COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN COMMISSION'S CONSULTATION OF THE MARKET DEFINITION NOTICE

October 9, 2020

The views stated in this submission are presented on behalf of the Antitrust Law Section and the International Law Section; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law Section and the International Law Section of the American Bar Association (the Sections) respectfully submit these comments in response to the European Commission's (Commission's) public questionnaire (Survey) concerning the evaluation of the Commission Notice on the definition of relevant market (Notice).[1] The Sections are available to provide additional comments or assistance in any other way that the Commission may deem appropriate.

These comments reflect the Sections' collective experience and expertise with respect to the application of antitrust law and economic analysis in the United States, the European Union, and other jurisdictions, as well as with international best practices. The Sections offer these comments to share our experience and provide suggestions to enhance the relevancy, effectiveness, and efficiency of any updated version of the Notice that may ultimately be adopted by the Commission.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section is the ABA section focusing on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 17,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law which often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to

[1] European Comm'n, EU competition law – market definition notice (evaluation), *available at* https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law/public-consultation.

[2] Past comments can be accessed on the Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

debates relating to major international legal policy.[3] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.[4]

I. Executive Summary

The Sections commend the Commission for seeking public comments on the Notice. The current Notice provides important guidance, transparency, and greater legal certainty on how the Commission applies the concept of a relevant product and geographic market in its enforcement of EU competition law. The current Notice eschews an overly formalistic approach and treats market definition as a tool to identify and define the boundaries of competition. It does so primarily by describing the general economic principles that the Commission uses to identify the competitive constraints firms face. This general effects-based approach has served the Commission well, is consistent with international norms, and enables the Notice to remain applicable and understood even as times or settings change.

The Notice's basic approach and general principles remain valid and should continue to avoid overly prescriptive or formalistic rules. The Sections nevertheless believe that the Notice should be updated to reflect important legal, economic, and market developments in the last two decades, including any changes or evolutions of the Commission's views and practices. In particular, the Notice would benefit from an expanded discussion of the following topics:

- **Economic Principles and Tools.** A revised Notice should provide more details on the economic tools and models, such as diversion ratios, critical loss analysis, upward pricing pressure, merger simulations, and other "quantitative tests," that the Commission uses to operationalize the hypothetical monopolist test.

- **Relevant Evidence.** An updated Notice should include more discussion on relevant evidentiary issues, including:

    - *Third Party Testimony.* The Commission's methods for obtaining the views of customers, competitors and other third parties, including how it formulates those inquiries, what views or evidence carry more or less weight with the Commission, and how the Commission tests the reliability of those views.

    - *Market Share Data.* The Notice should provide greater transparency on how the Commission evaluates, uses, and calculates market shares (*e.g.*, the general situations in which it uses different share metrics to be the best available indicator of firms' future competitive significance in a relevant market).

    - *Reasonable and Proportional Information Requests.* To avoid burdensome information requests related to product groupings or geographies that could not plausibly meet the hypothetical monopolist test, the Notice should also describe the limited circumstances in which information about "all plausible alternative product and geographic market definitions" are truly necessary for inclusion in a Form CO filing or other requests for information.

[3] American Bar Association, International Law Section Policy, https://www.americanbar.org/groups/international_law/policy/about/.

[4] Past submissions may be accessed at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

- **Specific Market Contexts.** The Sections believe further evaluation and possible discussion in any updated Notice is warranted for specific issues that have been increasingly prevalent in competition law matters in recent years and are likely to remain relevant for the foreseeable future, including:

    - *Platforms and Multi-Sided Markets.* The presence of platforms and multi-side market in many competition law enforcement situations has important consequences for the way in which competition agencies analyze and intervene in these markets (*e.g.*, whether a two-sided platform needs to be analyzed as participating in two markets to evaluate the competitive effects of any action). Given these complexities, a revised Notice would be more beneficial and useful if it discussed how the Commission will generally approach such markets.

    - *Price Discrimination Markets.* Although the current Notice contains some discussion of price discrimination markets, the Sections believe the Commission should provide greater guidance and transparency on this topic, particularly with respect to the criteria or evidence that is likely to cause it to find the existence of such a market.

    - *Technology, R&D and Innovation Markets*. The Sections believe the approaches taken to define technology, innovation, or R&D markets will not always follow the same methodology applied for traditional product markets. The Sections therefore suggest that the Commission add guidance on this topic since the current Notice is largely focused on traditional product market analyses. Some of the general criteria set forth in the Commission's Technology Transfer and Horizontal Co-operation Guidelines are likely appropriate, although additional detail is also likely warranted for the more broadly applicable Notice.

    - *Online/E-Commerce and Offline/Brick-and-Mortar Competition.* Given the significant growth of online e-commerce in the last two decades, the Sections believe an updated Notice should include additional guidance regarding the criteria the Commission uses (and the evidence it typically considers) when assessing the scope of markets relating to e-commerce business activities. This would include more details on the general principles, situations, and type of evidence that is likely to influence when the Commission is likely to conclude that online and offline sales do or don't serve as effective competitive constraints on each other.

    - *Secondary Markets or Aftermarkets.* The Sections believe additional discussion in the Notice is warranted regarding (i) the type of evidence that is likely to cause the Commission to distinguish an aftermarket from its foremarket, (ii) when such an aftermarket is likely to be limited to the aftermarket products (or services) offered by the producer of the foremarket product (or service), and (iii) how information regarding any related foremarkets may impact the Commission's evaluation of the business conduct or practices under review.

II. Methodological Note

The Sections' comments aim to highlight important U.S. and other international antitrust cases and enforcement actions, as well as academic and economic literature, that may inform and assist the Commission in completing its evaluation of the Notice and formulating any proposed revisions. The

Sections understand that the responses to the Survey are only one of many sources of information that the Commission will consider as part of its evaluation of the Notice. Nevertheless, the Sections respectfully caution the Commission against overreliance on responses to the Survey. Self-selected online surveys have significant limitations, such as the representativeness of the respondents. As explained by the U.S. Federal Judiciary's Reference Manual on Scientific Evidence, "participants are very likely to self-select on the basis of the nature of the topic. These self-selected surveys resemble reader polls published in magazines and do not meet standard criteria for legitimate surveys admissible in [U.S.] courts."[5]

III. General Topics Meriting Additional Discussion

A. Economic Principles and Tools

The current Notice contains a general discussion of economic concepts relevant to a market definition analysis, including the assessment of demand and supply substitution. The Sections, however, encourage the Commission to include additional discussion of how it operationalizes these economic concepts—*i.e.*, the economic "tools" that the Commission commonly employs. Guidelines in other jurisdictions that have been published since the current Notice have included some discussion of these economic tools. Notably, the U.S. merger guidelines—the 2010 *Horizontal Merger Guidelines* ("US-HMG") and the 2020 *Vertical Merger Guidelines* ("US-VMG")—contain discussions on the following topics that the Commission should consider addressing in the next version of any updated Notice. It will be helpful for the international business and legal communities to understand where the views and practices of the Commission regarding the application of these economic tools in assessing relevant markets is consistent with U.S. guidelines and any potential differences in approach.[6]

1. Diversion Ratios and Critical Loss Analysis

The current Notice mentions "quantitative tests" but is mostly silent about the nature of these tests.[7] The current Notice acknowledges that relevant market definition revolves around a hypothetical test based on a small but permanent price increase,[8] and it acknowledges that substitution may be quantified through estimates of "own-price" and "cross-price elasticities."[9] The US-HMG go further, explaining in more detail the mechanics of the "hypothetical monopolist test"[10] and providing additional examples where the test is

[5] Fed. Judicial Ctr., Reference Manual on Scientific Evidence 407-08 (3d ed. 2011), *available at* https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf.

[6] The Sections recognize that the economic tools used to inform agencies regarding the appropriate scope of the relevant market are also often informative of the competitive effects analyses in merger and other enforcement proceedings. We also recognize that the Commission has issued guidelines for horizontal and non-horizontal mergers that provide additional insight into its assessment of competitive effects; however, these guidelines largely refer back to the Notice for guidance on market definition issues and do not contain much discussion on the economic tools used to assess either competitive effects or market definition. Thus, if the Commission did not wish to update the Notice with additional discussion on the economic tools it uses to guide its assessments of market definition issues, it could alternatively provide greater discussion on this topic in its merger, technology transfer, and other guidelines that are tailored to the assessment of specific transactions, agreements, or unilateral conduct situations. If, however, those guidelines will continue to refer back to the Notice, we think greater discussion is warranted.

[7] Notice ¶ 39.

[8] *Id.* ¶ 17.

[9] *Id.* ¶ 39, n. 5.

[10] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) § 4.1.1, *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf, at (A hypothetical monopolist "likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on **at least one product** in the market, including **at least one product sold by one of the merging firms.**") (emphasis added) [hereinafter US-HMG].

applied and used.[11] Moreover, the US-HMG explain in more detail possible implementations of the hypothetical monopolist test and, in particular, describe the "critical loss analysis" as an important tool for quantifying the hypothetical monopolist test.[12] And relatedly, though in a different section, the US-HMG make specific mention of "diversion ratios" as an important measure for analyzing substitution and the incentives firms face in setting prices.[13] Where the equivalent concepts and tools are used by the Commission, it might consider incorporating a similar discussion in the revision to the Notice. And even if the Commission disagrees or considers that a different approach is warranted, some additional discussion of tools such as these could be beneficial to stakeholders.

2. Economic Models (e.g., Merger Simulations)

The Commission should also consider including further information on economic models bearing directly on market power and competitive effects. While the U.S. guidelines do not specify many of the exact details of the tools employed by U.S. agencies, they do acknowledge in the merger guidelines that economic models are employed in most analyses and provide some discussion of the general characteristics of these models. As examples, the US-HMG explain that economic models may include "independent price responses by non-merging firms," "merger-specific efficiencies," and that these "methods need not rely on market definition."[14] As further examples, the US-VMG mention that economic models "may incorporate feedback from the different effects on incentives," and that economic models may carry "more weight" when they "consistently predict substantial price increases" rather than when they show "precise prediction of any single simulation."[15] Finally, the US-HMG discuss the mechanics of economic models in some detail, such as the discussions of "critical loss analysis" and "upward pricing pressure."[16]

Although these examples most directly concern analysis of competitive effects of mergers, the US-HMG note the connection between these economic models and analyses and market definition, explaining:

> The Agencies' analysis need not start with market definition. **Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition**, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis. **Evidence of competitive effects can inform market definition**, just as market definition can be informative regarding competitive effects.[17]

The Sections suggest that additional discussion of economic models and analyses used by the Commission be similarly incorporated into any revision of the Notice.

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[11] *Id.* (see, e.g., Examples 6 and 7).

[12] *Id.* § 4.1.3

[13] *Id.* § 6.1.

[14] *Id.* § 6.1.

[15] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (2020) § 4, *available at* https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[16] US-HMG, *supra* note 10 § 4.1.3 and § 6.1.

[17] *Id.* § 4 (emphasis added).

B. Relevant Evidence

Although the current Notice includes high-level references to evidence used in market definition, the Sections encourage the Commission to include in its Notice more detail about the qualitative and quantitative information it gathers, how it evaluates that information, how different types of evidence influence the Commission, as well as caveats about when certain information may be more or less reliable. Below, we provide a few examples of areas that could benefit from more discussion related to how the Commission collects and weighs evidence.

1. *Application of Consistent Principles and Evidence to Market Definition*

The current Notice describes the hypothetical monopolist test as "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." The Sections encourage the Commission to identify or adopt principles of market definition that provide transparency as to how the Commission operationalizes the hypothetical monopolist test, provide consistency across cases and over time, and avoid the risk of markets that are either too narrow or too broad.

For example, the US-HMG adopt the "smallest market principle" and the "circle principle" of market definition:

> if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product [the circle principle] . . . when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test [the smallest market principle].[18]

In December 2014, the Commission introduced new Form CO instructions that require parties to submit evidence about "all plausible alternative product and geographic market definitions."[19] In some circumstances, during the pre-notification consultation process, this provision has been used to require parties to submit burdensome information related to product groupings or geographies that could not plausibly meet the hypothetical monopolist test in the Notice. The Sections submit that the Notice should

[18] *Id.* § 4.1.1 ("Example 6: In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test."). By way of example, consider a hypothetical involving 3 brands of wireless Bluetooth headphones, H1, H2, and H3. H2 and H3 are close substitutes (both are high-end products with advanced features), but are weak substitutes for the low-end H1 product; numerous wireless radio frequency ("RF") headphones are stronger substitutes for H1 than H2 and H3. Although "intuition and perhaps even qualitative and documentary evidence" might suggest than wireless Bluetooth headphones is the proper relevant market in a merger of H1 and H2, such a market would violate the circle and smallest market principles, and potentially condemn an otherwise procompetitive merger. In this example, H3 would discipline the pricing of H2 and the numerous RF headphones would discipline H1. Adherence to the circle principle would add RF competitors to the relevant market in the analysis of an H1-H2 merger, since they are closer substitutes for H1 than are H2 and H3, thus changing the conclusions drawn from measures of market share and concentration. Bryan Keating, Jonathan Orszag & Robert Willig, *The Role of the Circle Principle in Market Definition*, ANTITRUST SOURCE, Apr. 2018, at 3, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr18_full_source.pdf.

[19] COMMISSION REGULATION (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L 133) 1, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004R0802-20140101&qid=1599836121422&from=EN.

indicate and describe the limited circumstances in which information about "all plausible alternative product and geographic market definitions" are necessary.

2. *Customer and Third-Party Testimony*

The current Notice indicates that the Commission "often contacts the main customers and competitors of the companies involved in its enquiries, to gather their views about the boundaries of the product market." The Sections encourage the Commission to describe its methods for obtaining the views of industry participants, how it formulates those inquiries, what views or evidence carry more or less weight with the Commission, and how the Commission tests the reliability of those views.

In addition, the Sections encourage the Commission to indicate how it evaluates the evidence that it gathers. For example, the US-HMG acknowledge that the customers may have divergent views, and note that the U.S. agencies evaluate the likely reasons for those divergent views.[20] In gathering customer evidence, the U.S. agencies are "mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger."[21] The US-HMG also note that U.S. agencies credit the "conclusions of *well-informed and sophisticated* customers,"[22] acknowledging that some customer views might not be well-informed.

This approach is consistent with the approach of the U.S. courts, particularly as it relates to market definition. Although customers might have "preferences" for one product over another, preferences do not necessarily inform interchangeability, and the relevant question under the hypothetical monopolist test is how customers could respond in the event of an anticompetitive price increase.[23] For example, in the case of a market involving long-term contracts or relationships, a top customer might not have shopped recently for products, and therefore might not be well informed about alternatives.[24] In other cases, some customers might have not have access to imported products for regulatory reasons.[25]

With respect to the views of competitors, the US-HMG note that while information from rivals may be illustrative about marketplace conditions generally, the interests of competitors might diverge from that of consumers.[26] Moreover, a rival company might have an incentive to foment opposition to a merger if it believes that its rival might be a more efficient or effective competitor post-transaction. In other cases, a rival might believe it will have an opportunity to acquire the target if the antitrust authorities successfully block a transaction.

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[20] US-HMG, *supra* note 10 § 2.2.2 (emphasis added).

[21] *Id*.

[22] *Id*.

[23] U.S. v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); U.S. v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001) ("What is significant is not whether the companies that currently use internal solutions have the capacity to enter the market as vendors for others, but whether the customers that currently use shared hotsites would switch to an internal hotsite in response to a SSNIP.")

[24] *See, e.g.*, Ken Heyer, Predicting Competitive Effects of Mergers by Listening to Customers, EAG Discussion Paper 06-11 (Sept. 2006), https://www.justice.gov/sites/default/files/atr/legacy/2007/09/28/221883.pdf ("The cost to customers of becoming fully informed about their marketplace alternatives (and the terms on which these alternatives can be obtained) is nonzero. At some point, rational economic agents will likely find that the expected benefits of obtaining additional information exceeds the cost.").

[25] US-HMG, *supra* note 10 § 2.2.2.

[26] *Id*. § 2.2.3.

3. *Evidence related to Market Shares*

The Sections also encourage the Commission to address evidence related to market shares in the Notice. The Sections encourage the Commission to address in the Notice how it evaluates share data, how it tests the reliability of third-party submissions, and when use of different share metrics may be appropriate (e.g., share of volume, revenue, capacity, etc.). The Sections also encourage the Commission to outline particular issues that may arise in framing the relevant market for purposes of preparing market shares.

For example, one issue that could be addressed is how the Commission evaluates the shares of committed entrants[27] and future competition. For example, although the US-HMG "normally" base market shares on historical evidence, "recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."[28] Because merger analysis is inherently forward-looking, the U.S. agencies measure market shares "based on the best available indicator of firms' future competitive significance in the relevant market," when such analysis "can be done reliably."[29] This is consistent with the U.S. Supreme Court's rejection of historical share data where that data is not a proper indicator of a company's future ability to compete.[30]

Likewise, the Sections understand that in certain circumstances, the Commission has carved out jurisdictions from otherwise arguably global geographic markets. For example, we understand that the Commission has excluded from global market share calculations sales to certain countries without market economies or that are subject to sanctions.[31] The Sections encourage the Commission to address in the Notice the circumstances in which it would be appropriate to exclude sales to certain jurisdictions, and the economic and/or legal rationale for doing so, to ensure that the appropriate exclusion of specific jurisdictions can be done in a transparent, objective, and uniform manner.

4. *Retrospectives*

Both the current Notice and the US-HMG mention the ability of analyses of historical events to inform market definition.[32] Neither provides significant additional discussion of these analyses and what they might entail. While the Sections appreciate that such analyses are by definition hard to generalize, they nonetheless encourage more detailed discussion. For example, the Commission might explain at what point distant historical events are no longer significantly informative and to what degree these are weighed in relation to other economic analyses.

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[27] *Id*. § 5.

[28] US-HMG, *supra* note 10 § 5.2.

[29] *Id*.

[30] U.S. v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[31] *See, e.g.*, Commission decision of Sept. 9, 2015 in case M.8345 General Electric/Alstom ⁋⁋ 410-99. (reporting worldwide market shares excluding sales to China and Iran).

[32] Notice ¶ 38; US-HMG, *supra* note 10 §2.1.2.

IV. Specific Market Definition Categories Meriting Additional Discussion

A. Platforms and Multi-Sided Markets

The global economy has evolved substantially since the Notice was published over twenty years ago. While "platforms" and "multi-side markets" are not an entirely new business model, the explosive growth and use of the Internet to market and supply products and services, as well as the increasing importance of and reliance on digital, data-driven, and other information and computing technologies, has resulted in the massive growth of new industries and firms that utilize these business models.

While there are various definitions for platforms and multi-sided markets, economists generally use the terms to refer to a market in which multiple groups of participants are brought together such that the value of a product or service to one group depends on usage by a different group.[33] In other words, firms acting as a platform sell different products or services to different groups of customers, while recognizing that the demand from one group of customers may depend on the demand from the other group(s).

Likewise, economists have made significant progress since 1997 in learning how multi-sided markets often function in ways that are different, and importantly so, from standard markets and identifying the mistakes that can be made when platforms are treated the same as "traditional" markets that do not share similar characteristics or complexities. In particular, the analysis of market definition and market power can be more difficult in these industries and may require modifications or the introduction of some new methods of analysis.[34]

Naturally, these differences have consequences for the way in which competition law enforcers analyze these markets, and hence on whether, and if so how, they decide to intervene in these markets. For example, an important preliminary issue is whether a two-sided (or multi-sided) platform needs to be analyzed as participating in two (or more) markets to evaluate the competitive effects of any action. Demand conditions and competitive conditions can be very different on the various sides of the platform. Therefore, there could be very different antitrust issues, suggesting that treating it as two markets makes more sense.

Some two-sided platform markets can be analyzed using traditional tools. For example, in circumstances where the impacts of "indirect network effects" may be weak, analyzing a single side of the market with traditional forms of competition analysis may be appropriate.[35] Newspapers may be an example of a two-sided market where indirect network effects have been considered one-directional because readers

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[33] *See* David S. Evans, *The Antitrust Economics of Multi-sided Platform Markets*, 20 YALE J. REG. 325, 325 (2003) [hereinafter Evans, *Multi-side Platforms*]; David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, COMPETITION POL'Y INT'L, Spring 2007, at 151 ("the core business of the two-sided platform is to provide a common (real or virtual) meeting place and to facilitate interactions between members of the two distinct customer groups…Platforms play an important role throughout the economy by minimizing transactions costs between entities that can benefit from getting together") [hereinafter Evans & Schmalensee, *Two-Sided Platforms*]; Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280-81 (2018).

[34] *See* Evans, *Multi-sided Platforms*, *supra* note 36, at 325 ("For example, market definition and market power analyses that focus on a single side will lead to analytical errors; since pricing and production decisions are based on coordinating demand among interdependent customer groups, one must consider the multiple market sides in analyzing competitive effects and strategies."); Armstrong, *Competition in two-sided markets*, 37 RAND J. ECON. 668 (2006); Julian Wright, *One-sided Logic in Two-sided Markets*, 3 REV. NETWORK ECON. 44 (2002).

[35] Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory & Practice*, 10 J. COMPETITION L. & ECON. 293, 321-322 (2014) [hereinafter Filistrucchi, et al, *Market Definition in Two-Sided Markets*].

may be relatively indifferent to the volume of advertisements in their paper.[36] In this situation, market definition and market power can be evaluated by focusing on one side of the market using traditional analytical tools, such as the small but significant non-transitory increase in price (SSNIP) test, upward pricing pressure, and critical loss tests.

Where platforms exhibit more substantial indirect network effects and interconnected pricing and demand, including both sides in one relevant antitrust market has sometimes been advocated. The U.S. Supreme Court considered the degree of interrelation between both sides of the credit card network when addressing the relevant market in *Ohio v. American Express*.[37] While the U.S. government argued that the appropriate relevant market was a single side of the platform,[38] the Court analyzed the two-sided market for credit card transactions as a single antitrust market for three reasons.[39] First, the Court found pronounced network effects that two-sided transaction platforms exhibit and, specifically, the joint consumption of transactions by cardholders and merchants.[40] Second, only credit card companies, with both cardholders and merchants willing to use the network, could compete with a credit card company like American Express.[41] Third, to properly evaluate the impact of the restrictions at issue, it was necessary to evaluate their effects on both sides of the platform to see if higher prices to merchants were offset by greater benefits to card holders.[42] The analysis of the merchant and consumer sides could have also proceeded while viewing them as two different, highly connected markets.

Accordingly, market definition for platforms cannot be fully understood or analyzed without a clear understanding of the interaction between the different sides. In multi-sided markets, there can be important demand externalities among one side of the market and the other sides. Conduct that might appear anticompetitive if the analysis focuses on one side of the market might be viewed as benign or procompetitive when all sides of the market are taken into account. Where platforms exhibit more substantial indirect network effects and interconnected pricing and demand, analyzing all sides in the relevant antitrust market(s) analysis is appropriate.

Traditional tools for market definition applied to only one side of the market can cause the market to be defined either too narrowly or too broadly if there are significant, positive demand feedback.[43] For example, a SSNIP may be profitable on one side of a market if one assumes that prices on the other side of the market will not change. However, a price increase on one side of the market may feed back to the other

[36] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018) (citing Filistrucchi, et al, *Market Definition in Two-Sided Markets*, *supra* note 35, at 321, 323, and n. 99).

[37] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[38] Petition for Writ of Certiorari at 20-21, Ohio v. Am. Express Co., 838 F.3d 179 (2d Cir. 2016), *cert. granted*, 138 S. Ct. 355 (2017).

[39] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018).

[40] *Id.* at 2286.

[41] *Id.* at 2287.

[42] *Id*.

[43] Evans & Schmalensee, *Two-Sided Platforms*, *supra* note 33, at 173-74 ("The link between the customers on the two-sides affects the price elasticity of demand and thus the extent to which a price increase on either side is profitable. It therefore necessarily limits market power all else equal. For two-sided platforms it can be important to recognize that competition on both sides of a transaction can limit profits. Price equals marginal cost (or average variable cost) on a particular side is not a relevant economic benchmark for two-sided platforms for evaluating either market power, claims of predatory pricing, or excessive pricing under EC law. The constraints on market power that result from interlinked demand also affect market definition.").

side (*e.g.*, the price increase on one side causes the demand on the other side to fall, which in turn causes the demand in the first market to fall as well). In this case, a SSNIP may no longer be profitable, and the relevant market presumably would need to be expanded.

Moreover, when firms set a zero price on one side of the market, or there are substantial changes to non-price factors (e.g., degradation of product quality), standard approaches to market definition will often require some modification, and the SSNIP test may be less helpful to determine whether products compete. Therefore, the Sections believe a revised Notice should recognize that alternative tests may and can be employed.

The Sections acknowledge that some economists have argued that modification of traditional tools should sufficiently account for the different sides of multi-sided markets. For example, in markets in which different groups purchase services from both sides of the market in fixed proportions, traditional tools, such as the SSNIP test, critical loss test, and Lerner market power analysis, could be based on a composite price that incorporates the prices on both sides of the market.[44]

In addition, some types of firm behavior may not require detailed market definition analysis if the potential impact on all sides of the platform is taken into account. For example, in its case against 1-800-CONTACTS, the U.S. Federal Trade Commission (FTC) found a restriction on paid search advertising competition through trademark litigation settlements to be anticompetitive based on direct evidence of agreements that (1) restricted truthful advertising and (2) resulted in an increase in contact lens prices sold online.[45]

The challenges to market definition and other aspects of analyzing platform markets do not imply a revised Notice should abandon the basic approaches and analytical tools applied to all markets. The Sections believe current and developing analytic tools can address these challenges. However, the Commission may wish to discuss in a revised Notice in general how it will approach such markets.

B. Price Discrimination Markets

The current Notice recognizes that a group of customers "may constitute a narrower, distinct market when such a group could be subject to price discrimination" and explains that price discrimination "will usually be the case when two conditions are met: (a) it is possible to identify clearly which group an individual customer belongs to at the moment of selling the relevant products to him, and (b) trade among customers or arbitrage by third parties should not be feasible."[46] The Sections believe that the Commission

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[44] This approach was taken by Douglas Bernheim, the defendant's economic expert in the *Amex* case. In the case of a critical loss analysis the Lerner-based elasticity of demand would be based on the composite price and the composite marginal cost of providing the service to the two sides, though the same concerns about these approaches in one-sided analyses would generally apply. Emch and Thompson (2006) propose applying this approach to payment cards. The composite price includes the fees charged to merchant acquirers for each transaction (a network fee plus an interchange fee) and the fees charged to issuers for each transaction (a network fee minus the interchange fee which they are paid). The U.S. Department of Justice adopted this approach in a case involving payment cards; *see also* David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 18783, 2013), *available at* https://www.nber.org/papers/w18783.pdf [hereinafter Evans & Schmalensee Working Paper]. *See also* Renata B. Hesse and Joshua H. Soven, *Defining Relevant Product Markets in Electronic Payment Network Antitrust Cases*, Antitrust Law Journal
Vol. 73, No. 3 (2006), pp. 709-738.

[45] Opinion of the Commission, In the Matter of 1-800-CONTACTS, Docket N. 9372 (Nov. 7, 2018), at 42-47, *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf.

[46] European Comm'n, *Commission notice on the definition of relevant market for the purposes of community competition law*, 1997 O.J. (C 372) ¶ 43.

should consider expanding the current discussion to provide greater guidance and transparency on this topic, particularly with respect to the criteria or evidence that is likely to cause the Commission to find the existence of price discrimination.[47]

In the merger context, for example, the US-HMG and economists recognize that price discrimination markets for targeted customers may exist "when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product."[48] Absent limitations, the hypothetical monopolist test described in the Notice could be read to suggest a relevant market in these circumstances is as narrow as an individual customer.[49] The US-HMG acknowledge this issue and indicate that U.S. agencies will define price discrimination markets only "when they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers."[50] Moreover, by indicating they will define a market by the type of customer, rather than by individual customers, U.S. agencies are also better able to calculate and rely on aggregated market shares from a wider group of customers. The US-HMG specifically discuss how the presence of price discrimination markets can impact the product and geographic market definitions, and also the measurement of market shares, as well as the evaluation of likely competitive effects from a merger.[51] This approach may be more helpful in making enforcement decisions and predicting the competitive effects of a merger than utilizing narrow markets based on the hypothetical monopolist test that could define markets for individual or very small groups of customers.

Price discrimination may be difficult to prove when the product differs significantly across customers. The basic tenets of economic theory on price discrimination, as used to define relevant markets, require that price differences apply to the *same* products and services. If this condition is not met, price differences do not imply price discrimination.[52] For instance, in an industry where long-term contracts are prevalent, it is quite common for two customers to receive the same physical product at different prices because their contracts were negotiated at different points in time when economic conditions differed. Similarly, different delivered prices might themselves simply reflect differentials in transportation cost. The FTC challenge to the proposed Sysco/U.S. Foods merger highlights the challenge of defining narrow price

[47] Likewise, in bidding markets, standard economic tools such as the SSNIP test cannot be used effectively. Other agencies have explained how they evaluate the substitutability of various products or services when assessing the appropriate definition of the market. The FTC and Organisation for Economic Co-operation and Development (OECD), for example, have applied frequency analysis and regression analysis to understand how closely substitute particular products are. Germany's national competition regulator also typically reviews data from past auctions in order to assess which companies can be viewed as credible bidders, and in which geographic area they are able to place a credible bid. OECD, Competition in Bidding Markets, OECD Policy Roundtables, 2006; Notes submitted by the US Department of Justice and the US Federal Trade Commission for the Roundtable on Competition in Bidding Markets, 2006. In any future version of the Notice, the Sections respectfully suggest that the Commission consider specifying more clearly the types of non-price factors and other evidence it will investigate and review to inform its views on the extent of product substitutability in auction and bidding markets. OECD, *Competition in Bidding Markets*, OECD Policy Roundtables, 2006, at 173.

[48] US-HMG, *supra* note 10 § 4.1.4.

[49] *Id.* § 4.1.4 and § 6.2.

[50] *Id.* § 4.1.4.

[51] *Id.* § 3.

[52] Ian Simmons, Sergei Zaslavsky & Lindsey Freeman, *Price Discrimination Markets in Merger Cases: Practical Guidance from FTC v. Sysco*, ANTITRUST, Fall 2016 [hereinafter Jerry A. Hausman, et al, *Price Discrimination in Merger Cases*]; Jerry A. Hausman, Gregory K. Leonard & Christopher A. Vellturo, *Market Definition under Price Discrimination*, 64 ANTITRUST L.J. 367, 367 (1996).

discrimination markets when targeted customers may in fact purchase "a different basket of goods and services."[53]

Finally, in the context of geographic market definition, the U.S. agencies assess whether the hypothetical monopolist can discriminate based on customer location, such as when suppliers deliver their products or services to customers' locations. In those cases, the U.S. agencies note that they may define geographic markets based on the locations of targeted customers, as opposed to the location of suppliers, and local markets encompass the region into which sales are made. Consequently, firms that sell to customers in the specified region, independently of where firms themselves are located, are considered to be market participants in the local market.[54] Advocates for a merger, for example, may argue that the analysis should include not just firms that ship to a particular region, but also firms that would find it profitable to ship in the local geography in the presence of a SSNIP.

C. Technology, R&D, and Innovation Markets

While it is broadly recognized that patents and copyrights do not necessarily convey monopoly power in a properly defined market and are therefore not market-defining, such intellectual property rights remain economically important to many industries.[55] Valid patents convey the right to exclude others from the use of a patented technology, and the exercise of this right can often lower market output – something typically viewed as a measure of anticompetitive impact. This reduction, however, is by design, as it provides incentives for investment in innovation by affording rights holders the opportunity to earn returns on their risky investments.

The focus of the 1997 Notice is understandably on market definition for traditional product and service markets, as those markets are likely to comprise the core of Commission matters requiring market definition analysis. For the reasons discussed below, however, the Sections believe the Notice would benefit from greater guidance and discussion on how the Commission intends to define markets related to technology/intellectual property rights and R&D or other innovation-focused business activities.

First, while the Commission's 2011 guidelines relating to horizontal co-operation agreements and 2014 guidelines on technology transfer agreements both discuss how the Commission defines technology, R&D, and/or innovation markets, IP/technology rights and R&D activities often play an important role in many other contexts, including in evaluations of mergers and acquisitions and investigations of potentially anticompetitive unilateral conduct.[56] Since the Notice applies more broadly to a variety of Article 101 and

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[53] Plaintiffs' Corrected Proposed Findings of Fact and Conclusions of Law at 267, Sysco, 113 F. Supp. 3d 1 (No. 1:15-cv-00256-APM) (citations omitted); Jerry A. Hausman, et al, *Price Discrimination in Merger Cases*, *supra* note 52.

[54] US-HMG, *supra* note 10 § 4.2.2.

[55] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 1 (2007), *available at* https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf.

[56] *See* European Comm'n, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014 O.J. (C 89) 3, § 2.3 *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014XC0328(01)&from=EN; European Comm'n, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. (C 11) 1, § 3.2, *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011XC0114(04) [hereinafter *Horizontal Co-operation Guidelines*].

102 matters, the Sections believe it is appropriate for the Notice to include updates regarding the Commission's current perspective on this issue.

Market definition can have an important role in framing the potential concerns. The pharmaceutical sector illustrates the distinct issues that can arise for technology market definition outside the licensing or horizontal co-operation context. Over half of the companies with active drug development pipelines in 2019 were small entities.[57] Many larger drug companies rely on the acquisition of such smaller firms to expand their own product offerings. An aacquisition is often the end goal of many startups, and the availability of such an "exit" can create strong incentives for new firms to form and to invest in new risky inventions. Competition agencies, however, may fear an incumbent is buying a startup in order to kill off a promising rival product, for example to protect an existing blockbuster drug still under patent.[58]

Another potential concern is that an established incumbent may cease investing in a new innovation of its own when it acquires a smaller rival, reducing competition that the market may have benefited from had the acquisition been blocked. This scenario was at least part of the reasoning behind both the UK Competition Markets Authority (CMA) and FTC blocking Illumina's proposed acquisition of Pacific Biosciences.[59] More specifically, Pacific Biosciences offers products that sequence long strands of DNA while Illumina's products are geared toward sequencing relatively shorter DNA strands. Illumina had publicly announced that it was developing long strand sequencing capabilities, but both the FTC and CMA worried that Illumina would abandon those efforts if it acquired Pacific Biosciences. The agencies' definition of the market relevant for assessing the Illumina-Pacific Biosciences deal was clearly affected by their view of long strand sequencing research and development and its role in disciplining short strand sequencing solutions,[60] but traditional market share analysis offers few insights into R&D competition of this sort.

Concerns may also arise over competition between large rival firms' R&D programs and new product development plans. For instance, in 2017 the Commission required DuPont to divest its global R&D organization to secure approval for its merger with Dow.[61] The Commission's decision focused on

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[57] Elizabeth Doughman, *Number of Drugs in Global R&D Pipeline Projected to Reach Record High in 2019*, PHARMACEUTICAL PROCESSING WORLD, May 9, 2019, https://www.pharmaceuticalprocessingworld.com/number-of-drugs-in-global-rd-pipeline-projected-to-reach-record-high-in-2019/ ("[A]ccording to Pharma Intelligence. In 2019, these companies would control 20 percent of the marketplace, up from 15 percent last year. The report estimates that there are 1,633 companies that produce just one drug and 669 with two, making up 53.3 percent of the 4,323 pharmaceutical companies with active pipelines."); *see also*, Geoffrey Manne, *A Brief Assessment of the Procompetitive Effects of Organizational Restructuring in the Ag-Biotech Industry*, TRUTH ON THE MARKET, May 9, 2017, https://truthonthemarket.com/category/ag-biotech-symposium/.

[58] Similar concerns are currently being discussed in regard to the high tech sector. *See, e.g.*, OECD, *Start-ups, Killer Acquisitions and Merger Control, available at* https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf.

[59] *See, e.g.*, Charley Connor, "FTC official: Illumina/PacBio was a 'future innovation story'," GLOBAL COMPETITION REV., Feb. 27, 2020, *available at* https://globalcompetitionreview.com/ftc-official-illuminapacbio-was-future-innovation-story ("The US Federal Trade Commission's deputy director of competition … PacBio's innovation over the years had "continuously made its product better and less expensive"); *see also*, Press Release, U.K. Competition and Markets Authority, Illumina's takeover of PacBio raises competition concerns (Jun. 18, 2019*)* https://www.gov.uk/government/news/illumina-s-takeover-of-pacbio-raises-competition-concerns ("PacBio has also recently released a new, innovative system for DNA sequencing (the "Sequel II" instrument), which means that it is well-positioned to offer stronger competition to Illumina in the future.").

[60] *Id.*

[61] CASE M.7932, Dow/DuPont, Decision C (2017), https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf. *See also* Press Release, European Comm'n, Mergers: Commission clears merger between Dow and DuPont, subject to conditions (Mar. 27, 2017) https://ec.europa.eu/commission/presscorner/detail/en/IP_17_772 ("The Commission had concerns that the merger as notified … would have reduced innovation. Innovation, both to improve existing products and to develop new active ingredients, is a key element of competition between companies in the pest control industry, where only five players are globally active throughout the entire research & development (R&D) process.")

the impact on certain "innovation spaces" where competition would be impacted, rather than specific relevant product markets.[62]

Patented technology markets may also raise competition concerns. For example, in 2004/05 the Commission raised potential concerns that Microsoft's and Time Warner's joint acquisition of a startup digital rights management (DRM) firm (ContentGuard) would result in Microsoft buying a monopoly in DRM patented technologies.[63] The deal that eventually cleared involved three buyers, adding Thompson, with an equal spread (in thirds) of ContentGuard's DRM technology over the three buyers,[64] and thus denying Microsoft a monopoly over DRM technology.

When considering potential patent or other IPR/technology markets, traditional approaches described in the Commission's guidelines for technology transfer or horizontal co-operation agreements may not always be effective (and could even be misleading). For example, the Commission's 2014 Technology Transfer Guidelines and the 2017 Antitrust Guidelines for the Licensing of Intellectual Property issued by the U.S. Department of Justice and the FTC both indicate that the traditional hypothetical monopolist test may be used to define a technology market when these rights are licensed for royalties or other monetary terms.[65] In many situations, however, this type of price-related analysis may not be possible (e.g., when licenses do not have quantifiable monetary terms) or helpful (e.g., when thousands of complementary patents or IPRs are licensed together in package).[66]

When the traditional hypothetical monopolist test cannot be utilized to define a technology market due to lack of royalties or license fees, the Commission's Technology Transfer Guidelines instruct parties to identify other technologies that are "interchangeable with or substitutable for the licensed technology rights, by reason of the technologies' characteristics . . . and their intended use."[67] Many patents, however, have somewhat unique characteristics that make comparisons to other patents or technology rights challenging, especially for firms that own thousands of patents. To the extent that Commission uses additional criteria to evaluate whether technologies or patents should be viewed as substitutes or

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[62] *Id.* at ¶¶ 342-352.

[63] *See, e.g.*, Keith Regan, *EU Probes Microsoft, Time Warner DRM Acquisition*, E-COMMERCE TIMES, Aug. 25, 2004, https://www.ecommercetimes.com/story/36105.html.

[64] Press Release, Microsoft, Microsoft-Time Warner-Thomson Complete Acquisition Of ContentGuard (Mar. 15, 2005), https://news.microsoft.com/2005/03/15/microsoft-time-warner-thomson-complete-acquisition-of-contentguard/; *see also* Commission Decision COMP/M.5675 *Syngenta/Monsanto* where the Commission analyzed the merger of two vertically integrated sunflower breeders by examining both (i) the upstream market for the trading (namely the exchange and licensing) of varieties (parental lines and hybrids) and (ii) the downstream market for the commercialization of hybrids; COMP/M.5406, *IPIC/MAN Ferrostaal AG*, (Commission defined an upstream technology market for the supply of melamine production technology); COMP/M.269, *Shell/Montecatini*.

[65] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), § 3.2.2, *available at* https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [hereinafter U.S. IP Licensing Guidelines]; Comm'n Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, 2014 O.J. (L 93) 17, ¶ 22, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.093.01.0017.01.ENG [hereinafter Technology Transfer Guidelines].

[66] U.S. IP Licensing Guidelines, *supra* note 64 § 3.2.2 ("The Agencies recognize that technology often is licensed in ways that are not readily quantifiable in monetary terms. In such circumstances, the Agencies will delineate the relevant market by identifying other technologies and goods that are reasonable substitutes for the licensed technology.").

[67] Technology Transfer Guidelines, *supra* note 64 ¶ 22.

complements (e.g., blocking patents or patents essential for practicing a particular standard), it would be helpful to describe this more fully in an updated Notice.

Similarly, the Horizontal Co-operation Guidelines indicate it can be appropriate to "calculate market shares on the technology market on the basis of sales of products or services incorporating the licensed technology on downstream product markets."[68] Parties involved in merger and unilateral conduct proceedings would benefit from knowing if the Commission would view this approach as a valid measurement for market share (and a proxy for market power) in other circumstances. This is especially true since the Commission is already addressing technology and innovation market issues in a number of merger cases (as the examples above illustrate).

In sum, the approaches taken to define technology, innovation, or R&D markets may not always follow the same methodology applied for traditional product markets. The Sections therefore suggest that the Commission add guidance on this topic in any updated Notice. Some of the general criteria for defining technology, innovation, and R&D markets set forth in the Technology Transfer and Horizontal Co-operation Guidelines are likely appropriate for including in the more broadly applicable Notice.

At the same time, it will be helpful for the Commission to elaborate further in any updated Notice on the criteria it intends to utilize to define such markets, as well as how the Commission will assess market power and competitive effects issues in different circumstances where an analysis of such markets is required. More clarity on how the Commission intends to consider the substitutability of different technologies or patents (or assess the competitive nature of a firm's R&D and other innovation efforts) would also improve the usefulness of the Notice. Likewise, identifying the types of tools (particularly through examples) that are likely to be accepted by the Commission in defining technology or R&D market definition would also improve the Notice.

D. Online/E-Commerce and Offline/Brick-and-Mortar Competition

Since the Notice was published in 1997, there has been explosive growth in electronic commerce (e-commerce) of consumer goods and digital content. Frost and Sullivan estimates that global business-to-business (B2B) e-commerce sales will reach over $6.6 trillion by the end of 2020 and business-to-consumer (B2C) sales will be approximately $3.2 trillion.[69] The Commission's final report on its recent E-commerce sector inquiry also noted that consumers in the EU have increasingly ordered goods or services over the Internet - growing from 30% in 2007 to 55% in 2016.[70]

E-commerce has not only enabled consumers and businesses to conduct transactions remotely, it has also provided unprecedented access to product and service information online. Many services that are consumed offline, such as travel, lodgings, and concert tickets, are now regularly sold online. Many

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[68] *Id.*

[69] *See U.S. B2B eCommerce Platform Market, Forecast to 2023*, FROST & SULLIVAN, Sept. 26, 2017, https://store.frost.com/u-s-b2b-ecommerce-platform-market-forecast-to-2023.html. Similarly, Forrester estimated that the value of business-to-business (B2B) e-commerce worldwide in 2017 was US$7.6 trillion and the value of business-to-consumer (B2C) was US$2.4 trillion. *See* Aaron Orendorff, *B2B in Ecommerce: How the Best Succeed in a $7.6 Trillion Online Industry*, ShopifyPlus, July 17, 2017, https://www.shopify.com/enterprise/b2b-ecommerce.

[70] EUROPEAN COMM'N, FINAL REPORT ON THE E-COMMERCE SECTOR INQUIRY at 3 (2017), available at https://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf. In a recent submission to the OECD, the Commission acknowledged that its e-commerce sector inquiry resulted in several findings that may be relevant to market definition issues and ultimately the analysis of market power. *See* European Comm'n, *Implications of E-commerce for Competition Policy - Note by the European Union* at 3-4 (June 6, 2018), *available at* https://one.oecd.org/document/DAF/COMP/WD(2018)61/en/pdf.

traditional retailers also maintain an online presence because it enables them to serve a diverse set of customers or needs in different situations. Some operators of online marketplaces may be involved in directly selling goods, including their own private label brands, in competition with their suppliers and other distributors or retailers, while others may simply serve as an intermediary to bring buyers and sellers together.

Due to e-commerce's growth over the last twenty years and these concomitant developments, competition authorities throughout the world have increasingly had to assess how to define markets under these different circumstances, including whether to include online and traditional "brick-and-mortar" retailers within the same or different product markets.[71] The presence of e-commerce suppliers throughout the world also raises important issues with respect to the appropriate scope of the relevant geographic market for products that are sold online.

Accordingly, the Sections believe it would be helpful and appropriate for the Commission to update the Notice and provide additional guidance regarding the criteria it uses and the evidence it typically considers when assessing the scope of markets relating to e-commerce business activities. For instance, it would be useful for the Notice to describe the general principles, situations, and type of evidence that is likely to lead the Commission to conclude when online and offline sales do or do not serve as effective competitive constraints on each other.[72] Providing hypothetical illustrations or relevant examples would also better enable interested stakeholders to take any general principles or considerations into account when making their own business plans and decisions. If this guidance were available, firms involved in e-commerce activities would be better able to evaluate whether transactions and commercial agreements that they are contemplating are likely to give rise to any potential competition law issues or risks.

E. Secondary Markets and Aftermarkets

The Sections believe the Notice would benefit from more discussion of the criteria it uses to analyze, define, and assess the existence and competitiveness of distinct aftermarkets (also known as secondary markets). This may include further elaboration on (1) the type of evidence that is likely to cause the Commission to distinguish an aftermarket from its foremarket, (2) when such an aftermarket is likely to be limited to the aftermarket products (or services) offered by the producer of the foremarket product (or service), and (3) how information regarding any related foremarkets may impact the Commission's evaluation of the business conduct or practices being reviewed. The Sections submit that providing further details on these important issues and principles will help ensure that the Commission's guidance is applied consistently across a range of industries and cases.

As part of its evaluation, the Commission may want to consider that U.S. agencies generally use the hypothetical monopolist test to determine whether an aftermarket is a distinct market from the related foremarket. According to the U.S. agencies, "application of the hypothetical monopolist test to market definition *very rarely* leads to the conclusion that a relevant market is limited to the product of a single

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[71] *See, e.g., Implications of E-commerce for Competition Policy - Note by the United States* at 4-7 (June 6, 2018), *available at* https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf (describing several recent enforcement actions that presented issues relating to competition between online and offline suppliers, including the mergers of Amazon-Whole Foods, Men's Wearhouse/Jos. A Bank, Staples/Office Depot and Zillow/Trulia, as well as litigation against Apple and book publishers related to the pricing of e-books).

[72] For example, the Notice could describe the general situations and reasons why it would (or would not) be appropriate to exclude sales made by a firm via one of these online or offline channels from market share calculations (or other assessments of market power).

manufacturer."[73] According to the U.S. agencies, courts are likely to focus on the existence of an aftermarket that is being generally conditioned on a policy change after customers are locked in.[74]

According to the U.S. agencies, economic analysis of aftermarkets show that "significant or long-lived consumer injury based on monopolized aftermarkets is likely to be rare, especially if equipment markets are competitive."[75] The U.S. agencies also have noted that even if the OEM is a monopoly in the aftermarket, harm is unlikely if the monopolist cannot "charge more in total than the buyer's reservation price for the services generated by the equipment over its lifetime," if switching costs are low, or consumers engage in lifecycle pricing analysis.[76]

Thus, even though aftermarkets are common in a number of industries and the U.S. Supreme Court has rejected a blanket rule that would have insulated manufacturers from antitrust liability for monopolizing aftermarkets, the U.S. antitrust agencies have not challenged an OEM's use of unilateral aftermarket restrictions on products or services in recent years.[77] Likewise, in the United States successful private litigation challenges to competitive conduct within aftermarkets are rare. [78]

If the Commission is considering adopting rules related to aftermarkets that diverge from the approach of the U.S. agencies and courts, the Sections respectfully encourage the Commission to consider the potential unintended consequences. For example, the Commission should consider potential unintended economic consequences brand-specific aftermarkets where a product was purchased in a manner consistent with lifecycle pricing. For example, suppliers may as a result raise costs in the foremarket to account for lower expected returns in the aftermarket or could face financial instability if they priced in reliance on recouping costs in the aftermarket. If lifecycle pricing is properly viewed as a form of seller financing, purchasers (particularly small purchasers) could be disadvantaged if they are unable to obtain third-party financing for large purchases.

V. Conclusion

The Sections appreciate this opportunity to provide their views on the Consultation Document and are available for any further consultation the Commission may deem appropriate.

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[73] *Id.* at 6. *Competition Issues in Aftermarkets – Note from the United States*, at 6 (May 26, 2017), *available at* https://www.justice.gov/atr/case-document/file/979226/download [hereinafter Aftermarkets Report to OECD].

[74] *Id*. at 19.

[75] *Id*. (citing Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of Kodak*, 63 ANTITRUST L.J. 483, 485 (1995)).

[76] *Id*. at 10 (citing Joseph Farrell & Paul Klemperer, *Coordination and lock-in: Competition with switching costs and network effects*, HANDBOOK OF INDUSTRIAL ORGANIZATION 3, 1967-2072 (2007) (noting that "with (large) switching costs firms compete over streams of goods and services rather than over single transactions. So one must not jump from the fact that buyers become locked in to the conclusion that there is an overall competitive problem. Nor should one draw naïve inferences from individual transaction prices, as if each transaction were the locus of ordinary competition. Some individual transactions may be priced well above cost even when no firm has (ex-ante) market power; others may be priced below cost without being in the least predatory.").

[77] Aftermarkets Report to OECD, *supra* note 72, at 3.

[78] Jonathan I. Gleklen, *The ISO Litigation Legacy of Eastman Kodak Co. v. Image Technical Services: Twenty Years and Not Much to Show for It*, 27 Antitrust 56, 63 (2012) (discussing lack of success of plaintiffs bringing aftermarket claims after the Supreme Court's Kodak decision). For a seminal U.S. aftermarket case example, *see* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).