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Revised Market Definition Notice Gives European Commission Increased Flexibility in Competition Assessments

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The revised Notice introduces new chapters on market definition in specific circumstances, notably markets characterized by significant R&D, multi-sided platforms, and digital ecosystems. On 8 February 2024, the European Commission ("**Commission**") updated its Market Definition Notice ("**Notice**") for the first time since its initial publication in 1997. The revised guidance softens the rigidity of the Commission's earlier approach and grants it more flexibility in competition assessments – particularly in relation to digital and R&D intensive markets. Companies active in these sectors should see the update as a tool to support the Commission's stricter enforcement agenda. **A. Background**

- ***The 1997 Notice***

The original Notice was published over 25 years ago. It aimed to provide companies with official guidance on how the Commission applies the concepts of relevant product and geographic market in its enforcement of EU competition law. To this day, market definition plays a pivotal role in competition enforcement. Competition authorities define the relevant market as a first step in both behavioral cases and merger control. It provides a framework for analyzing the competitive situation and identifying potential competitive constraints.

- ***Commission's evaluation of the 1997 Notice***

The Commission acknowledged that, since publication of the 1997 Notice, there have been significant societal and technological changes, including the rise of digitalization. These changes, in conjunction with developments in EU case law and the Commission's decisional practice, warranted re-evaluation of the Market Definition Notice. The results of the evaluation were published in July 2021:

- Despite calls from stakeholders for a more progressive approach, the Commission confirmed that, in general, market definition (and the principles on which it rests) will remain of central importance going forward.
- Nevertheless, the Commission recognized the need for changes in, or additions to, individual areas, notably: digitalization, innovation, geographic market definition, and quantitative techniques. This largely follows the direction of EU court case law and the Commission's own practice.

A revised draft of the Notice was published for consultation in November 2022. More than 100 stakeholders responded. On 8 February 2024, the final version was adopted. **B. Key takeaways of the revised Notice** While the Commission's fundamental approach to market definition remains the same (i.e., examining demand- and supply-side substitution, product and geographical market), the revised Notice introduces the following key changes:

- **Relevance of non-price comparators.** While the 1997 Notice focused on price as the main parameter of competition for market definition, the revised Notice adopts a broader approach. For example, it considers that the SSNIP test[1] may be ill-

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suited to cases where undertakings compete on parameters other than price.[2] In such instances, non-price factors such as product characteristics (including product quality or level of innovation), functionalities and intended use, might be more determinative for demand substitution.[3] This might be particularly relevant in situations involving multi-sided platforms.[4] In such cases, the Commission suggests analyzing switching behavior of customers in response to a Small but Significant Non-transitory Decrease of *Quality* ("**SSNDQ**").[5]

- **Forward-looking assessment to capture market dynamics.** The revised Notice states that, in markets undergoing structural transition (such as regulatory or technological changes) or where a forward-looking assessment may be appropriate, future market shares may be estimated to reflect those expected changes.[6] This chimes with the Commission's recent merger control practice. Notably, the revised Notice states that internal ordinary course documents or independent industry reports may be particularly relevant for conducting a forward-looking assessment.[7]

Along with general guidance, the revised Notice also provides specific direction on the Commission's approach to market definition in cases where there is: (i) significant differentiation, (ii) discrimination between customers or customer groups, (iii) significant R&D, (iv) multi-sided platforms, (v) after-markets, bundles and (digital) ecosystems. We consider the Commission's guidance on (iii)-(v) in more detail below.

- ***Market definition in specific circumstances***

(1) Market definition in the presence of significant R&D

Examples of industries characterized by significant R&D include pharmaceuticals, chemicals, electrical equipment, and hardware technology. The Commission explains that, while the specificities of highly innovative industries are usually taken into account during the competitive assessment, they may also be relevant for market definition. In particular, the Commission may factor in various potential outcomes of innovation efforts in its assessment of market definition. For 'pipeline' products (where products are not yet available to customers), the Commission notes that there may be sufficient visibility to establish which other products are likely to be substitutable with the pipeline product. In such cases, the Commission can conclude on whether the pipeline products belong to an existing product market or a new product market.[8] However, where an R&D project is in the early stages of development,[9] the Commission concedes that it may be difficult to identify a relevant product market. However, it may still be possible to delineate the boundaries within which companies compete in early innovation efforts.[10] Factors that may be taken into account include the nature and scope of innovation efforts, the objectives of the research, and the specialization of the teams involved.

(2) Market definition in the presence of multi-sided platforms

The Commission uses the term multi-sided to refer to platforms which support interactions between different groups of users. It considers that often, demand from one group of users will have an influence on demand from others i.e., indirect network effects. Examples include payment card systems, online marketplaces, advertising-sponsored platforms, social networking services, and general search services. The revised Notice is intended to afford the Commission with the flexibility to define a relevant product market in a way that encompasses all (or multiple) user groups, or to define separate relevant markets for the products offered on each side of the platform.[11] This will depend on factors such as the nature of the platform, the degree of product differentiation on each side, and the behavior of each user group (such as multi-homing i.e., using multiple platforms in parallel), among other things. The Commission explains that multi-sided platforms often supply products at a monetary price of zero, a fact that it considers will render application of the SSNIP test more challenging. It also highlights that, when a product is supplied at a monetary price of zero, non-price elements become more relevant as does evidence on hypothetical

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substitution, and barriers or costs of switching such as interoperability.[12]

(3) Market definition in the presence of after-markets, bundles and digital ecosystems

The Notice defines an after-market as a market where customers who buy a primary product are likely to buy a connected or complementary follow-on (secondary) product. Examples include cars and auto parts/repair services, printers and ink cartridges, etc.[13] In these circumstances, the Commission will also consider the competitive constraints imposed by market conditions in the respective connected markets when defining the relevant market(s). The Commission lists three possible ways to define relevant product markets in the case of primary and secondary products: (i) as a system market comprising both the primary and the secondary product, (ii) as multiple markets, namely a market for the primary product and separate markets for the secondary products associated with each brand of the primary product, and (iii) as two markets, namely the market for the primary product on the one hand and the market for the secondary product on the other hand. The Notice also makes reference to digital ecosystems.[14] This section of the revised Notice is likely to play a significant role in the coming years, considering the Commission's increased scrutiny on interoperability in its recent decisional practice.[15]

C. Conclusion How markets are defined will continue to play a central role in competition assessments. Market definition will remain the first step in the Commission's analysis of any proposed transaction and any potential behavioral case. How the Commission views the relevant markets will lay the groundwork for all subsequent analysis, including on the existence of a dominant position and potential anticompetitive effects. The revised Notice introduces new chapters on market definition in specific circumstances, notably markets characterized by significant R&D, multi-sided platforms, and digital ecosystems. The Notice leaves many questions open and seeks to allow for a less rigorous and more speculative assessment in order for the Commission to enjoy greater flexibility to pursue stricter enforcement in digital and R&D-intensive markets. Time will tell if such speculative analysis will withstand scrutiny from the Courts. _____ [1] "Small but Significant and Non-transitory Increase in Price". [2] Revised Market Definition Notice, para. 30. [3] Revised Market Definition Notice, para. 48. [4] Revised Market Definition Notice, para. 98. [5] At footnote 54 of the Notice, the Commission refers to case AT.40099 Google Android as an example of a case in which it used the SSNDQ test to determine the boundaries of the relevant market. [6] Revised Market Definition Notice, para. 113. [7] Revised Market Definition Notice, para. 77. [8] At footnotes 121 and 122 of the Notice, the Commission refers to i) case M.7275 *Novartis/GlaxoSmithKline Oncology Business* as an example of a case in which it included pipeline products still under development in an existing relevant market, alongside products that were already marketed; and, conversely, ii) case M9461 *AbbVie/Allergan* as an example of a case in which it identified a new relevant market limited to a specific type of inhibitor for the treatment of ulcerative colitis and Crohn's disease, even though no such inhibitor was, at the time, marketed by any supplier. [9] The Commission makes clear at footnote 9 of the Notice that the term "product" also covers technologies. [10] At footnote 125 of the Notice, the Commission refers to case M.7932 *Dow/DuPont* as an example of a case in which it applied the concept of innovation space to determine that the merging parties were involved in innovation competition. [11] At footnote 129, the Commission refers to case M.8124 *Microsoft/LinkedIn* as an example of a case in which it defined a single market which included user groups on either side of the platform. [12] See for instance Cases M.7217 *Facebook/Whatsapp*, AT.39740 *Google Search (Shopping)*, M.8124 *Microsoft/LinkedIn*, AT.40099 *Google Android*. [13] OECD, Competition issues in aftermarkets, June 2017 available here. [14] At footnotes 142 and 143, the Commission refers to i) the judgment in *Google and Alphabet v Commission* T-604/18, where the General Court defined a digital ecosystem and noted the complementarity/interoperability of the products which would form such an ecosystem, highlighting the potential competitive constraints which such a system may give rise to; and ii) case AT.40099 Google Android as an example of a case where the conditions necessary to give rise to an ecosystem comprising app stores and smartphone operating systems were not present. [15] E.g., European Commission, Mergers: Commission clears acquisition of VMware by Broadcom, subject to conditions, July 2023 available here.

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