

DT RESPONSE TO THE COMMISSION ´S PUBLIC CONSULTATION ON THE DRAFT MARKET DEFINITION NOTICE

January 13, 2023

Deutsche Telekom (“DT”) welcomes the consultation of the European Commission (the “Commission”) on the draft Market Definition Notice. As DT has explained in the prior public consultation in 2020 it appreciates the initiative of the Commission to update this notice on market definition to reflect the current economic thinking and the market realities. The revision is necessary given the shift in the functioning of the economy and conception of markets since the issuance of the notice in 1997, especially in light of the digitalization and the globalization of the economy.

The Market Definition Notice is an essential instrument for the Commission to provide guidance and transparency on its approach to the competitive assessment. To this end DT appreciates the Commission ´s effort to give broader and more detailed guidance in the notice. However, DT also believes that it is important to note that market definition is only a point of departure and that market shares may not be the decisive factor for the determination of market power.

1. Introduction and general comments

In general, DT welcomes the Commission's recognition in the chapter purpose of the notice that competition policy has a role in contributing to the twin green and digital transitions and in increasing the resilience of the European economy. It is also important that the Commission acknowledges in para. (2) that there are new ways of offering goods and services and an increasingly globalized nature of commercial exchanges. In the notice it should be stressed that in the context of market definition this likely translates to broader product and geographic markets. In the past, the Commission has adopted overly narrow market definitions, which have

the consequence of over-regulation. This disregard of the full economic reality with too narrow market definitions has put in particular European companies at a disadvantage in global competition.

DT also appreciates the affirmation that the Commission is not bound to apply the definition of a relevant market from past decisions in future cases, as the markets are continuously evolving. In the telecommunication industry we have undergone a significant shift, in particular with virtualization, where operators have increasingly been facing competitive constraints from digital players. This is especially the case with big platforms, which are providing competing services over the internet relying on telecommunications infrastructure. These clear competitive constraints need to be included at the stage of market definition of communications markets with a focus on the features prevailing at the moment of the analysis. A fallback to outdated market definitions from the past should be avoided.

Further, it is important for the notice to stress that the market definition for the purpose of the competitive assessment is different from the definition of a market in other contexts. Especially, with regards to regulated industries it should be noted that the regulatory definition of relevant markets cannot be used in a competition law context. In the past the Commission has had a tendency to base its analysis on pre-defined regulatory markets instead of collecting forward looking information before defining relevant markets for an in-depth investigation, leading to a confirmation bias. The market definition needs to be an unbiased screening tool, in order to focus the required data collection and further analysis on issues that are relevant from a competition law perspective.

Beyond that, DT appreciates that the draft notice puts more emphasis on time periods considered and recognizes that in certain cases a more forward-looking assessment is necessary. Given the increasing instances of new developments especially in the fast-moving digital markets it is important to move from a static, backward- looking approach, to a more dynamic approach.

2. Concept of the relevant market and general methodology

Overall, DT agrees with upholding the concept of delineation of the markets according to their product and geographic dimensions in line with the case law of the European courts and the Commission's case practice.

However, regarding the methodology for market definition DT believes the notice falsely classifies all potential competition as remote competitive constraints under para. (25), which should be assessed at a later stage. Potential competition should be part of market definition when it is likely to affect the structure of a market and to become a competitive constraint in the foreseeable future. In particular, regarding digital markets potential competition should play a bigger role, since market entry or envelopment to adjacent markets is much easier and faster. Otherwise, a market definition which does not take into account potential competition may fast become misleading. This particularly holds true in the context of the acquisition of nascent companies, where the target is a potential competitor. Therefore, the Commission should introduce a benchmark to assess when

potential competition should be considered at the market definition stage and when potential competition should be treated as a remote competitive constraint. To this end, internal documents could be a valuable source to identify potential competitors that are likely to become an immediate competitive constraint in the relevant market.

With regard to demand substitution, we appreciate that the Commission emphasizes the role of competitive parameters other than price when defining product markets, such as quality, innovation or other parameters referenced in para. (12). Against this background it should be clear that these other parameters have the same importance and weighting should be adapted on a case-by-case basis depending on the relevance for consumers. In light of this DT welcomes the Commission's explicit acknowledgement of the limitations of the SSNIP test when parameters such as quality and innovation are more relevant than price in a certain market. We agree that there should be no obligation on the Commission to use the SSNIP test empirically, but there could also be an explicit reference in the text of the notice in para (32) to alternative tests, such as the "SSNDQ" test for quality or "SSNIC" regarding privacy.

In relation to the supply substitutability DT appreciates that there is more guidance on where supply substitution is relevant. As we have stated in our previous submission, especially in digital markets key inputs, like data and AI, are crucial for competition and therefore should be considered at a market definition stage. Platforms in possession of or with access to these key inputs can easily leverage their market power and use these key inputs to expand to adjacent markets or also develop new products to enter new markets in the short term. Hence, it is crucial that there is more emphasis on supply side substitution in the notice.

On the subject matter of geographic market definition methodology, DT would encourage the Commission to be more inclusive, in particular in light of the increasingly globalized nature of commercial exchanges, which it recognizes under para. (2). Globalization has changed the geographic scopes and market integration dramatically. The notice should more clearly acknowledge that geographic markets have become much wider, and market integration in turn has become much more relevant. Often markets will even have a scope that is wider than EEA, which in turn means that competition coming from outside the EEA should be factored in.

3. Process of defining markets

DT largely agrees with the Commission's approach to market definition in practice and evidence gathering set out by the notice. However, in the process of defining markets it is important that the notice also stresses the principle of proportionality. Defining alternative markets, for instance wider and narrower markets, always comes with an additional burden of information gathering for the parties. Especially, when the market definition is ultimately left open, it is inefficient to collect detailed data on all potential markets at the outset of proceedings. In this context it should be noted that leaving the market definition open also poses a problem for

the self-assessment, given that in practice this uncertainty will lead to a more cautious approach by companies thereby forgoing potential gains.

Generally, it would be helpful if the Commission would give more guidance in the notice on what specific kind of evidence it would expect when the market delineation should be based on other product characteristics than price, like quality and innovation.

More particular on the gathering of past evidence it should be noted that in forward-looking cases the value of such evidence may be very limited and therefore should be kept to a minimum. This is especially true for the rapidly evolving industries, as referred to under para (55). The Commission defines rapidly evolving industries as those characterized by fast technological progress, new or newly developed products or processes, as well as technological or regulatory changes that may lead to structural market transitions which affect existing competitive dynamics. We believe the notice should not be overly restrictive in the interpretation of rapidly evolving industries, since important technological changes also can take place in traditional industries, for instance convergence in telecommunications sector. Beyond that the blurring of different services leads to breaking up of traditional business silos, where we no longer are looking at distinct and separate markets but at interrelated ecosystems. In our industry we see the blurring on the service level with platforms competing in the same market as traditional telecommunication operators, partly with the same partly with different types of technology. At the same time, we see blurring on infrastructure level, e.g. acquisition of spectrum to supplement operators in niche areas. Usually, in these cases gathering of static information will not be very informative for defining the relevant market.

With regard to the geographic market definition DT welcomes that the Commission considers the barriers and costs associated with supplying customers in different areas. The regulatory framework and licenses mentioned in para. (71) form a particularly high barrier in the telecommunications industry and are decisive for the boundaries of our geographic markets.

Concerning the evidence gathering and evaluation process DT appreciates that the Commission relies on different categories and sources of evidence. Even if the Commission does not want to apply a rigid hierarchy, it would be helpful to have some more guidance on the value associated with certain types of evidence. Beyond that, it is also important to stress the principle of proportionality here, given the vast evidence toolbox the Commission has. Evidence gathering via third party information requests, surveys and inspections often create a high administrative burden for all affected companies. Therefore, the notice should underline that these tools should not be used disproportionately and have strict conditions for their application in order to keep them to the minimum necessary for the purpose of defining the market. Similarly, where the Commission relies on consumer surveys or other information that was not gathered for the purpose of the market definition in the current investigation, it must carefully scrutinize the information and consider whether it is still accurate, up-to date and relevant for the case at hand.

DT understands that the Commission highly values the evidence from internal documents and in particular of internal documents prepared in the ordinary course of business as referred to under para. (79). In this context,

DT believes that it is important for the Commission to emphasize in the notice that such evidence needs to be considered on a holistic basis. This means that it should be weighted according to the author/ source of such evidence, e.g. whether the author was aware that the wording used could reflect certain legal definitions with an entirely different meaning. Furthermore, any contradictory views should be weighted accordingly. Beyond that, it should be considered in which context such evidence was created, given that often such assessments are created with a different goal in mind. This would ensure that a reasonable value can be placed upon such documents by the Commission in its assessment of the parties' motivations.

4. Market definition in specific circumstances

Under specific circumstances a very particular approach to market definition may be applicable and DT appreciates the additional guidance in the notice on the more detailed assessment in those circumstances. At the same time, the notice should be very clear that these particular approaches only apply in very exceptional situations.

With regard to market definition in the presence of significant differentiation DT considers that most products and services will differ to some degree. Therefore, in the majority of cases, it would be overly restrictive to only consider the closest substitutes as being within the same product or geographic market. Here the reference to the telecommunication industry in footnote 95 is a good example. While the Commission considered whether the mobile retail market could be further split into sub-markets in the T-Mobile NL/Tele2 NL merger, it rightly opted for a broad market in the end. In general, DT's view is that the delineation of markets should err on the side of a broader market definition, to allow for all relevant competitive factors to be taken into account throughout the analysis process. For instance, in a different set of circumstances a market may be considered as broader than just mobile retail, especially given the growing trend of convergence and hybrid products in the telecommunications industry. Another example from our sector is SMS services and messenger apps, where competition is also coming from new digital platforms. Even though these services may be considered to be different based on their technical characteristics, they are regarded as substitutes by the consumers and therefore should be considered as being in the same market.

Concerning the application of different market definitions in the presence of price discrimination DT would urge the Commission to not define overly narrow markets. It is not uncommon that there are different prices for the same product and therefore it should only be defined as separate market in very exceptional cases. Price differences may have many reasons which are no indicator of separate markets, such as overall customer relationship or successful negotiations. Another obstacle is that in practice, price discrimination will not be applied in the same manner across a market and assessing the delineation of markets based on price discrimination would therefore lead to the definition of overly narrow markets. Hence, the conditions listed in

para. (88) of the notice should be used as indicators, but not necessarily “usually” lead to a narrower market definition.

With reference to the market definition in the presence of significant investment in R&D DT would caution the Commission to not look at nascent R&D as a separate market with the exception of very specific industries. While DT believes that the Commission generally needs to broaden the time horizon for the assessment of markets depending on the characteristics of an industry, R&D usually still involves a lot of uncertainty as to whether and how this may evolve into a commercial product. The same is true for innovation, e.g. a pipeline product that is still 15 years away from launch. Therefore, DT’s view is that nascent R&D and future innovation should not play a role at the stage of market definition, but instead be examined at a later stage of the competitive assessment. Only in the exceptional cases, where R&D is at a sufficiently advanced stage and there is clarity on the final commercial product this should be considered at the market definition stage.

Regarding the market definition in the presence of multi-sided platforms DT welcomes that the notice looks into the specific characteristics of the digital markets. In these markets multi-sided platform-based business models are of utmost relevance. These platforms often consist of ecosystems made up of an ever-increasing number of linked products and services. Therefore, DT appreciates that the Commission will take into account the indirect network effects between user groups on different sides of the multi-sided platform when defining the relevant markets. DT also believes that the Commission rightly leaves sufficient flexibility for the definition of markets in the context of multi-sided platforms by providing for different possible definitions of the relevant product market for the products offered by the platforms (i.e. “platform as a whole” or “separate relevant product markets”).

DT also agrees with the greater emphasis given to non-price elements when assessing multi-sided platform markets, where zero monetary prices are considered as an integral part of their business strategy. In those cases, the non-price elements relevant for the assessment of substitution cited in para. (98) include additional parameters like data, economies of scale and scope, speed of consumer habits changing, barriers to entry and multi-homing. Regarding the test to be used in cases of zero monetary price products, and as set out above, the logic of the SSNIP test should be adapted with non-monetary indicators such as attention, i.e. “Attentional-SSNIP”, privacy, i.e. “SSNIC”, and quality, i.e. “SSNDQ”.

As far as the market definition in the presence of after markets, bundles, and digital ecosystems in para. (99) et seqq. is concerned DT appreciates that the Commission recognizes the relevant dynamics. In our view, it is important that the concepts are explicitly defined, but at the same time leave enough flexibility for the Commission to determine the market definition on a case-by-case basis. We also welcome the Commission's attempts to define broader markets rather than narrower markets when different products are involved. As per DT’s response to the Commission’s previous public consultation, defining a product or service as a bundle or as part of a wider product and service ecosystem, can be of decisive relevance during the later market assessment phase. This is particularly important with respect to the convergence of services taking place in the telecommunications industry and leveraging strategies that are applied in digital platform markets.

5. Market shares

Principally, DT agrees with the statement that market shares may not always be the best determination factor for market power and therefore should not be the sole indicator of strength in a given market. Already in the previous public consultation, DT had cautioned the Commission against relying too heavily on the concept of market shares, especially with regard to digital platform markets. Beyond that, DT strongly supports the addition of complementary metrics that are introduced in para. (107), such as the number of active users, number of visits, time spent, or audience numbers, as they are particularly relevant for calculating market shares in digital markets.

Although DT welcomes the clarifications the notice makes with regards to digital and multi-sided markets, it would query that a strict application of market definition and market shares would be possible in digital multi-sided markets. Especially, when looking at closed or quasi-closed ecosystems, which are characterized by having extensive market power, the notice should introduce specific guidance. Given the specificities of those markets, other factors that constitute a significant competitive constraint, such as lock-in effects, barriers to entry and conglomerate effects are more appropriate measures. A failure to consider these factors results in a real risk that the actual market power of these ecosystems is not captured by the mere calculation of market shares.