSION NOTICE ON THE DEFINITION OF RELEVANT MARKET FOR
THE PURPOSES OF EU COMPETITION LAW**

Clifford Chance LLP welcomes the opportunity to respond to the consultation on the Commission Draft Notice on the definition of relevant market for the purposes of EU competition law (the **Draft Notice**). Our comments below are based on the substantial experience of our lawyers of advising on antitrust and merger control laws for a diverse range of clients, and across a large number of jurisdictions. However, the comments below do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

1. GENERAL OBSERVATIONS

1.1 We welcome the extended length of the Draft Notice, in comparison with the current version. As a document that guides businesses and their advisors in all areas of competition law, it has substantial value and the Commission is right to supplement it with examples from its own case law. However, given the Commission's very extensive volume of decisional practice, in the area of merger control in particular, we consider that it could go much further in its citation of relevant and useful examples. In particular, in the following areas the Draft Notice provides only limited number of case reference as an illustrative example, and could usefully be supplemented with several other relevant examples:

1.1.1 cases in which markets have been defined on the basis of supply-side substitution (paragraph 36) and cases that have considered the relevant time period for supply-side switching in different contexts (paragraph 39);

1.1.2 cases in which the various types of switching barriers and costs described in paragraphs 57, 61 and 71 have been relevant;

1.1.3 additional examples of catchment areas that have been defined in different markets (paragraph 74); and

1.1.4 additional examples of cases involving each of the specific circumstances in section 4.4 (differentiated products, price discrimination, innovation, multi-sided platforms and aftermarkets).

2. SECTION 1 OF THE DRAFT NOTICE: INTRODUCTION

2.1 We broadly agree with the principles for market definition that are described in this section and consider the greater emphasis on the role of non-price parameters of competition to be appropriate. However, we have identified below a number of areas in which the Draft Notice could be clearer and/or more comprehensive.

Role of market definition

2.2 Paragraph 7 of the Draft Notice states that market definition is "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". This is potentially misleading, in our

view, since there are many areas of Union competition law in which it is a mandatory step in all assessments. The Draft Notice ought instead to refer to the clear and consistent position of the EU Courts that "a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition"¹ as well as being a "prerequisite of any assessment of whether the undertaking concerned holds a dominant position".²

General principles of market definition

- 2.3 Paragraph 12 states that the Commission "takes into account the various parameters of competition that customers consider relevant in the area and period assessed", including level of innovation, durability, sustainability, value and variety of uses, image conveyed, security and privacy protection afforded and availability. In our view, the Commission should seek to elaborate a test for assessing when a particular factor is sufficiently relevant (to a sufficient number of customers) to be taken into account in market definition. This is particularly important in markets where the Commission seeks to apply the "Small but Significant Non-Transitory Decrease in Quality" (SSNDQ) test. For example, evidence that a decrease in privacy protection does not prompt significant consumer switching may not be a good indicator of a narrow relevant market if only a very small proportion of consumers view privacy as a material factor in their choice of product. See also our comments on the SSNDQ test at 3.5 below.
- 2.4 Paragraph 15 seems to imply that where undertakings compete on different parameters of competition there may be distinct product markets in respect of those different parameters, despite those parameters relating to the same products or services. We consider that to be an unclear and potentially misleading description of the Commission's approach in *Dow/Dupont*, which is the cited authority for this statement. In *Dow/Dupont*:
- 2.4.1 the Commission defined different markets for (i) crop/pest combination groupings, which were considered national in scope; and (ii) upstream technology markets for the sale and licensing of active ingredients for such products, the geographic scope of which was left open. Contrary to the statement in the first sentence of paragraph 15 of the Draft Notice, the development of technology is not the "same economic activity" as the production of products using that technology, and the "outcome" of the geographic market definition did not differ in respect of the same economic activities or product markets; and
- 2.4.2 the Commission explained that "[w]hen considering both the downstream product markets and the upstream technology markets, innovation should not be understood as a market on its own right, but as an input activity for both the upstream technology markets and the downstream [...] markets."³ Consequently, the Commission's assessment of market shares for crop/pest combination groupings at the global and EEA levels global market shares of R&D suppliers

¹ Case T-380/17, *HeidelbergCement AG and Schwenk Zement KG v. Commission*, ECLI:EU:T:2020:471.

² Case C-307/18, *Generics (UK) Ltd and others v CMA*, EU:C:2020:52, paragraph 127. See also the recent judgment in Case T-691/14, *Servier and Others v Commission*, ECLI:EU:T:2018:922.

³ Case COMP/M. *Dow/Dupont* at para.348.

were not factors that led to "different outcomes" at the stage of market definition, but were instead relevant to the substantive assessment of the parties' market power (and likely future market power) in the relevant markets.

- 2.5 We therefore submit that the example relating to "parameters of competition" in paragraph 15 should be deleted. The other example relating to "the undertaking(s) involved" remains correct and should be retained.
- 2.6 Footnote 31 of the Draft Notice describes the CJEU in the *Generics* judgment⁴ as having "found that the market may be narrowed down to only a specific molecule in light of impending entry by a generic version of an originator product because the *'manufacturers of generic medicines [were] in a position to enter the market immediately or within a short period [...]*'. The use of the phrase "narrowed down" is misleading. The CJEU accepted that the scope of the market could be limited to a specific molecule for other reasons and did not suggest that this is a necessary consequence following the market entry of generics – as this will depend on several other factors. Indeed, the statement that is reproduced in the footnote goes instead to the question of whether the market could be widened to include generic products involving the same molecule.
3. **SECTION 2 OF THE DRAFT NOTICE: CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY**
- 3.1 We consider that this section provides a useful overview of the conceptual framework for market definition. However, there are certain areas which could be made clearer, and certain important issues that are omitted.
- 3.2 One such omitted issue is the presence of indirect constraints. Take, for instance, the scenario where the merging parties make inputs that are used in one production process, but competitors of the merging parties' customers use a different production process. In those circumstances a hypothetical monopolist imposing a SSNIP on the merging parties' products may find that price increase defeated by customers further down the supply chain switching to products produced with the alternative production process, notwithstanding that immediate customers do not view the merging parties' product as substitutable for the inputs that are used by their rivals. The Draft Notice implies in paragraph 14 that such indirect constraints will be taken into account only at the competitive assessment stage, but also indicates in footnote 42 that where demand is driven by "other stakeholders" this will be taken into account at the market definition stage. Given these seemingly contradictory statements and the importance of this point, we submit that it should be addressed explicitly.

Concept of the relevant geographic market

- 3.3 Paragraph 21 sets out the test for defining relevant geographic markets as areas "in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas, in particular because conditions of competition are appreciably different in those areas." While we recognise that this formulation is derived from case law and legislation, it can be misleading in certain circumstances, in our view. In particular, the application of the SSNIP test can lead to

⁴ Generics (UK) and Others, C-307/18, EU:C:2020:52, paragraphs 134-135.

the definition of distinct geographic markets in which the "conditions of competition" are all materially the same. For instance, in markets for supplying cement, it may be the case that the products, prices, market shares, customers, customer preferences, transport costs, production costs, market structure and levels of capacity are all broadly the same from one region to the next, but that would not preclude the identification of distinct markets on the basis that high transport costs and short lead times prevent arbitrage between the two regions, such that a hypothetical monopolist in one region would be able to increase prices. Consequently, the Draft Notice could usefully include a clarification (perhaps by cross referencing paragraph 74 of the Draft Notice) that the assessment of whether conditions of competition are homogenous or appreciable different is fundamentally the same as the assessment of demand and supply-side substitution that is described in the remainder of this section of the Draft Notice. This comment applies equally to paragraph 62 of the Draft Notice.

- 3.4 For similar reasons, we do not agree that the approach set out in paragraphs 43 and 44 of the Draft Notice is appropriate. Those paragraphs state that where conditions of competition in two areas are not "sufficiently homogeneous" it would "hamper rather than facilitate the competitive assessment" to treat them as forming part of the same relevant geographic market, because it may "erroneously include in the relevant market customers who would likely be affected differently by the relevant conduct or concentration". Our particular concern is that these paragraphs imply (with reference to Case M.9592 *Freudenberg/L&B* in footnote 59) that this will be the case even if imports from one area (e.g. Asia) constrain the pricing of producers located in the other (e.g. the EU). In our view this approach is not correct, as it is inconsistent with the general methodology for assessing geographic markets that is set out elsewhere in the Draft Notice and is not supported by the case law of the Union Courts. In particular:
- 3.4.1 if producers in Region A are unable to increase prices because any such increase would result in customers in region A buying from producers in Region B, that is demand-side substitution at work and we do not consider there to be any good reason to create an exception to the usual approach to defining markets simply because the substitution is between regions that are not "sufficiently homogenous";
 - 3.4.2 if customers would be affected differently in one region, then that must be because demand- or supply-side substitution is asymmetric (e.g. customers in Region B in the above example would not switch to producers in Region A). In that case, a narrower geographic market can be defined for assessing competition in one market (e.g. Region B in the above example), with a wider geographic definition used to assess competition in the other (i.e. assessing competition in Region A on the basis of a geographic market comprising both Regions A and B). That would be consistent with the Commission's approach to product market definition (see, e.g., the discussion of asymmetric constraints in paragraph 15 of the Draft Notice) and the case law of the Union Courts;⁵ and
 - 3.4.3 even if the Commission does not accept the above, there can be no risk that the competitive assessment is hampered in cases where the exporting region is

⁵ See also Case C-457/10, *AstraZeneca AB*, ECLI:EU:C:2012:770, paragraph 50, in which the CJEU ruled that it was appropriate to define product markets in this way.

outside the EEA, as the Commission will not be assessing the impact of the transaction or conduct in that other region in any event.

- 3.5 Consequently, we submit that paragraphs 43 and 44 should clarify that where exports from another region constrain domestic suppliers from implementing a SSNIP, then it will be appropriate to treat them as forming the same geographic market, at least for the purpose of assessing competition in the importing market.

General methodology for market definition

- 3.6 Footnote 46 of the Draft Notice states that the SSNIP considered "is normally a price increase in the range of 5% to 10% implemented on one or more products in the candidate market including at least one product of the undertaking(s) involved" (emphasis added). However, recent economic literature indicates that adopting a product-by-product (or "firm-level" approach) to critical loss analysis can lead to excessively narrow market definitions, thereby increasing the risk of Type-I errors.⁶ Consequently, we consider that the Draft Notice should recognise that, in most cases, a market-level approach to applying the SSNIP test will be the most appropriate.
- 3.7 As regards the use of the SSNDQ test described in paragraph 33 of the Draft Notice, we have concerns that the absence of any requirement to quantify what is regarded as a "significant" decrease in quality means that the test lacks conceptual rigour and is therefore not useful as a framework for determining market definition. In particular, if a change in quality does not prompt significant switching by consumers, that might be because it is significant but there are no sufficient substitutes. However, it could also be the case that there are effective substitutes and consumers do not switch to them because the decrease in quality is not significant to them. Unless the Draft Notice can elaborate a test (even if not a quantitative one) for assessing the significance of a decrease in quality then it will be impossible for businesses and their advisors to predict whether the SSNDQ test might lead to the former conclusion or the latter one. For example, the Commission might consider a requirement that a majority of customers must consider that the hypothetical decrease under consideration would be a material factor in their choice of supplier. In contrast, quality decreases that would only be material to a small minority of customers should not be taken into account.
- 3.8 Paragraph 26 of the Draft Notice states that "[t]he Commission may also distinguish between customer groups that face materially different conditions of competition in differing contexts, for example when there is price discrimination between different customer groups". The use of the words "for example" implies that the Commission may define distinct markets for different groups in circumstances in which the test set out in section 4.2 is not met (i.e. even where it is not possible to discriminate on price or other factors of competition, or where trade among customers or arbitrage by third parties is likely). However, we do not consider it appropriate to define distinct markets in those circumstances and unless the Commission is aware of examples of cases in which it has done that (in which case they should be cited here) we submit that the words "for example" should be omitted.

⁶ See, in particular, *On the Risk of Using a Firm-Level Approach to Identify Relevant Markets*, Autio, Padilla Piccolo, Sääskilahti and Väänänen, available at <https://www.ssrn.com/abstract=3701141>

- 3.9 The Draft Notice's explanation of the cellophane fallacy in footnote 48 focuses solely on the possibility of erroneously identifying a wider product market in abuse of dominance cases. In our view, it should also refer to the possibility that assuming that existing prices are "supra-competitive" and applying the SSNIP test to a hypothetical, lower "competitive" price may also erroneously identify a product market that is too narrow. In practice, given that all businesses are "profit maximising", the suggested approach to addressing the cellophane fallacy allows the Commission to always identify dominance in circumstances in which a business is the only supplier of a differentiated product with distinct characteristics that is nevertheless constrained by products that are substitutable at the prevailing price. This may lead the Commission to adopt an artificially narrow definition of the product market in question and overlook the relevance of non-price elements to substitution. In our view, the Draft Notice should recognise that in these circumstances the SSNIP test is of limited usefulness as an analytical tool, and that dominance will need to be established by the "other evidence" referred to in footnote 48.
- 3.10 In this respect, the footnote should explain what that "other evidence" would be. Given that the Draft Notice focuses entirely on factors relating to demand and supply-side substitution to determine market definition it is not obvious what evidence would suffice to counteract or outweigh evidence of substitution at the existing/prevaling price.
- 3.11 As regards supply-side substitution, footnote 51 of the Draft Notice highlights that the relevant period for assessing such substitutability is "such a period that allows the producer to market the product to the customer in a timeframe that is not significantly longer than the timeframe the customer needs for switching to the other product(s) in the candidate market" and that "[s]uch assessment is specific to the products assessed". As noted in paragraph 25 and footnote 43 of the Draft Notice, the "immediacy" of switching is the key factor in distinguishing between supply side substitution (which is taken into account in market definition) and potential competition (which is considered in the competitive assessment). Consequently, the Draft Notice would benefit from examples from the Commission's decisional practice of how the relevant period for switching was determined in different circumstances.

4. **SECTION 3 OF THE DRAFT NOTICE: PROCESS OF DEFINING MARKETS**

Evidence to define product markets

- 4.1 Paragraph 53 refers to the use of "econometric techniques" to estimate price elasticities. Given that the specific techniques, and the way in which they are used, can have a determinative role in the outcome of the market definition process, we consider that the Notice should provide more detail in this respect, with the use of examples to illustrate how the approach may differ in certain cases (e.g., homogeneous versus differentiated products).
- 4.2 Paragraph 54 of the Draft Notice states that "views of market participants relating to the likelihood or magnitude of hypothetical switching to an alternative product may not be sufficiently reliable, complete or accurate to allow the Commission to estimate own-price elasticities of demand. However, this is a case-by-case assessment and depends on the strength of the evidence available." In our experience, evidence from market testing is often a decisive factor in market definition. Consequently, the Notice would

benefit from an explanation of how the Commission weights the reliability of this evidence, with examples of factors that might tend to indicate that it is more or less reliable (e.g. whether the market participant has an incentive to oppose the merger for other reasons, whether the participant is representative of the wider customer base and the degree to which the participant is well informed about potentially substitutable offerings). This comment applies equally to paragraph 77 of the Draft Notice.

Gathering and evaluating evidence

- 4.3 Paragraph 79 notes that "customer surveys on usage patterns and attitudes, data on customer purchasing patterns, the views expressed by suppliers and market research studies submitted by the undertaking(s) involved and their competitors may be taken into account to establish whether an economically significant proportion of customers considers two products as substitutable." In practice, conducting a customer survey is one of the most valuable tools for merging parties to self-assess whether their transaction might give rise to competitive concerns, and it is important that they are able to do so with a format and methodology that ensures that the Commission will accept the resulting evidence as probative. While we recognise that this is outside the scope of the Notice, we submit that the Commission should consider preparing separate guidelines on the design and presentation of customer surveys, similar to those of the UK Competition and Markets Authority.⁷

5. **SECTION 4 OF THE DRAFT NOTICE: MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES**

Market definition in the presence of significant differentiation

- 5.1 Section 4.1 is a welcome addition to the Draft Notice, as it allows stakeholders to better understand how they can approach product differentiation in their analysis of a relevant market. Indeed, explicitly referring to differentiation as applicable to both the product and geographic dimension in paragraph 84, with direct examples on how such differentiation may occur, will help stakeholders to foresee when products that have specific characteristics may or may not fall in the same relevant market.
- 5.2 However, we would kindly ask that the Commission takes the following points into consideration in the next iteration of the notice:
- 5.2.1 Paragraph 85 and footnote 94 refer to the possibility, in appropriate cases, for the Commission to "define a relatively broad relevant market that includes differentiated products". We recognise that, in fact patterns such as those that gave rise to the *Wieland-Werke* judgment, it may be appropriate and administratively efficient to do so because it is difficult to define the precise boundaries of any given segment and the merging parties both have some presence in the relevant segments in any event. However, we are concerned that this approach can lead to incorrect outcomes in cases where merging parties are not both present in the relevant segment, as it may lead to them being treated erroneously as competitors, when a more detailed market definition analysis may have indicated that the relevant segments are, in fact, distinct product

⁷ Available at <https://www.gov.uk/government/publications/mergers-consumer-survey-evidence-design-and-presentation>

markets. Consequently, we submit that the Notice should state that in such cases the Commission will take particular care when deciding whether it is appropriate to define a broader market (with segments), or a number of distinct markets.

- 5.2.2 It would be helpful to include direct cross references to the relevant sections in Section 3 and the interplay between 'product differentiation' and the evidence normally used by the Commission to establish the boundaries of demand and supply side substitutability both at the product and geographic levels. For instance, paragraph 49 of Section 3.2.1 ("Product characteristics, prices, intended use and general customer preferences"), could make cross references to the characteristics flagged in paragraph 84 and vice versa. Similarly, it is not clear how/if geographic differentiations would warrant a separate exercise when it comes to market delineation than the exercise one needs to undertake when looking at the relevant geographic market level evidence in section 3 – again, cross references would help clarify this. We think these would be helpful clarifications, as we understand that product differentiation does not require an additional exercise over and above the overarching consideration of demand and supply side substitutability, but rather forms a consideration that stakeholders will need to bear in mind when delineating relevant markets.
- 5.2.3 While we appreciate the Commission clarifying, in Paragraph 86, the impact product differentiation can have at the competitive assessment stage, given that this section's aim is to clarify how product differentiation can influence the market definition, we recommend that the Commission removes this paragraph and amalgamates it with paragraph 109 in Section 5. As it stands, this paragraph may confuse stakeholders in the future who try to establish what the relevant market should be for products that have differentiating characteristics.
- 5.3 Finally, we welcome the Commission's statement in paragraph 87, which touches explicitly on chains of substitution, and for providing an example in footnote 99 of how a chain of substitution operates in practice to bring two products that compete indirectly, into the same relevant market. For clarity, we would ask that the Commission moves footnote 99 into the main body of the text, and if possible, provide additional examples of considerations that could lead chains of substitutions to influence the relevant market definition in a given case.

Market definition in the presence of price discrimination

- 5.4 There is a helpful addition to Section 4.2 of a brief description of what price discrimination is ("Price discrimination occurs when different customers (or customer groups) are charged different prices for the same product, for reasons unrelated to costs.") However, it is unfortunate that this addition appears to insist on customers being charged different prices for the "same" product as a prerequisite for finding the price discrimination. We would suggest that it is made clear that price discrimination can also take place among products which are merely similar, as well as among those which are identical. If a product market can encompass more than one type of product (given the possibility of demand and supply-side substitutability), so too price discrimination should be acknowledged to take place among strictly more than one exact type of product.

- 5.5 The new description of price discrimination at the start of the section (as cited in paragraph 5.4 above) is also potentially over-inclusive, given that it notes price discrimination can take place only when price differences are unrelated to costs. There are myriad instances, beyond cost, where prices may be different for different consumers. Some such instances, we would suggest, are nonetheless incapable of constituting price discrimination. Examples might include where lower prices are offered to some customers in an effort to clear stock before new products are brought in. The key point is perhaps more usefully expressed not as the *absence* of a grounding in costs, but as the *presence* of a grounding in customer or customer group characteristics.
- 5.6 It should be noted that it remains possible under the revised Section 4.2 to identify distinct markets for *each and every customer* of a given product. This is particularly so, given (i) the fact that undertakings typically now hold more data about the average user than when the previous Market Definition Notice was published; and (ii) the resulting smaller classes of customers so distinguished could in theory be identified more clearly as distinct classes than larger ones. This could result not only in customers being differentiated to such an extent that each has a price tailored to them, but also limb (a) of the Notice's test – identification of a distinct class – being more easily met when the market comes to be defined. We note in this connection that it is not uncommon for case teams in EUMR proceedings to insist that the narrowest "plausible" relevant markets are those involving sales to particular customer categories. It would not necessarily be an issue if ever-narrower markets, right down to individual customers, were defined. But it should perhaps be clarified that the Notice intends to create this possibility. It should be added that with more tailored prices – and more tailored, though similar, products – the possibility of arbitrage might be low enough to also satisfy the test's limb (b) than previously.
- 5.7 We also note that price discrimination can be relevant to market definition by virtue of the fact that price is a key basis upon which undertakings compete. However, it is not the only factor. In an era defined by competition between tech firms, it might for example be that undertakings compete on non-price aspects. They might, for example, provide different but similar products to customers based on the extent that they are willing to provide data or watch advertisements and so forth. This could equally create different markets for different consumers, but it would not necessarily be accounted for under the current draft Market Definition Notice.
- 5.8 Finally, the Notice could be made more coherent in its treatment of markets that are subject to price discrimination if it were to include in section 4.3 cross references to other parts of the Notice that deal essentially with the same issue, in particular, barriers to switching between sales channels (paragraph 58) and arbitrage in geographic markets (section 3.3).

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

- 5.9 The new section 4.3 of the Draft Notice, addressing market definition in the presence of significant investment in R&D, focuses on two issues: (i) pipeline products and (ii) innovation competition as a more general concept.
- 5.10 As regards pipeline products addressed in paragraph 90 of the Draft Notice, we would appreciate further guidance on the criteria under which "[t]he Commission may find

that such pipeline products belong to an existing relevant product and geographic or new market". The citations, limited to the pharmaceutical sector, do not sufficiently provide for a framework for undertakings to assess how their pipeline products should be treated. Furthermore, the two cited precedents are not sufficiently indicative of the established decisional practice of the Commission. We would welcome the Draft Notice to go beyond mentioning the possibility of including pipeline competition in the market definition and detail the Commission's general approach to pipeline competition. In this regard we note that in general more clarity on the treatment of potential competition by future products and / or entrants would be welcomed and should provide a consistent and predictable framework to establish whether such developments (based on the approach suggested in this section 4.3) are included in the relevant market or (in line with the general approach to market definition in section 2) should be considered as competitive constraints or effects outside the relevant market.

- 5.11 In practical terms, in particular in merger control, we note that inclusion of pipeline products in the relevant market can lead to results disadvantaging the undertakings concerned, as, generally speaking, their pipeline products are included in the assessment, whereas less visible third-party pipeline products are less likely to be included. In addition, the inclusion of pipeline products in the relevant market limits the competitive assessment either to a count of products, predictions of future market position or qualitative arguments instead of present market share data.
- 5.12 As regards the more general concept of early-stage innovation efforts, paragraph 91 of the Draft Notice states that "[a]lthough the fact that such earlier innovation efforts do not immediately translate into tradeable products may render it difficult to identify a relevant product market within a strict sense, it may still be relevant to identify the boundaries within which undertakings compete in such earlier innovation efforts". This statement implies that it may be appropriate in some cases to define some form of market for early innovation efforts (albeit not one in a "strict sense") even if it is not possible to identify any downstream technology or product markets into which the innovation will be an input. As such, the statement goes significantly further than the concept of innovation spaces that was introduced in *Dow/DuPont*, in which the Commission noted that innovation cannot be understood as a market on its own right, but is instead as an input to the relevant downstream technology and product markets that it had identified and defined in that case (i.e. crop protection formulated product markets and the related technology markets).⁸ Consequently, we submit that paragraph 91 has no place in the market definition notice, as it pertains to an analytical tool for the substantive assessment of downstream product and technology markets (once defined), not the approach to defining product or technology markets.
- 5.13 If the Commission decides to retain paragraph 91 (and the associated references to earlier innovation efforts in paragraph 92), our view is that it should, at minimum, clarify that "delineating the boundaries" of early innovation efforts is not a market definition exercise, but is instead aimed at understanding the R&D inputs into relevant product and technology markets, and will therefore not be relevant if no such product or technology markets have been identified or can be identified. Given the clear statements of the Union Courts that "a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on

⁸ Case M.7932 – *Dow/Dupont*, para 348.

competition",⁹ we consider that any substantive assessment of "delineated early innovation efforts" without reference to any identifiable product market that would be affected by those efforts would exceed the legal powers of the Commission and should not, therefore, be implied as a possibility by the Draft Notice.

- 5.14 Moreover, innovation spaces are a comparably new concept and we would welcome guidance on the application of this concept, both in terms of their delineation and assessment. In the same vein, paragraph 92 of the Draft Notice should include guidance on which aspects to consider when assessing the "continuum" between specific product and earlier innovation efforts.
- 5.15 We are concerned that paragraph 93 of the Draft Notice introduces a biased approach to market definition, as the wording can be read as implying a discretion as to which factors to include in market definition which is considering a hypothetical worst-case scenario ("in particular those scenarios where competition would be significantly affected by the conduct or the transaction in question"). This potentially creates a feedback loop, basing the competitive assessment on a market definition already skewed against the undertakings concerned. We consider such approach to not be good administrative practice and decisions based on such risk to fall short of the standard of proof required by the Union Courts.
- 5.16 Finally, we would welcome guidance on how this section of the Draft Notice interacts with other Commission materials, e.g. the current and draft 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, which employs the concept of "technology markets", and the current and draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, mentioning the concept of "R&D poles".

Market definition in the presence of multi-sided platforms

- 5.17 We welcome the addition of a section discussing market definition in the presence of multi-sided platforms, and the Commission's express acknowledgement that indirect network effects between user groups on different sides of the platform can be relevant at the stage of market definition and – in addition or alternatively – during the competitive assessment.
- 5.18 We encourage the Commission to provide more guidance on how it determines whether to define a single market encompassing all (or multiple) products offered by a multi-sided platform, or separate relevant product markets for products on each side of the platform. Paragraph 95 of the Draft Notice identifies various factors which are often relevant to the strength of indirect network effects (e.g., the nature of the platform and whether the undertakings offering substitutable products for each user group differ), but the Draft Notice would be more useful if it were to include more details of how these factors are likely to impact the Commission's market definition analysis. For example, the Draft Notice could compare and contrast the key factors that led the Commission to define a single product market for online recruiting services in M.8124 *Microsoft/LinkedIn* versus separate product markets for issuing and acquiring payment

⁹ Case T-380/17, *HeidelbergCement AG and Schwenk Zement KG v. Commission*, ECLI:EU:T:2020:471.

cards in AT.34579 *Mastercard*, and include additional examples of when – and why – the Commission considers the single- or multi-market approach to be most appropriate.

- 5.19 We also suggest that the Draft Notice could acknowledge expressly (in paragraph 95) that the substitution possibilities to a multi-sided platform are not necessarily limited to other multi-sided platforms and that, in addition to the factors listed as relevant to determining whether multi-sided markets should be defined holistically or separately for each side, other relevant factors include typology and the provider's business model (as recognized in the EC Support Study).¹⁰
- 5.20 Finally, the Draft Notice reflects that the presence of indirect network effects may render the application of a SSNIP test more challenging (paragraph 96). While this is correct, it would be more useful if the Draft Notice were to provide guidance on how a SSNIP test might be applied to multi-sided platforms. As part of this guidance, we encourage the Commission to acknowledge that the principles underpinning a hypothetical monopolist test do not differentiate between direct or indirect constraints – the question hypothesised in the test is whether the price increase would be profitable for the hypothetical monopolist.¹¹ If a SSNIP would be unprofitable (whether due to direct or indirect constraints, or a combination of these), the process of adding substitutes to the candidate market continues with the addition of the next closest substitute. For example, a SSNIP test might be run for one side of a multi-sided platform in order to consider whether a market should be defined more widely considering only direct constraints, in scenarios in which indirect constraints would reinforce the conclusion that the market should be defined more widely.

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

- 5.21 The Draft Notice includes a more thorough examination of the criteria for analysing, defining, and assessing the relevant market definition in the presence of after markets. In particular, the systematic categorisation of system, dual and multiple markets substantiated by examples from the Commissions' past decisions provides the much needed clarity on the Commission's approach to future cases with elements of after markets.
- 5.22 However, while the Draft Notice contains a useful list of considerations that may be relevant to assessing whether distinct markets should be defined for aftermarkets or bundles it does not, in our view, sufficiently emphasise that the relevant test remains one of substitutability, as set out by the General Court in its *CEAHR* judgment, i.e., whether "a sufficient number of consumers would switch to other primary products if there were a moderate price increase for the products or services on the after markets and thus render such an increase unprofitable".¹² The Draft Notice could also usefully clarify the application of the hypothetical monopolist test to aftermarkets and the

¹⁰ European Commission, DG Competition, *Support study accompanying the evaluation of the Commission notice on the definition of relevant market for the purposes of Community competition law: final report*, Publications Office, 2021, <https://data.europa.eu/doi/10.2763/46075>

¹¹ Paragraph 31 of the Draft Notice and paragraph 17 of the current Notice.

¹² Case T-427/08, *Confédération Européenne des Associations d'Horlogers-Reparateurs (CEAHR) v Commission*, ECLI:EU:T:2010:517, paragraph 105.

approach to assessing the degree to which a SSNIP test in the aftermarket impacts demand substitution in the primary market.

- 5.23 Finally, we have some reservations regarding the discussion of the concept of "digital eco-systems" in paragraph 103 of the Draft Notice. The concept itself is ill-defined in the Draft Notice and the example given in footnote 123 does little to clarify it. Moreover, it is not explained whether the Commission's intention is to treat market definition of "digital ecosystems" differently to market definition for any other type of products or services and, if so, why. In our view, the Draft Notice should, at minimum, make it clear that there is no different approach to defining markets that products or services that form part of a digital ecosystem, such that the fundamental question is one of substitutability of the products or services under consideration, and the resulting competitive constraints that are imposed on them.
- 5.24 The Draft Notice could also usefully provide more guidance on how elements set out paragraph 103 (i.e. network effects, switching costs and single- or multi-homing) may or may not affect the relevance of the after markets framework on the digital ecosystems.

6. SECTION 5 OF THE DRAFT NOTICE: MARKET SHARES

- 6.1 Paragraph 109 of the Draft Notice makes reference to the consideration of sub-segmentations of the relevant market and indicates that such sub-segmentations may be relevant to the assessment of closeness of competition, especially in cases of substantial product or geographical differentiation. Given the substantial work that can be required to produce market share segmentations, in particular when reliable third-party data is lacking, we would welcome further guidance from the Commission on its approach to determining when such segmentations are required (including for the technical assessment of whether the simplified procedure should apply). Such guidance, where possible, should make reference to a wide array of case precedents across industries to assist practitioners in determining when such segmentations will be required. This is of particular importance when requested segmentations may not align with segmentations reported by trade associations, recorded in internal data in the course of normal business, or contained in industry reports.
- 6.2 Paragraph 110 of the Draft Notice notes that market share estimates submitted by undertakings involved may be unreliable. We encourage the Commission to reflect in the Draft Notice how it assesses the probative value of different sources of (possibly conflicting) market data, such as independent and commissioned third-party reports, contemporaneous and non-contemporaneous internal estimates, and, potentially, market reconstructions, including examples of the respective advantages and disadvantages.
- 6.3 We would also welcome additional guidance from the Commission on how it assesses the evidence related to the relevant value of sales, especially in cases related to competition between online and brick-and-mortar retailers, and the extent to which ancillary services (e.g., delivery, etc.) should be considered in the evaluation of market shares.
- 6.4 There are also a number of other areas in which issues arise frequently in calculating market shares. These include:

- 6.4.1 **Markets with captive sales.** The proper assessment of captive consumption may be determinative of whether shares indicate market power, in particular in capacity constrained intermediate markets. The absence of any reference to this issue is a significant omission and we encourage the Commission to include guidance on their treatment of such sales in the new Notice.
- 6.4.2 **Shares based on metrics other than sales or volume.** The usage of metrics other than sales or volume often presents practical challenges, in particular with regard to R&D intensive industries, and we suggest that the Commission should provide additional citations to cases in which these have been used to help to increase transparency about how such shares might be calculated in different industries.

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