

## **DRAFT COMMISSION NOTICE ON THE DEFINITION OF THE RELEVANT MARKET FOR THE PURPOSES OF UNION COMPETITION LAW – OBSERVATIONS FROM THE ITALIAN ANTITRUST ASSOCIATION**

In thanking the European Commission ('Commission') for the opportunity to submit comments to the Draft Commission Notice on the definition of the relevant market for the purposes of Union competition law ('Draft Notice'), the Italian Antitrust Association ('AAI') particularly welcomes this initiative as it aims to provide greater clarity to businesses and their advisors regarding the requirements they must comply with in relation to how they can interact and cooperate with each other.

In order to establish a fruitful dialogue with the Commission, the AAI makes the following observations, consisting of both boxed general comments for each section and more detailed comments on specific points covered in the related section of the Draft Notice, hoping that they would contribute to the reorganisation and further clarification of an important preliminary tool for the subsequent competition assessment of a certain conduct under the relevant EU competition provisions.

### **SECTION 1 – INTRODUCTION**

The Draft Notice generally builds up on the Current Notice. Therefore, as the main goal appears to be a reorganisation and further clarification of the previous text, we welcome the efforts taken by the Commission to update it in accordance with the current legal framework.

The Commission has rightly indicated the role of market definition as an important but preliminary tool for the subsequent competition assessment of a certain conduct under the relevant EU competition provisions. It is indeed often useful to set the boundaries of the analysis of the parties' behaviour and, thus, to limit the assessment of the competent authority.

The outcome of market definition is the identification of a product/geographic space where competition supposedly takes place. But in some cases it is difficult (and misleading) to compartmentalize economic activities in this way.

Market definition forces a binary decision, i.e. whether to include a product or not, whereas substitutability is clearly a matter of degrees. For instance, consider a group of products that individually taken do not exert a sufficient competitive constraint to be included in the relevant market: it may well be the case, however, that the sum of those competitive constraints – while individually small – does constrain the exercise of market power of a hypothetical monopolist of products included in the relevant

market.

Further, products included in a relevant market rarely exert the same competitive constraint on the focal product: some will be closer substitutes than others. Yet, market definition does not account for these differences: all products in a relevant market weigh the same, despite them playing different roles in the competitive process.

In short, market definition can lead to a loss of information about the ways products relate to one another. While this is the price to be paid for being able to conduct a structural analysis, sometimes this price is too high, because the information being lost is crucial to a correct competitive assessment of the matter at hand. For example, the defining characteristic of multi-sided economic activities or digital ecosystems is that the products concerned are interconnected and somehow complementary to one another. One activity carried out by a platform feeds another (or many others) in ways that may not be immediately obvious; and the platform will take strategic decisions taking these links fully into account. Market definition struggles in appreciating these links.

The Draft Notice represents a substantial improvement on the current Market Definition Notice to the extent that it explicitly acknowledges some of these limits.

First and foremost, the Commission has correctly acknowledged that the SSNIP test often presents significant difficulties to be applied in practice. This test is therefore now conceived as a sort of guidance principle, indicating a general methodology to investigate substitutability. The Draft Notice suggests that the small but significant non-transitory increase in price (SSNIP) test is not the only methodology to determine whether two different products or services are substitutable and, thus, competing. Indeed, as known, the SSNIP test is "starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether competition from these other products and areas affect or restrain sufficiently the pricing of the parties' products in the short term" (para. 16, Current Notice, emphasis added). Market definition then allows for a structural analysis of markets, i.e. the measurement of market shares and concentration levels.

This being said, we note that, under section 1.3, among the principles of market definition, the Draft Notice clarifies that market definition "is only one step in the Commission's assessment under Union competition law" and that market definition "does not prejudge the outcome of the Commission's assessment" (para. 13, Draft Notice); it recognizes that while "market definition allows for the distinction between competitive constraints from within and from outside the market, by including only the immediate competitive constraints in the relevant market", "the Commission takes

into account all competitive constraints (immediate or not) in the competitive assessment” (para. 14, Draft Notice).

The principle has clear implications in cases that involve differentiated products, i.e. where attributes of the products (e.g. design, brand image, technical specifications, durability) matter for the customer’s choice and where market shares may thus fail to provide a reliable indication of market power. Consistently with the above principle, the Draft Notice rightly clarifies that “[a] detailed competitive assessment of how closely suppliers compete with each other may reduce the importance of market shares and hence that of market definition. Therefore, although market definition remains an important step, analysing how closely suppliers compete may become more relevant in the competitive assessment of differentiated markets” (para. 86, Draft Notice). This is an important acknowledgement of the fact that, under certain circumstances, structural analysis and market definition should play a rather limited role.

The Draft Notice is also bound to make market definition a more flexible tool, conceding that “markets may be defined differently depending on the undertaking(s) involved”; and that “market definition results may vary over time if competition dynamics change” (para. 15, Draft Notice). It also provides for the possibility of taking into account “expected transitions in the structure of a market when the case calls for a forward-looking assessment” (para. 16, Draft Notice). While the added flexibility comes at the likely price of reduced predictability, the change is a welcome one: it decreases the likelihood of markets being defined merely based on legal precedents, which may in turn lead to wrong conclusions reached in one case being unduly perpetuated.

But the most important principle that the Draft Notice introduces is that market definition may not be always necessary: it should be regarded merely as 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” (para. 7, Draft Notice, emphasis added). Therefore, the Draft Notice acknowledges that market definition is not always appropriate and that in such cases the Commission can do without it. In other words, market definition should be carried out only when it is useful.

However, the revised Market Definition Notice should perhaps go one step further, and explicitly acknowledge that in cases involving multi-sided markets and digital ecosystems competition authorities need not engage in market definition and should avoid setting boundaries to the assessment of market power and the relative competitive strength of undertakings (as it will be furtherly discussed below).

## SECTION 1.2 – ROLE OF MARKET DEFINITION

In terms of more specific comments on section 1.2 – role of market definition, the AAI would like to note the following:

- **Page 5, para. 9** – the Draft Notice refers to *'Market definition makes it possible to calculate market shares, which the Commission may use to assess an undertaking's competitive strength for the purposes of the competitive assessment. The Commission may also use market shares as a first screening tool to assess whether competition concerns may arise. Market share thresholds are one of the elements determining the scope of the block exemption regulations for Article 101 TFEU; for assessing whether there may be an effect on trade under Articles 101 and 102 TFEU; and for identifying concentrations deemed from the outset not to raise competition concerns under the Merger Regulation with respect to any markets or with respect to certain markets, unless there are specific circumstances'*.
- AAI suggests that the Commission provide more explicit guidance on the conditions under which specific market share levels are used to ascertain market power (such as the well-known 40% limit for the finding of dominance).

## SECTION 1.3 – GENERAL PRINCIPLES OF MARKET DEFINITION

In terms of more specific comments on section 1.3 – general principles of market definition, the AAI would like to note the following:

- **Page 6, para. 12** – the Draft Notice refers to *'Second, the definition of the relevant market involves defining both the product market and the geographic market. When defining the relevant market, the Commission takes into account the various parameters of competition that customers consider relevant in the area and period assessed. Those parameters 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, the image conveyed or the security and privacy protection afforded –, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs.'*
- The AAI appreciates that the Draft Notice lists also sustainability among the relevant criteria. However, while this introduction is more than welcome, we consider that, given the increasing importance allocated by customers (as well as by new Commission's proposals in this field, such as forced labour, corporate sustainability due diligence or CBAM) to sustainable products and services, it would be better to explicitly add compliance with ESG factors as elements that are relevant for the assessment of substitutability.
- **Page 6, para. 14** – the Draft Notice refers to *'Fourth, market definition allows for the distinction between competitive constraints from within and from*

*outside the market, by including only the immediate competitive constraints in the relevant market. However, the Commission takes into account all competitive constraints (immediate or not) in the competitive assessment'.*

- The AAI appreciates the Draft Notice's specification in brackets as we acknowledge that potential competition may limit the exercise of market power (for instance in the context of a merger) because it may induce operators not to increase their prices beyond a certain level in order not to entice potential competitors to enter the market.
- **Page 7, para. 15** – the Draft Notice refers to *'The parameters of competition. An undertaking may compete with other undertakings based on different parameters of competition, as explained in paragraph (12). For example, the competitive constraints on the prices of the products of the undertaking(s) involved may be different from the competitive constraints on investing in product improvements by the same undertaking(s), which can lead to different relevant product and geographic markets'*.
- The Draft Notice indicates that the outcome of market definition may differ based on certain specific circumstances of the case at hand even when the same economic activity and geographic area are concerned. These circumstances include, *inter alia*, the parameters of competition being considered. While greater flexibility is in general desirable in market definition, it is unclear why market definition should be different based on which parameter of competition is being considered.

In most markets, firms compete with one another based on more than one variable: e.g. price, quality and other product characteristics. Each firm will decide its positioning on each of those variables, and customers will choose the product to be purchased based on their preferences and product characteristics: e.g., some customers will be more sensitive to quality and will attach greater weight to that variable, and choose the product accordingly; others may be more price sensitive and choose the cheapest options; and so on. Thus, firms compete simultaneously on all dimensions that are relevant to customers' choices and may decide to push more on one dimension than the other. This does not mean that the set of competitors changes depending on which dimension is being considered, but only that customers are heterogeneous in their preferences and that products are differentiated. Market definition should, like in all other cases, aim at understanding whether a firm that produces a certain product can profitably exert market power, be that by worsening its quality or by raising its price.

- **Page 8, para. 16** – the Draft Notice refers to structural market transitions, in particular, it specifies that *'[...] Structural market transitions can affect the definition of the relevant product market, for example when there is sufficient probability that new types of products are about to emerge on the market [...]* For the Commission to be able to do so, there must be strong indications that the projected structural changes will take place with sufficient probability. The

*evidence must be reliable and needs to go beyond mere assumptions that observed trends will continue or that certain undertakings would change their behaviour'.*

- The AAI invites the Commission to identify the circumstances under which it will consider evaluating, on a standard basis, the 'sufficient probability' (e.g. the absence of regulatory obstacles to the entry into the market) and also to provide examples of what would be evidence that goes 'beyond mere assumptions' (e.g. companies' business plan).
- **Page 9, para. 17** – the Draft Notice refers to the fact that '[...] *the concept of 'relevant market' in Union competition law is different from the use of the term 'market' in other contexts, in particular in business contexts. [...]*'.
- The AAI believes that this paragraph is not relevant and it suggests deleting or moving the paragraph at the beginning of Section 1.3.

## ▪ SECTION 2 – CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY

As indicated above, the AAI appreciates that the Draft Notice indicates that the SSNIP test is conceived as a sort of guidance principle, indicating a general methodology to investigate substitutability.

Indeed, the Commission repeatedly recalls that competition needs not necessarily be based on price as other factors could – in some instances – be more relevant to properly capture the competitive dynamics. For instance, the alternative small but significant non-transitory decrease in quality (**SSNDQ**) test is referred to in Draft Notice (see para. 32 and footnote 47).

In this regard, we would welcome a definition not necessarily based on quality alone (as other competitive factors – such as, for instance, delivery lead time or level of innovation – might potentially be used as a parameter).

In addition, we notice that the practical methodology of the SSNDQ test was not explained in the Draft Notice. Specifically, the Commission does not explain how the relevant quality conditions would be objectively determined or, more importantly, how the decrease in quality would be calculated. Moreover, it has not been specified what degree of such a decrease in quality would be considered relevant by the Commission for the purpose of the test. Given the increasing attention of both the Commission and the NCA to the digital markets, usually classifiable as multi-sided platforms, a further clarification is needed.

An additional element that should be expressly included in the Draft Notice is that



competition law at large, and thus, the relevant market definition should only concern lawful competition. That means that products or services whose marketing in the EU would violate the relevant regulatory or intellectual property provisions should not be considered substitutable for the purpose of EU competition law. However, the competitive pressure they are able to exert on lawful products or services should not be disregarded and, in this event, a clarification in relation to substitutability of different products in heavily regulated industries, such as the pharmaceutical sector would be also particularly appreciated.

## SECTION 2.2 – GENERAL METHODOLOGY FOR MARKET DEFINITION

In terms of more specific comments on section 2.2 – general methodology for market definition, the AAI would like to note the following:

- **Page 18, para. 43** – the Draft Notice refers to *'[...] the mere existence or possibility of imports in a given geographic area does not necessarily lead to widening the scope of the geographic market to the area where imports originate[...]* and also that *'Customers located in the area where imports originate may face different conditions of competition compared to customers located in the area where imports are delivered [...]'*.

The AAI invites the Commission to include in the Draft Notice some general and substantial principles stemming from its case-law and applied for the definition of the relevant markets, such as:

- (i) where trade flows between countries represent less than 10% of local production or consumption, the Commission may not accept that those countries comprise part of the same geographic market;
- (ii) where trade flows between countries represent 10-20% of local production or consumption, the Commission may be inclined to accept the existence of a geographic market comprising those countries, depending on the circumstances;
- (iii) where trade flows between countries exceed 20% of local production or consumption, the Commission is likely to regard this as evidence of a geographic market comprising those countries.

Secondly, with reference to import tariffs or duties, we acknowledge that these may represent direct barriers to entry. For this reason, it may be clarified - on the basis of a specific parameter - the cases where the Commission may consider import tariffs:

- (i) too small to limit trade (e.g. when they represent less than 5% of a product's total costs) or, conversely

(ii) high enough to restrict competition (e.g. when they exceed 10% of the costs).

### SECTION 3 – PROCESS OF DEFINING MARKETS

The Draft Notice recognises that *'geographic markets can range from a local dimension to a global dimension depending on the conditions of competition that customers face'*, including the likelihood of a global market where the same suppliers can be accessed on similar terms (see para. 40 and para. 70). The Commission also rightly points out that market shares *per se* may not be sufficient to determine homogeneity of conditions of competition (see para. 65).

As a preliminary remark, we welcome the Commission's clarifications in defining the relevant geographic market, which include more detailed guidance on definitions going beyond the European Economic Area (**EEA**). However, we observe that the Draft Notice only very generally discusses the regulatory framework as a barrier associated with supplying customers in different areas (see paras. 71-72).

With regard to regulatory frameworks, we note that the Commission has the opportunity to present more holistic views on subsidisation by foreign governments, as well as the degrees of regulatory harmonisation between EU and non-EU jurisdictions.

In terms of foreign subsidies, we welcome the recognition that public subsidies may pose a barrier and affect suppliers from other areas. However, the Draft Notice does not explain how the Commission will assess conditions of actual or potential competition in light of foreign subsidisation. In line with Regulation 2022/2560 on distortive foreign subsidies (the 'FSR'), the Commission could specify how it addresses the transfer of funds, foregoing of revenue that is otherwise due, and the provision of goods and services in the identification of (potential) markets outside the Union. In light of expected further guidance under the FSR, the Commission could also make cross-references to ensure consistency between the approaches under the Draft Notice and the FSR.

In terms of regulatory harmonisation, the Draft Notice recognises that such harmonisation may reduce trade barriers and indicate wider or expanding geographic markets, including at global level. The Commission could further specify how it measures the degrees of such harmonisation and how any differences may impact the requisite evidence that indicates a structural market transition.



### SECTION 3.2 – EVIDENCE TO DEFINE PRODUCT MARKETS

In terms of more specific comments on section 3.2.2 – evidence relevant for supply substitution, the AAI would like to note the following:

- **Page 23, paras. 60-61** – the Draft Notice refers to *'evidence of past substitution'* and *'barriers and costs associated with switching supply'*.
- The AAI believes that paras. 60 and 61 do not provide sufficient insights on this matter, thus, it invites the Commission to provide more detailed examples.

### SECTION 3.3 – EVIDENCE TO DEFINE GEOGRAPHIC MARKETS

In terms of more specific comments on section 3.3 – evidence to define geographic markets, the AAI would like to note the following:

- **Page 26, paras. 73 ff.** – the Draft Notice refers to *'distance-related factors, transport costs and catchment areas'*.
- The AAI observes that, paras. 73-74 deal with cases in which the existence of significant transport costs associated with consumption of a good makes it appropriate to define local geographic markets. In other words, transportation costs limit the geographic extension of the markets, making customers not perceive suppliers located outside a certain area as substitutes. The Draft Notice explains that *"[i]n such cases, the Commission may define geographic markets based on catchment areas that reflect the distance within which customers and suppliers are generally located"* and that, while it would often be more appropriate to draw catchment areas around customers, for practical purpose the center of catchment area is usually represented by the relevant suppliers' premises. The Draft Notice further specifies that *"the Commission typically considers catchment areas covering 80% of sales or customers as a starting point"* and that in some cases catchment areas of alternative sizes, covering 70% and/or 90% of sales, have been considered. There are a few critical aspects in these paragraphs.

First, the indication on the size of catchment areas is too vague. Based on existing case law, it appears that the reason for limiting catchment areas to areas where a certain percentage of stores' revenues is generated is that customers outside this area are considered to be "passing by". If this interpretation is correct, this should be made more explicit. The Draft Notice only points out that *"[t]he size of catchment areas should be representative of the purchasing patterns of most customers"* but does not provide any indication on why 80% would be an appropriate threshold. In addition, the Draft Notice does not provide any useful indication on the circumstances that would make it appropriate to consider smaller or larger thresholds. This may also help improve the predictability of the choices likely to be made by the Commission.

Second, the relationship between catchment areas and relevant markets is unclear in the Draft Notice. The two concepts are not the same, and this should be more clearly established in the revised Market Definition Notice. The catchment area is the area from which each shop draws its customers. While the identification of the catchment area usually represents the starting point for the local geographic market definition, this area cannot simply be considered to form the relevant geographic market, as stores outside the catchment area may still pose a competitive constraint. Defining relevant markets as equal to the catchment areas implies ignoring these constraints, which would lead to a systematic underestimation of local geographic markets.

- **Page 26, para. 75** – the Draft Notice refers to *'trade flows and pattern of shipments'*.
- In this regard, while the Draft Notice explains that the existence of trade flows might not necessarily imply that conditions of competition are sufficiently homogeneous, we consider that the Commission could provide more guidance on the degree or the characteristics that further indicate(s) the requisite homogeneity for expanding the relevant geographic market.

#### **SECTION 4 – MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES**

In general, the Draft Notice represents a substantial improvement on the Current Notice to the extent that it explicitly acknowledges the limits inherent in market definition. Among the principles of market definition, the Draft Notice clarifies that market definition is not always appropriate and that in such cases the Commission can do without it. In other words, market definition should be carried out only when it is useful.

However, as anticipated above, this is where in our view the Draft Notice falls somewhat short. In particular, the revised Market Definition Notice should perhaps go one step further, and explicitly acknowledge that in cases involving multi-sided markets and digital ecosystems competition authorities need not engage in market definition and should avoid setting boundaries to the assessment of market power and the relative competitive strength of undertakings, relying instead on alternative tools.

Paras. 96 and 95 of the Draft Notice make an appreciable contribution in tackling the challenges posed by multi-sided markets and digital ecosystems; however, we believe that the revised Market Definition Notice should mark a clearer departure from the past practice and case law and clearly recognizes that, in some of these cases, the use of such tool can be disregarded as not appropriate.

Moreover, we observe that section 4 significantly updates the Current Notice and provides useful clarifications on how to define the relevant market in the digital context (either in the presence of multi-sided platforms in Section 4.4 or digital

ecosystems in Section 4.5).

While these additions are important, we believe that the Commission should consider adding an acknowledgement that, in some cases, competition also exists between different platforms. In this sense, there is not only competition *within* the platform but also competition *for* the platform. This has increased in recent years as a result of technological convergence (between previously distinct channels, such as radio, TV and the internet). Similarly, platforms providing apparently different services could be found to be competing with each other in the sense that they seek to capture the consumers' attention.

Finally, while digital ecosystems should be assessed with reference to the interactions occurring within them, it is nevertheless important to recognise that digital ecosystems might also compete with other ecosystems, installed in competing machines (e.g., Android and iOS as far as smartphones or cars are concerned).

#### **SECTION 4.3 – MARKET DEFINITION IN THE PRESENCE OF PRICE DISCRIMINATION**

In terms of more specific comments on 4.2 – market definition in the presence of price discrimination, the AAI would like to note the following:

- The Draft Notice acknowledges that the existence of distinct groups of customers may lead to the definition of a narrower, distinct market for each distinct group of customers for the relevant product. The Draft Notice also notes that price discrimination based on customers' location may also result in the definition of the relevant geographic market in accordance with these locations. However, a further and detailed explanation of the circumstances under which this would be appropriate is still missing

#### **SECTION 4.3 – MARKET DEFINITION IN THE PRESENCE OF SIGNIFICANT INVESTMENTS IN R&D**

In terms of more specific comments on 4.3 – market definition in the presence of significant investments in R&D, the AAI would like to note the following:

- The AAI notices that the Draft Notice also refers to concepts included in the new draft R&D Block Exemption Regulation. A notable example is the notion of 'R&D/innovation effort'. In this regard, we would suggest providing further clarification on this concept and, in particular, on how to determine when an R&D activity amounts to an 'effort'. Further details on this notion could be crucial to safely determine whether certain research and development activities can benefit from the exemption set out in the new draft R&D Block Exemption Regulation.

## **SECTION 4.4 – MARKET DEFINITION IN THE PRESENCE OF MULTI-SIDED PLATFORMS**

In terms of more specific comments on 4.4 – Market definition in the presence of multi-sided platforms, the AAI would like to note the following:

- **Page 35, para. 98** – the Draft Notice refers to *'non-price elements are particularly relevant for the assessment of substitution'*.
- The Draft Notice envisages that, when the platform offers services at a zero monetary price to one group of its users, the Commission should focus on non-price elements for the assessment of substitution, and rely on alternatives to the SSNIP, in particular assessing the switching behaviour of customers in response to a small but significant non-transitory decrease of quality (SSNDQ). Moreover, although the shift to this test allows practice to evolve and adapt to new realities, it is not clear how the SSNDQ test would be operationalized in practice by the Commission. Specifically, it is not clear what procedure(s) the Commission followed to select the qualities that were tested for this purpose nor the degree of quality degradation that was applied. Given the increasing attention of both the Commission and the NCAs to the digital markets, usually classifiable as multi-sided platforms, a further clarification is needed.

## **SECTION 4.5 – MARKET DEFINITION IN THE PRESENCE OF AFTER MARKETS, BUNDLES AND DIGITAL ECOSYSTEMS**

In terms of more specific comments on 4.5 – market definition in the presence of after markets, bundles and digital ecosystems, the AAI would like to note the following:

- The Draft Notice lists the relevant factors that could be considered in determining whether there is a system market. For instance, if customers are more likely to take the whole-life costs of a product into account, this is an indicator to take together the primary and secondary products when defining the relevant market. If secondary products from different suppliers are compatible with all or most of the primary products the definition of dual markets may be more appropriate, whereas if customers of the primary product are locked-in to using only a restricted set of secondary products, the definition of multiple markets may be more appropriate.
- The Draft Notice points out that primary and secondary products may also exist in digital ecosystems, whose complementarity is due to technological links or interoperability between products. In these cases, it is possible to apply similar principles which it typically applies to traditional after markets. In addition, when the Commission finds that secondary products are offered as a bundle, it may conclude that the bundle constitutes a relevant market on its own. Finally, the Draft Notice also clarifies that the Commission may in any event take into

account elements such as network effects, switching costs and (single and/or multi)-homing decisions for defining the relevant product market(s).

## SECTION 5 – MARKET SHARES

AAI appreciates that the Draft Notice gives a further guidance compared to the current Market Definition Notice, updating the topic with current insights and clarifying existing doubts.

The Draft Notice gives useful indications on how the Commissions deals with methods for calculation other than sales volumes. Indeed, 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, such as capacity, production volumes, the number of suppliers, the number of tenders awarded, active users, number of visits, time spent or audience numbers, number of downloads, etc. In addition, the Draft Notice indicates in which cases the Commission may opt for which alternative metric to calculate market shares. For instance, by recalling the Google Android case, the number of downloads is considered a useful tool to determine market shares for multi-sided platforms (§ 107, Draft Notice).

As explained in section 4.1, in the case of differentiated markets it may be more relevant to assess the degree of substitutability in the context of the competitive assessment. In such a case, the Commission may rely on shares for segments of the relevant market and take those into account when assessing how closely undertakings compete with each other and with their competitors.

The Draft Notice addresses also the topic of the sources for the calculation of market shares information. They may be provided in the form of estimates by the undertaking(s) involved, if precise market shares are not available to them. The Commission can additionally or alternatively use other sources of information on market size and market shares, such as studies or reports by public authorities, industry consultants or trade associations, internal documents of the undertaking(s) involved, or estimates provided by market participants (§ 110, Draft Notice).

To the extent no reliable estimates from the undertaking(s) involved or information from other sources are available, the Commission may also carry out a full or partial market reconstruction, through requests for information addressed to relevant market participants. In this context, it may ask the suppliers or customers to provide data on their own sales or purchase volumes or values or other relevant metrics.

Lastly, the time period to be applied when calculating market shares is computed over one year reference periods for at least three years. However, the Draft Notice acknowledges that the time period over which market shares

are computed may differ depending on the characteristics of the relevant market. In markets characterised by lumpy or irregular demand, such as tender markets , or seasonality of supply and/or demand , it may be appropriate to compute market shares over longer or shorter reference periods (§ 111, Draft Notice).