

## DRAFT REVIEWED NOTICE ON RELEVANT MARKET DEFINITION CONTRIBUTION TO CONSULTATION

In early November 2022, the European Commission launched a consultation on its draft revised notice on the definition of relevant market for the purposes of EU competition law. This new notice intends to:

- take into account the significant changes of the past 25 years, in particular digitization and new ways of offering goods and services,
- reflect on the interconnected and globalized nature of trading markets.

Companies welcome the publication of this document. For many months, during the consultations carried out by the Commission and as players operating in globalized markets, they have supported the revision of the 1997 notice on the definition of relevant market.

This definition remains essential to the identification and definition of the perimeter within which competition between undertakings takes place and of the framework used by the Commission to apply competition policy. This is an essential prerequisite for any analysis, whether in terms of anti-competitive practices (Articles 101 and 102 TFEU) or in terms of merger control (EC Regulation No. 139/2004). Proper, comprehensive and clear guidance on this definition is therefore needed.

The 1997 Notice has long provided stakeholders (economic actors as well as competition authorities) with a framework for analyzing the market while offering relative legal predictability. The revision of these parameters in light of the general digitization of the economy and its globalization had to be carried out. Because the delimitation of the market in question is essential, having "*often (...) a decisive influence on the assessment of a competition case*" (existing Notice - §4), the assessment made of it by the Commission should be adapted to the new economic reality.

AFEP member companies therefore appreciate the clarifications provided on numerous provisions, supplemented by enlightening decision-making or case-law references. This is particularly the case with elements on borders of the relevant market that may be different depending on the company in question, market shares as a less conclusive indicator in the presence of differentiated products or with the inclusion of the digitization of the economy in general. It is also appreciable that insights are shed on the role of price discrimination (cf. free services) and on the different ways of defining a relevant market in the presence of two-sided activities or R&D activities.

However, companies consider that this draft notice could remove certain uncertainties developed in the paragraphs below. They consider that areas of legal (A) and economic (B) insecurity remain in this document.

### A/ LEGAL INSECURITY

#### [1/ Linked to the margins of appreciation of the European Commission](#)

The draft notice leaves the Commission with significant leeway to challenge market definitions already established in previous decisions, for example depending on market developments, companies considered, competition parameters studied, etc. If companies understand the need to have a text capable of adapting to different scenarios, the interpretative margins left to the

Commission are ample, relativizing their legal certainty which is supposed to be provided by a definition of the relevant markets.

This is the case, for example, with the general principles of market definition (point 1.3 of the draft Notice).

While presenting a methodology based on eight criteria, the first of them recalling that the definition of the market is based on the facts of the case (§ 11), many of them are tempered by a great variability of the approaches likely to be accepted by the Commission.

In addition, in §14, the draft Notice provides that *“the Commission takes into account all competitive constraints (immediate or not) in the competitive assessment”* whereas in the general methodology of market definition (§25), the project specifies that *“by contrast, more remote competitive constraints that do not meet the criteria of supply substitution in terms of immediacy and effectiveness require an analysis of additional factors, including the circumstances related to the conditions of entry, and are taken into account during the competitive assessment as constraints arising from potential competition.”*

## 2/ Related to digital specificities

This legal uncertainty is also found in the sections devoted to digital, whether in the new paragraphs or in the updates.

### - Definition of the relevant product market

§95 provides that *“in the presence of multi-sided platforms, the Commission may define a relevant product market for the products offered by a platform as a whole, in a way that encompasses all (or multiple) user groups, or it may define separate relevant product markets for the products offered on each side of the platform”*.

Member companies appreciate the flexible definition of “multi-sided platform” provided by the draft Communication and the fact that the Commission intends to take into account “indirect network effects” between user groups on different sides of the platform when defining relevant markets and/or doing their competitive assessment.

They also appreciate that the project bases the evaluation of the definition of the product market in the presence of multi-sided platforms on an alternative: either from the point of view of a single market where the platform would evolve or from the point of view of product markets separate for each side of the platform. In this respect, companies support the approach of the Commission who can decide on a case-by-case basis, taking into account parameters such as the degree of differentiation on each side or behavioural factors.

Nevertheless, the conditions for applying these two approaches could be specified.

### - “Free” markets

In §98 relating to situations where the price observed on the market is zero, the Commission indicates that it *“focuses on elements such as product functionalities, intended use, evidence on hypothetical substitution and on competitive constraints based on industry views, barriers or costs of switching such as interoperability with other products and licensing features”*.

These criteria do not appear to be fundamentally different from those used for cases where prices are positive.

The Commission further states that “*non-price elements are particularly relevant for the assessment of substitution*”.

However, these other elements, such as quality, may also be particularly relevant in markets where positive prices are practiced. The list provided for in §98 should also include other indicators to be taken into account when analysing the market, such as data monetisation effects, data accumulation and conglomerate effects. The cause-and-consequence links between conglomerate effects and data accumulation should therefore be explicitly developed.

The **definition of the market for the supply of a product at a zero monetary price** therefore does not appear sufficiently clear: how do elements such as “*intended use (of the product)*”, “*evidence on hypothetical substitution*” or “*competitive constraints based on industry views*”, “barriers or costs of switching” constitute a substitute proposition for a monetary measure?

Companies believe that these elements should be clearly linked to the identification of tangible added value (eg user data to better enhance the sale of digital advertising, etc.).

- Market shares

Member companies appreciate the clarification in §107 that “*in addition to sales or purchases, depending on the specific products or on the specific industry in question, other metrics can offer complementary or more useful information to determine market shares*”.

Indeed, many complementary indicators can be relevant to calculate market shares, especially in digital markets, such as the number of active users, the number of visits, or audience figures. It should be noted that despite these clarifications, the strict application of the market definition may still be difficult given the specificities of digital markets. Beyond the notion of market shares, the Communication could thus introduce specific guidelines to address closed or quasi-closed ecosystems, which are characterized by considerable market power, and thus integrate other factors such as competitive constraints, barriers to entry and conglomerate effects.

## B/ ECONOMIC INSECURITY

### 1/ Take better account of **potential competition**

The Commission's general methodology (§24 and seq.) reiterates its traditional approach to market definition even though the conditions of general competition have changed significantly since 1997.

At this stage, in §25 which identifies “three main sources of constraints” to define the market, the Commission still considers substitution on the demand side as “*the most immediate and effective disciplining force on the suppliers of a given product*” and the substitution on the supply side as an element likely to be taken into account for this definition in particular “*when it is as immediate and effective as demand substitution*”. The Commission also recalls that more distant competitive constraints require an analysis of additional factors, de facto confining consideration of potential competition to a later stage.

AFEP considers, on the contrary, that the analysis of the relevant market should include **potential future competition** within **time horizons consistent with economic reality**. It is thus a question of obtaining a more dynamic and long-term approach to competition, on a global scale, taking into account both the well-being of the consumer and the economic reality with which European

players are confronted. This approach seems essential to them to allow a more balanced restitution of the economic reality and thus avoid an overly narrow definition of the market concerned, likely to lead to the undue invalidation of certain concentration operations.

It would seem appropriate to use these three criteria, in a non-cumulative manner, in **an overall analysis** of the competitive situation concerned, **as soon as the markets concerned are delimited**:

- **the demand substitution**, based on the elasticity of demand to price, can no longer be the main criterion of analysis for defining the relevant product markets.

In a digitized economy, new modes of consumption are indeed offered such as multi-sided platforms, distribution via the Internet or complete free-of-charge service;

The Commission rightly points this out in §94 et seq. ; §96 and 97 lead to the observation of prices no longer being so immediately relevant.

However, the way in which tests based on prices (SNIPP) are abandoned in favour of other analysis criteria with tests specific to free market deserves to be clarified in §98. See in this sense the difficulty raised supra, p.3.

- the analysis of **potential competitors** likely to arrive on the market concerned has become strategic and must be read within a **realistic timeframe** of at least 3-4 years following the time when the economic analysis is carried out. *"More remote competitive constraints that do not meet the criteria of supply substitution in terms of immediacy and effectiveness"* (§25) are likely to exclude from the analysis innovative products with a strong competitive impact on the market on the point of being launched on a market. If §89 and following paragraphs deal with this subject, the companies believe that details concerning this type of innovative product linked to sustainable development should be provided in these paragraphs. For the purpose of analyzing potential competition in the context of market definition, the Commission could take into account, for example, any internal documents of companies operating in the market that indicate potential competitors that could become an immediate competitive constraint on the relevant market, but also market studies and academic reports showing rapidly changing competition in the relevant product/geographical market.

As such, the drafting of §25 should affirm its essential nature by integrating it into the general methodology of market definition from the first stages of the analysis rather than reserving it for a second time.

What is at stake is no longer a hypothetical analysis that would be disconnected from the facts, but rather an approach considering new products currently being researched that will give rise to innovations for consumers and customers, particularly in the framework of the ecological transition. The supply of new sustainable products changes the definition of the market. See in this sense infra point 2/ p. 5.

From a terminological point of view, it should be noted that there is an undifferentiated use in certain paragraphs (e.g. 51, 88) of the notions of consumers or customers. Economically, this does not induce the same behaviours from the point of supply or demand. A clarification of these notions would be welcome.

This renewed analysis must be accompanied by better consideration of the impacts of these operations in areas other than competition alone (competitiveness, employment, international trade, etc.), according to transparent and fair procedures. To ensure this process, the competition

analysis should also integrate the significant positive contributions of mergers to adopted European policies, following the example of the precedent existing in European texts encouraging IPCEIs.

## 2/ Reconciling sustainable development and analysis of the relevant market

Companies welcome the Commission's consideration of the resilience of the single market (§2) which refers to its Communication of November 2021 "A competition policy adapted to new challenges". They also appreciate that the definition of the relevant market (§12) takes into account various parameters which *"may include the product's price, but also its level of innovation, its quality in various aspects – such as, for example, its durability, sustainability, the value and variety of uses offered by the product,..."*

A certain number of operations are in fact now linked to competition in quality, which, to be maintained, requires significant investments, as well as a cross-assessment of quality and prices in the long term. This is the case with sustainable products, the price of which can no longer be the only relevant data to define the market in question.

In this regard, little clarification is offered in the Commission's document, while European economic players are working to offer ever more sustainable products in order to fully comply with the green transition policy encouraged by the Commission. Companies consider that competitive analysis in general must evolve to better integrate the essential notion of efficiency, positive effects on the climate and the environment, for the market, and for consumers.

In this respect, companies are questioning the methodology adopted by the Commission not only to take into account future innovative products (see above) but also sustainable products, which are often more expensive.

Clarifications should be made to:

- succeed in reconciling market definition tests that are still taking prices into consideration, while sustainable development and the greening of the economy will lead to price increases and risk excluding sustainable, greener products from this type of market,
- consider the possibility of combining several components in the same product to create a real product market rather than assessing a market product by product.

The green transition of the European economy must support sufficient collective creativity to compete under comparable conditions with companies supported by their national authorities in other regions of the world. This support not only involves updated tools such as the HBERs, which now include a chapter devoted to sustainable development, but also a realistic approach to the relevant market where competition is played out in particular in the area of greening the economy, which is expensive.

As the consumer is increasingly aware of the purchase of sustainable products, the weight of demand substitution and the price indicator alone should be put into perspective by integrating possible competition in quality.

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## About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority.

AFEP has 113 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property, digital, data protection, labour law and social protection, environment and energy, corporate social responsibility and trade.

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