

## **Consultation on the Draft Market Definition Notice** **Observations in the Context of the Commission's Public Consultation**

### **1. INTRODUCTION**

- 1.1. Gibson, Dunn & Crutcher LLP welcomes the opportunity to comment on the draft revised market definition notice ("Draft Notice") of November 8, 2022.<sup>1</sup>
- 1.2. We agree with Executive Vice President Vestager that the market definition *"rule book needs to be clear, accurate and up to date to ensure legal certainty and predictability for businesses"* and that it should *"reinforce sound principles that have stood the test of time, provide necessary clarifications and fill gaps in our guidance."*<sup>2</sup>
- 1.3. As a preliminary point, we consider that market definition should be an important cornerstone of competition law that captures both the core dynamics of competition between different products and that facilitates the administrability of competition law in a way that ensures legal certainty. As regularly outlined by the European Court of Justice, *"a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition."*<sup>3</sup> Against this backdrop, we welcome the European Commission's ("Commission") efforts to provide increased transparency and legal certainty via a revised market definition notice.
- 1.4. With this aim in mind, we provide comments and recommendations on:
  - **General principles of market definition** (Section 2): more weight should be given to key principles of market definition such as demand-side substitution.
  - **Demand-side substitution** (Section 3): more account of substitution by intended use should be made. The Draft Notice should also provide additional guidance on product characteristics and how they should be assessed for market definition.
  - **Supply-side substitution** (Section 4): additional practical guidance would be necessary on the circumstances where supply-side substitution should be considered.
  - **Difference in market definitions** (Section 5): the Draft Notice should be refined to avoid the identity of undertakings – as opposed to the services

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<sup>1</sup> Our comments are based on our extensive experience advising on antitrust and merger control cases for a diverse range of clients. Our comments do not necessarily represent the views of each Gibson Dunn lawyer. Any views expressed in this document do not purport to represent the views of our clients.

<sup>2</sup> Commission, Competition: Commission seeks feedback on draft revised Market Definition Notice, Press release of November 8, 2022.

<sup>3</sup> See, e.g., Case T-399/16, *CK Telecoms UK Investments v Commission*, Judgment of the General Court of May 28, 2020, para. 144.

and products they supply – becoming a factor giving rise to different market definitions.

- **Considerations of future market developments** (Section 6): additional guidance on what “*structural market transitions*” should be considered as part of market definition would be necessary.
- **Relevant evidence** (Section 7): additional guidance on the application, methodology, and interpretation of the significant non-transitory increase in price (“SSNIP”) test and of the small but significant non-transitory decrease of quality (“SSNDQ”) test would be necessary. Further guidance on the interpretation of internal documents and the weight given to different types of documents would also be useful.
- **Market definition in specific circumstances** (Section 8). Regarding markets in the presence of significant differentiation, additional practical guidance on how to identify attributes for product differentiation would be necessary. We also comment on the role of market shares in differentiated products. More actionable guidance on market definition in the presence of multi-sided platforms would also be necessary, for example to determine when a single market or multiple markets should be defined. Regarding markets characterized by significant investments in R&D, we do not believe that the concept of “*innovation space*” is suitable for market definition. If it is retained, we believe that it should be significantly qualified.

- 1.5. We also provide additional general recommendations on the drafting of the document in Section 9.

## 2. **GENERAL PRINCIPLES OF MARKET DEFINITION**

- 2.1. We welcome the additional guidance provided on the general principles of market definition. We however note that, in the codification of new principles, the Draft Notice underplays what we consider to be key guiding principles, notably demand-side substitution.
- 2.2. The Draft Notice separates general principles from the general methodology. However, distinguishing both is difficult to do in practice as they are tightly intertwined. By comparison, the 1997 Notice (“Current Notice”) only contains one section, on “[b]asic principles for market definition” where it defines key concepts such as demand-side and supply-side substitution. In the Draft Notice, the Commission lists the “[g]eneral principles of market definition” without referring to those two key concepts. As currently drafted, this separation may lead to underplaying the role of key concepts, such as demand-side substitution. In practice, the Commission could delete paragraph 12 of the Draft Notice and replace it by the current paragraphs 19 and 20.
- 2.3. Regarding demand-side substitution, the Draft Notice provides that “[w]hen defining the relevant market, the Commission takes into account the various

*parameters of competition that customers consider relevant in the area and period assessed.”*<sup>4</sup> Instead, the Draft Notice should – as the Current Notice – reinstate the key role of demand-side substitution as an initial step of the analysis. Demand-side substitution is only discussed as part of the methodology (Section 2.2.1), but not as a key general principle (Section 1.3). Although the Draft Notice insists that “*the main approach the Commission uses to define the relevant product market is that of assessing the substitutability of products from the perspective of the customer (demand substitution),*” we consider that this should be more clearly included in the general principles.<sup>5</sup>

- 2.4. The Draft Notice introduces the notion of “*parameters of competition*” at paragraph 12, which is not used in the Current Notice. The concept is however used, for example, in the Guidelines on the assessment of horizontal mergers. While we understand that this concept is intended to catch both demand characteristics as well as more general parameters of competition, we believe that this concept is more suitable for the competitive assessment rather than market definition.

### 3. **DEMAND-SIDE SUBSTITUTION**

- 3.1. As explained above, we believe that the Draft Notice should more strongly emphasize the role and importance of demand-side substitution as the key first step in the market definition framework.
- 3.2. The Draft Notice should also more strongly emphasize the key question of substitutability according to intended use.<sup>6</sup> Intended use is currently only mentioned as one of many types of evidence of demand-side substitution, when it is in practice the starting point of the analysis. By comparison, the Current Notice provides that “[a]n analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes.”<sup>7</sup>
- 3.3. In addition, while the Draft Notice mentions product characteristics as part of the evidence relevant to demand-side substitution, it does not provide additional guidance on how to identify and assess those characteristics for the purpose of market definition. Especially in the presence of differentiated products, it may be difficult to adequately factor in distinctive features when determining the relevant product market. In many cases, products that have distinctive features but the same intended use form part of the same product market. Regarding the identification of those product characteristics, the Draft Notice mentions the “*image conveyed*” in paragraph 12. Therefore, in line with this, a practical way to identify the relevant product characteristics for market definition for consumer products would be to assess the way products are marketed and supplied to

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<sup>4</sup> Draft Notice, para. 12.

<sup>5</sup> Draft Notice, para. 27.

<sup>6</sup> Draft Notice, para. 28.

<sup>7</sup> Current Notice, para. 36.

customers (*i.e.*, are they marketed for the same use, and which product characteristics are put forward).

- 3.4. Finally, we would appreciate the Commission’s guidance on the circumstances where one product is substitutable for another, but not the other way around (asymmetric substitution cases).

## 4. **SUPPLY-SIDE SUBSTITUTION**

- 4.1. In line with the Current Notice, the Draft Notice outlines that supply-side substitution may be taken into account if *“most, if not all, suppliers are able to switch production between products in the range of related products, while incurring only insignificant additional sunk costs or risks, have the incentive to do so when relative prices or demand conditions change, and can market them effectively in the short term.”* The Draft Notice also specifies that *“situations of sufficiently strong supply substitution may arise typically when undertakings market a range of qualities or grades of one product.”*<sup>8</sup>
- 4.2. We would welcome additional explanations and practical guidance on the implementation of these principles. While the Notice provides useful notions, it fails to provide guidance on their practical implementation. More specifically, we consider that it would be useful to provide more details on the scenarios when supply-side substitution should be taken into account and those when it should not.

## 5. **DIFFERENCE IN MARKET DEFINITIONS**

- 5.1. The Draft Notice provides at paragraph 15 that *“the outcome of market definition can differ, even when the same products and geography are concerned,”* depending on a number of factors outlined in the Draft Notice. While we understand that the Commission wishes to maintain a certain degree of flexibility and discretion in its assessment, this appears to be in tension with the Draft Notice’s aim to *“ensure legal certainty and predictability for businesses.”*<sup>9</sup>
- 5.2. Market definition is an objective exercise based on objective features of demand and supply, as well as market conditions. We agree that the *“time period considered”* and potentially *“parameters of competition”* are relevant in determining whether different cases may lead to different market definitions. However, the current wording of the Draft Notice also allows for markets to *“be defined differently depending on the undertaking(s) involved.”* While we understand that this may not be the Commission’s intention, this wording leaves some room for introducing the identity of the undertakings involved as a potential differentiating factor. The identities of the undertakings involved, even in cases of asymmetric competitive constraints, should however be irrelevant. What should matter is their activities – and more specifically the products and

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<sup>8</sup> Draft Notice, paras. 35 and 36.

<sup>9</sup> Commission, Competition: Commission seeks feedback on draft revised Market Definition Notice, Press release of November 8, 2022.

services supplied – as opposed to the undertakings themselves. We therefore consider that the wording should be refined to avoid leading to different and imprecise legal standards.

## 6. CONSIDERATION OF FUTURE MARKET DEVELOPMENTS

- 6.1. The Draft Notice provides that the Commission can “*take into account expected transitions in the structure of a market.*”<sup>10</sup> While we appreciate that the introduction of this principle aims to provide flexibility in order to better assess markets characterized by rapid and dynamic competition, this notion should be further explained and delineated in the Draft Notice to provide sufficient legal certainty.
- 6.2. In principle, as recalled by the Draft Notice, “*only the immediate competitive constraints in the relevant market*” should be considered for market definition, and the “*Commission [may take] into account all competitive constraints (immediate or not) in the competitive assessment.*”<sup>11</sup> Although the Draft Notice distinguishes “*expected transitions in the structure of a market*” from potential competition considerations, it may be difficult to draw the line between both in practice. In essence, both are different sides of the same coin, albeit with a difference in degree of immediacy. The new formulation raises concern that possible future changes to a market are taken into account already at the stage of defining the relevant market, which may be too speculative.
- 6.3. Mergers and antitrust cases are generally assessed at the time of the notification or of the practices at stake. Regarding merger cases, although future-looking considerations have at times been taken into account in the competitive assessment, this is only done in limited circumstances. As recognized by the Court in *Tetra Laval*, “[a] *prospective analysis [...] must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future.*”<sup>12</sup> In antitrust cases, likely future events may be considered as part of the analysis of dominance or potential effects. Introducing the possibility to consider future market developments at the market definition stage would result in doing so one step earlier in the analysis and therefore in a shift in the legal approach.<sup>13</sup>
- 6.4. As such, if introduced, additional guidance would be necessary to further define what constitutes a “[s]tructural market transition” that “*would lead to effective changes in the general dynamics of demand and supply.*”<sup>14</sup> The Draft Notice

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<sup>10</sup> Draft Notice, para. 16.

<sup>11</sup> Draft Notice, para. 14.

<sup>12</sup> Case C-12/03 P, *Commission v Tetra Laval*, Judgment of the Court of February 15, 2005, para. 42.

<sup>13</sup> Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, paras. 12 and 16.

<sup>14</sup> Draft Notice, para. 16.

only explains that they “*affect the general dynamics of demand and supply in a market*” and provides three examples, namely, certain pipeline products and “*impending technological changes or impending changes in the regulatory framework.*”<sup>15</sup> Further detailed guidance on what constitutes an “*effective change[] in the general dynamics of demand and supply*” should be provided.

- 6.5. We welcome the fact that only “*expected short-term or medium-term structural market transitions*” happening “*with sufficient probability*” should be considered. However, we would welcome further guidance on the interpretations of these notions, especially as they may vary by industry sector.

## 7. **RELEVANT EVIDENCE**

- 7.1. The Commission uses various categories and sources of evidence to define the relevant market and it may rely on both qualitative and quantitative information. In line with established Commission practice, the Draft Notice provides that it “*does not apply a rigid hierarchy of different sources of information or types of evidence.*”<sup>16</sup>
- 7.2. **SSNIP and SSNDQ tests.** In order to assess demand substitutability, the Draft Notice provides that the SSNIP and SSNDQ tests are useful to determine whether products are sufficiently close substitutes.
- 7.3. In line with established precedents, the Draft Notice provides that “*there is no obligation on the Commission to apply the SSNIP [or SSNDQ] test empirically, and other types of evidence are equally valid to inform the market definition.*”<sup>17</sup> Although we understand that the Commission should retain its discretion in applying the SSNIP and SSNDQ tests, we would welcome additional guidance on whether and when it is practical to apply these tests. In our experience, SSNIP and SSNDQ tests may be more relevant for consumer goods. However, they may have more limited practical relevance in real-life business situations. In business contexts, purchasing decisions are based on individual, company-specific, complex cost/benefit analyses, margins analyses, and budget allocations based on both short-term and long-term considerations.
- 7.4. While we also appreciate the codification of the SSNDQ test in the Draft Notice, we would also welcome additional guidance on the situations in which the SSNIP or SSNDQ test may be more or less useful to perform (where one or the other may be performed). Currently, the Draft Notice only refers to situations of “*zero monetary price products*” and “*innovative industries.*”<sup>18</sup> The Draft Notice also explains that “*difficulties arise depending on the type of assessment carried out,*” but fails to provide detailed guidance on what these difficulties might be.<sup>19</sup> Further guidance on the interplay between both may also be

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<sup>15</sup> Draft Notice, para. 16 and fn. 29.

<sup>16</sup> Draft Notice, para. 76

<sup>17</sup> Draft Notice, para. 33.

<sup>18</sup> Draft Notice, para. 32.

<sup>19</sup> Draft Notice, para. 32.

necessary in situations where both tests can be performed. For example, if both tests can be used, should both be used? If both are implemented, further guidance should also be provided on situations where they may lead to different or contradictory results. Further guidance on how to interpret their results would also be necessary.

- 7.5. We would also welcome additional guidance on the implementation of the tests. Regarding the SSNIP test, while the Draft Notice provides some guidance on the magnitude of the “*small but significant*” price increase in footnote 46 (which we recommend should be expanded and moved to the body of the text), it is silent on what constitutes a “*non-transitory*” increase, and on the timing of the implementation of the increase. Regarding the SSNDQ test, while the Draft Notice states that the Commission does not engage in a “*quantitative application of the SSNDQ test, which is subject to several difficulties, including in relation to the quantification of quality*,” further guidance on the definitions of “*quality*,” “*small decrease*,” and the timing of the decrease would also be necessary.<sup>20</sup>
- 7.6. **Interpretation of internal documents.** The Draft Notice codifies the Commission’s more recent practice with respect to the collection and use of internal documents for market definition. We welcome the added guidance on this point, and in particular on the types of internal documents that may be relevant.<sup>21</sup> We would welcome additional guidance on the interpretation of these documents – including when these documents contain contradictory statements – and of their language, and in particular the recognition, as currently provided in paragraph 17, that “*the term ‘market’ in other contexts, in particular in business contexts*” may not be used in its competition law context. We would also welcome additional guidance on the weight that is given to these internal documents including, for example, when these are in draft form or are marketing materials.

## 8. **MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES**

- 8.1. In an effort to provide increased transparency and legal certainty, the Draft Notice provides specific guidance on particular types of markets flagged in the evaluation. We very much welcome this added guidance, particularly in relation to differentiated markets, multi-sided platforms, and markets in presence of significant investments in R&D. We provide comments on the Draft Notice’s explanations on these.
- 8.2. **Market definition in the presence of significant differentiation.** We welcome the Commission’s explanations that “*differentiation occurs where attributes of the products matter for the customer’s choice*.”<sup>22</sup> In line with the observations made with respect to product characteristics, we would, however,

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<sup>20</sup> Draft Notice, fn. 47.

<sup>21</sup> Draft Notice, para. 79.

<sup>22</sup> Draft Notice, para. 84.

welcome further explanations on how to identify and assess these attributes. Further, for better practical value, the Draft Notice should also provide guidance on when differentiation entails different markets or not.

- 8.3. Regarding market shares for differentiated products, the Draft Notice also provides that “*the Commission usually considers sales values to better reflect the heterogeneity between the different products*” in differentiated markets.<sup>23</sup> The Draft Notice however also noted that “[w]hen products are differentiated, market shares may provide a less reliable indicator of market power.”<sup>24</sup> While we agree with the latter, it slightly contradicts the former. Regarding the former – although inspired from the Current Notice – it is more appropriate in the presence of significant differences in prices between different products. Differentiated products do not, however, necessarily exhibit significant price differences. Even in situations of price differentiation, sales shares do not necessarily “*better reflect the competitive strength of undertakings*” but are likely to only reflect, in most cases, the product differentiation at stake.
- 8.4. **Multi-sided platforms.** In line with the results of the evaluation, the Draft Notice includes specific explanations on market definition in the presence of multi-sided platforms. The Draft Notice codifies the Commission’s practice to either define product markets for the products offered by a platform as a whole, or as separate product markets for the products offered on each side of the platform. While we welcome the Draft Notice’s recognition of this practice, it provides little practical guidance on situations where a single market or multiple markets should be defined. The Draft Notice only provides that “[d]epending on the facts of the case, it may be more appropriate to define separate markets where there are significant differences in the substitution possibilities on the different sides of the platform.”<sup>25</sup> The Draft Notice is also silent on multi-homing situations (*i.e.*, situation where consumers use multiple products for the same use).
- 8.5. **Market definition in the presence of significant investments in R&D.** The Draft Notice refers to the concept of “*innovation spaces*” developed in *Dow/Dupont* for situations where it may be “*relevant to identify the boundaries within which undertakings compete in such earlier innovation efforts.*”<sup>26</sup> Although innovation competition has regularly been considered in the competitive assessment, the Commission has only done so after identifying existing and pipeline products. Regarding pipeline products, the Draft Notice recalls that “[w]hile these products may not yet be available to customers, there may be sufficient visibility on their R&D process to establish the market to which these products will likely belong.”<sup>27</sup> The Commission’s reference to innovation spaces therefore only relates to products where there is insufficient visibility and

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<sup>23</sup> Draft Notice, para. 108.

<sup>24</sup> Draft Notice, para. 86.

<sup>25</sup> Draft Notice, para. 95.

<sup>26</sup> Draft Notice, para. 91 and fn. 107.

<sup>27</sup> Draft Notice, para. 90, emphasis added.



where it would be “*difficult to identify a relevant product market within a strict sense.*”<sup>28</sup>

- 8.6. First, in *Dow/Dupont*, the Commission considered that an innovation space “*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.*”<sup>29</sup> Introducing the concept in the Notice therefore appears to contradict the notion of market definition being a “*necessary precondition for any assessment.*”<sup>30</sup>
- 8.7. Second, in line with our observations made above with respect to future-looking considerations, introducing this concept one step earlier in the process may create significant legal uncertainty and implementation difficulties. As the Draft Notice recognizes, the products aimed to be caught by this notion “*may serve multiple purposes or may not yet be targeted at any specific objective.*”<sup>31</sup> Given this, it would deviate from the core guiding principle of demand-side substitution which first delineates product markets according to intended use. In addition, as the Draft Notice notes, such R&D processes may in the “*longer term [...] feed into various products.*” Given the speed of competition in R&D intensive markets, the application of the “*innovation space*” concept appears to be particularly speculative.
- 8.8. Third, if formalized as a concept, extensive practical guidance would be required to allow practitioners to identify such “*innovation spaces.*” The Draft Notice only mentions high-level factors, such as the “*nature and scope of the innovation efforts, the objectives of the different lines of research, the specialisation of the different teams involved or the results of the undertaking’s past innovation efforts.*”<sup>32</sup> It however fails to provide specific illustrations and specific guidance on their practical application.
- 8.9. Overall, we consider that the concept is not particularly suitable for the market definition notice or that if it is retained, it should be significantly qualified in line with the comments above.

## 9. ADDITIONAL GENERAL OBSERVATIONS

- 9.1. We would encourage the Commission to streamline the document and make it more user-friendly. The Draft Notice runs the risk of compromising on clarity due to the amount of references to, and explanations on, specific cases. For example, the Draft Notice contains extensive explanations on specific industries and products, such as stainless steel slabs, finished flat carbon steel, trains, or gas turbines. While we appreciate the level of detail and increased guidance provided by these explanations, a potential way of retaining this guidance could

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<sup>28</sup> Draft Notice, para. 91.

<sup>29</sup> Case COMP/M.7932, *Dow/DuPont*, Commission decision of March 27, 2017, para. 348.

<sup>30</sup> See, e.g., Case T-399/16, *CK Telecoms UK Investments v Commission*, Judgment of the General Court of May 28, 2020, para. 144.

<sup>31</sup> Draft Notice, para. 91.

<sup>32</sup> Draft Notice, para. 91.

be to delete it in the Notice but publish a digest of the case-law on specific principles, such as those published by the European Court of Justice.

- 9.2. Currently, the Draft Notice aims to both codify the history of market definition and legal developments since 1997, as well as provide guidance on the Commission's current approach to market definition. We believe the Notice should focus on the latter objective, to provide actionable guidance on the Commission's current practice.