

## **REPLY TO THE PUBLIC CONSULTATION ON THE DRAFT REVISED MARKET DEFINITION NOTICE**

1. In the context of the public consultation launched on 8 November 2022 by the European Commission (the “**Commission**”), the *Association des Avocats pratiquant le Droit de la Concurrence* (Association of Lawyers Practicing Competition Law, hereinafter, the “**APDC**”) welcomes the opportunity to comment on the draft revised Notice on the definition of the relevant market for the purposes of Union competition law (the “**Market Definition Notice**”).
2. In this context, the APDC presents the following observations, relating to each section of the Market Definition Notice<sup>1</sup>.
3. Notwithstanding the comments and proposals detailed below, the APDC welcomes the fact that the Market Definition Notice has been supplemented with practical illustrations and references to case law and decision-making practice.

### **1. INTRODUCTION**

#### **1.1. Purpose of the notice**

##### **Comments on point 1**

4. Please refer to the comments below related to the distinct function of market definition in merger control or antitrust enforcement, and the differences that may result.

##### **Proposals on points 2 and 3.**

5. Proposals. The Market Definition Notice, which has not been modified in 25 years, should be supplemented by a regularly updated database of relevant market delimitations by sector<sup>2</sup>. Should this database be provided by the Commission, the Market Definition Notice will in any case require constant updates to reflect developments in the methods and techniques used by the Commission to define relevant markets.

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<sup>1</sup> The following members of the APDC have contributed to the drafting of this contribution: Maria Bagate, Leyla Djavadi, Loraine Donnedieu de Vabres Tranié, Guillaume Fabre, Dominique Heintz, Sara Gil Garcia, Alexandre Glatz, Clément Hubert, François-Charles Laprèvote, Clarisse Ouakrat, Thomas Picot, Emmanuel Reille, Jean-Baptiste Roche, Juliette Tamalet, Florent Vever, Anne-Laure-Helène des Ylouses and Pierre Zelenko.

<sup>2</sup> APDC response to Questions II.1 and V.3 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

**Comments and proposals on points 3 and 4.**

6. Comments. The Market Definition Notice lacks a dedicated glossary to define the key concepts, as suggested by the APDC in its previous contribution<sup>3</sup>, and only some of them are defined in footnotes.
7. Proposals. The APDC believes that it would be useful to include in the Market Definition Notice a section on definitions of concepts essential to the analysis and application of the Market Definition Notice.

**1.2. Role of market definition**

**Comments and proposals on points 7 and 8 of the Market Definition Notice related to the circumstances in which the prior definition of relevant markets is necessary.**

8. Comments. *First*, the APDC regrets that the Market Definition Notice states that the definition of relevant markets is not considered, in principle, a necessary step before assessing any practices under EU competition law.

Some decisions based on Article 101 TFEU do not define beforehand the markets on which the practices at hand are observed and this may give rise to reasoning inconsistencies. For instance, the European Court of Justice did not define the market for cosmetics and personal care products in its judgment of 13 October 2011, even though it stated that Pierre Fabre had a 20% market share in France (Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS*, Judgement of 13 October 2011).

The obligation to define the relevant market(s) before assessing the alleged practices, including restrictions of competition by object, would allow all stakeholders to refer to a unique decision-making practice on the assessment of the relevant markets, which in particular would prove useful to assess the alleged practices and to comply with competition law.

9. *Second*, the Market Definition Notice should indicate that prior definition of the relevant market remains necessary to assess the anti-competitive agreement's effect on trade between Member States and its unique and/or global nature, even though this may not be required where the agreement is anti-competitive by object.

The General Court thus ruled that “*it may be necessary to define the reference market in order to determine the scope of the cartel, its unique and/or global nature and the extent of the individual participation of each of the undertakings concerned (Adriatica di Navigazione v Commission, paragraph 81 above, paragraph 30).* An error in the allocation of responsibilities

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<sup>3</sup> APDC response to Questions V.2 of the Commission's online questionnaire (Contribution dated 8 October 2020).

*of the participants in a cartel may be due to an insufficient definition of the relevant market, since a deficient definition would lead the Commission to misunderstand the nature and scope of the cartel concerned.” (Case T-76/06, ASPLA v Commission, Judgement of 16 November 2011, §83).*

10. Proposals. In line with its previous submissions<sup>4</sup>, the APDC suggests that the Market Definition Notice underlines that:

- the definition of the relevant market is a mandatory step in all assessments under EU competition law, including antitrust law;
- it is only by way of derogation, and under narrow circumstances, that the Commission may refrain from precisely defining the relevant market(s) in the presence of an anti-competitive agreement by object;
- in any event, the definition of the relevant product and geographic markets remains necessary for a number of specific assessments, including in antitrust cases, in particular to assess the effect on trade between Member States, the effects of a cartel and the unique nature of an infringement.

### **1.3. General principles of market definition**

#### **Comments on points 1, 8, 11, 38, 54, 77, and footnotes 20, 48, 90, 102 of the Market Definition Notice related to the distinct function of market definition in merger control or antitrust enforcement, and the differences that may result**

11. During the previous consultation, the APDC insisted that the Commission underlines that market definition may lead to different results depending on the type of analysis carried out<sup>5</sup>.

The APDC therefore welcomes the clarification efforts on the distinct function of market definition whether it takes place in the context of merger control or antitrust enforcement (**Points 8, 11, and footnote 20** in particular).

In particular, the APDC welcomes the efforts made by the Commission to address the differences that may exist in the definition of the relevant market when assessing anticompetitive practices (current or past situation assessment) and mergers (forward-looking assessment).

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<sup>4</sup> APDC response to Question V.2 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

<sup>5</sup> APDC response to Question II.1 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

**Comments and proposals on footnote 5 related to the application of market definition in State aid assessment**

12. Comments. The APDC welcomes the efforts made by the Commission to provide more elements within the Market Definition Notice on the application of market definition in State aid assessment.
13. Proposals. The Market Definition Notice merely provides that “[i]n view of the more limited application of market definition in these two types of assessments, this notice will not discuss their specific aspects further”. Since the Commission may need to define relevant markets in State aid cases, in particular in the context of the prevention of undue market distortions, the APDC suggests that the Notice should deal with these “specific aspects” in an annex and/or refer to other relevant State aid communications (in which it would be useful to include a section on market definition).

**Comments and proposals on points 11 and 15 of the Market Definition Notice related to the function and importance of past Commission decisions**

14. Comments. The APDC welcomes the reference to prior Commission decisions when defining the relevant market(s) and to the necessity to assess whether the definition of the relevant market(s) in these past decisions should be applied to the case at hand.

The APDC wishes to make the following comments in line with its previous contribution<sup>6</sup>.

**First**, in order to ensure legal certainty over time, the APDC believes that the Commission should state the reasons why the market definition(s) in prior decisions would not be relevant in the case at hand. In particular, the Commission should explain precisely the new prevailing circumstances based on the facts of the case (*i.e.* market evolution as a result of the emergence of new products, internationalization or major technological developments) that justify not applying the definition of the relevant market in prior decisions to the case at hand.

**Second**, the Market Definition Notice does not refer to prior decisions of other national competition authorities and/or regulators while they may provide useful insights in the absence of relevant market definition in prior Commission decisions.

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<sup>6</sup> APDC response to Question II.1 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

15. Proposals. Given the importance in practice of prior decisions in defining the relevant market(s), the Market Definition Notice should, in particular in merger control (see section 3.1, below):
- specify that decision-making practice is the starting point for the analysis of the relevant markets;
  - impose a specific obligation to state the reasons as to the circumstances that justify not applying the market definition(s) in prior decisions to the case at hand; and to
  - specify that competition authorities may refer to other national competition authorities and regulatory authorities' decisions.

**Comments and proposals on point 16 related to the forward-looking assessment of market definition**

Comments. The APDC welcomes the introduction of a framework for assessing future competitive constraints in relation to market definition.

Proposals. The APDC encourages the Commission to clarify the instances where a future competitive constraint is to be included within a relevant market. In particular, the APDC would welcome clarifications as to (i) the relevant period which is to be taken into account for identifying “*short-term or medium-term*” market transitions and (ii) whether the Commission is under an obligation or a mere faculty to integrate such market transitions within the relevant market.

**Comments and proposals on point 18 and footnotes 34 to 37 related to the practice of leaving the question of market definition open**

16. Comments. The APDC regrets that the Commission did not use the opportunity of the revision process to limit its practice of leaving the market definition open<sup>7</sup>.

In merger control, since the Commission regularly leaves the question of the market definition open, the parties are required to provide numerous data corresponding to all of the potentially conceivable segments and sub-segments. This leads the parties to the merger to devote considerable resources to providing data on all the segments under consideration (in order to determine whether the markets are affected or not) of all geographic and product markets that the Commission has not yet precisely defined, even though the transaction under review is not likely to raise any competition concerns.

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<sup>7</sup> APDC response to Questions II.1 and III.4.1 of the Commission's online questionnaire (Contribution dated 8 October 2020).

While it is understandable that the Commission seeks to reduce the number of cases in which it has to make a final decision on the relevant market(s), the practice of leaving the market definition open leads to a lack of clarity in the Commission's decision-making practice and to the mobilization of important means without their necessity being established.

A fair balance needs to be struck in this respect.

17. Proposals. The APDC encourages the Commission to strive to limit its practice of leaving the market definition open, in merger control at least. Alternatively, the Commission could, while leaving the precise scope of the market open where the outcome of its assessment would not change under different plausible market definitions, be under an obligation to expressly set aside elements of its past decision-making practice which are clearly outdated or obsolete in light of the market evolutions revealed by the Commission's investigation.

#### **Comments and proposals related to the envisaged market definitions in simplified decisions**

18. Comments. Since the implementation of the simplified procedure, the Commission has issued simplified merger control decisions on a regular basis. By definition, in these decisions, the relevant markets are defined by the parties and such definitions are accepted in most if not all cases by the Commission. Yet, these definitions are not included in the final decision.

This lack of transparency is problematic. Not only does it weigh on the collection of information by the parties (to the extent that they are unable to rely on prior market definition), but it also makes the competitive assessment of the transaction by the Commission more difficult (insofar as it will potentially require the parties to provide information on sub segmentations that the Commission has already considered in past decisions, but that they necessarily could not have been aware of).

The fact that the Commission fails to provide guidance in this respect is particularly problematic when it comes to cases of abuse of dominance. In such cases, the undertakings concerned may face uncertainty regarding the precise definition of the markets on which they operate (even if such markets have already been assessed in prior merger decisions), making it more difficult for them to adapt their behaviors in order to comply with competition law.

In order to ensure transparency and effectiveness, stakeholders should be able to acknowledge all market definitions that have previously been considered by the Commission in its decision-making practice.

19. Proposals. In line with its previous contribution<sup>8</sup>, the APDC encourages the Commission to include its assessment of the relevant market in simplified decisions and/or (without necessarily

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<sup>8</sup> APDC response to Question II.1 of the Commission's online questionnaire (Contribution dated 8 October 2020).

including the subsequent competitive analysis) and/or publish the list of markets/segments considered in simplified decisions, e.g. on a quarterly or half-yearly basis.

## 2. CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY

### 2.1. Concept of the relevant product market and geographic market

#### Comments and proposals with respect to the temporal delimitation of the relevant market

20. Comments. The APDC had proposed to retain a section dedicated to this delimitation which would describe in particular the specificities of cyclical markets or markets in decline or growth<sup>9</sup>. **The Commission partially takes up this proposal**, since it mentions the possibility of taking into account temporal considerations for cyclical markets (**point 22**: "*where factors such as seasonality or peak/off-peak time considerations affect customer preferences or the structure of supply*"; see also **footnote 40** for additional examples).

However, only one paragraph addresses this topic. The Market Definition Notice does not otherwise address the issue of declining and growing markets.

21. Proposals. This issue could therefore be addressed in order to complete the analysis of temporal delimitation.

### 2.2. General methodology for market definition

#### Comments and proposals with respect to the substitutability of supply

22. Comments. The APDC had made two types of proposals with respect to the substitutability of supply.

One proposal suggested that the Commission indicates the modalities according to which complementary and imperfectly substitutable goods or services could or could not be grouped together within the same relevant market<sup>10</sup>.

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<sup>9</sup> APDC response to Questions III.1, III.11 and III.12 of the Commission's online questionnaire (Contribution dated 8 October 2020).

<sup>10</sup> APDC response to Questions III.1, III.2 and III.7 of the Commission's online questionnaire (Contribution dated 8 October 2020).

The Market Definition Notice took up this proposal in section 2.2.1.2 as "Supply substitution" which "*can be relevant when defining the relevant market where suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products*" (points 34-39).

In addition, in section 4.5 of the Market Definition Notice:

- **Points 99 to 101:** the Commission highlights the criteria for assessing the extent to which primary and secondary products (often referred to as "aftermarket") can be grouped into a single, dual or multiple market(s).
- **Points 102:** it considers the hypothesis of "bundled products" without however explaining how they will or will not be bundled in the same market.
- **Point 103** deals with digital ecosystems that are likely to follow the "aftermarket or bundled market approach" and provides, "in any event", the criteria for market delimitation purposes in these circumstances.

The APDC had also suggested to provide further clarification on **supply-side substitutability**, specifying that the concepts of costs and timeframes should be analysed on a case-by-case basis to take into account the specificities of the sector under consideration and to provide additional elements of assessment to enable the parties to carry out the analysis<sup>11</sup>.

The Market Definition Notice partially takes up this proposal since it defines the notion of "short term" while specifying that "*such assessment is specific to the products assessed*" (footnote 51) and presents the situations in which supply substitutability is relevant for market definition (points 34-39).

23. Proposals. The Market Definition Notice should more precisely define the notions of "costs" and "risks", even though some details are given in **point 61**. It should also indicate that they should be assessed on a case-by-case basis to take into account the specificities of a given sector.

**Comments and proposals on points 31, 32, 33, 42, 59, and footnotes 46, 48, 57 related to the description of possible economic tests**

24. Comments. The APDC had suggested that the methodology of the economic tests used should be clarified. The Market Definition Notice should include a description of the different types of economic tests that can be used (SSNIP, UPP, GUPPI, etc.), the cases in which such test should be applied, and the main methodological principles applicable<sup>12</sup>.

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<sup>11</sup> APDC response to Question III.2 of the Commission's online questionnaire (Contribution dated 8 October 2020).

<sup>12</sup> APDC response to Question III.3 of the Commission's online questionnaire (Contribution dated 8 October 2020).

This suggestion was partially taken into account by the Market Definition Notice to the extent that it includes significant developments on the SSNIP test (*i.e.* the appropriate use cases of the SSNIP test and its limits).

25. Proposals. However, other tests are scarcely, if ever, mentioned in the Market Definition Notice<sup>13</sup>. Such addition would provide stakeholders with a comprehensive description of the choices made and the methodology followed by the Commission in its analysis with respect to the various tests (see section 3.2.1, §31, proposal of §35 and section 4.4, §46, below).

### **Comments and proposals with respect to the distinction between actual and potential competitors**

26. Comments. The APDC had suggested that the distinction between actual and potential competitors defined in Article 1 of Regulation 2022/720 should be incorporated into the Market Definition Notice. It was also suggested to consider whether the concept of "purchasing markets" should be abandoned. However, the Market Definition Notice does not take up this proposal as it neither makes a reference to the notion of "actual competitor" nor to the definition of "potential competitor" provided in Regulation 2022/720<sup>14</sup>.

The only references to the notion of "potential competitor" are in **point 16** ("*Structural market transitions differ from considerations relating to market entry by potential competitors ('potential competition')*"), in **point 25** ("*more remote competitive constraints that do not meet the criteria of supply substitution [...] are taken into account during the competitive assessment as constraints arising from potential competition*"), and in **point 39** (the Commission examines the effects of a switch of production to a related product "*in the competitive assessment as constraints from potential competition*").

Furthermore, the Market Definition Notice retains the concept of "purchasing markets" (**point 6 and footnote 45**).

27. Proposals. If it decides against abandoning the notion altogether, the Commission should at least elaborate on the notion of "purchasing markets" and clarify in which instances it is expected to define such purchasing markets, and in which instances it is not. For legal certainty purposes, it is essential that interested parties be provided with clear guidelines, as any market could theoretically be defined from the buy-side as well as from the sell-side.

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<sup>13</sup> Only the SSNDQ test ("Small but Significant Non-transitory Degradation in Quality" test) is considered, in footnote 47.

<sup>14</sup> APDC response to Question V.2 of the Commission's online questionnaire (Contribution dated 8 October 2020).

**Comments and proposals with respect to the degree of substitutability of products and services**

28. Comments. The APDC had suggested that the Commission should clarify the extent to which the substitutability of two products or services must be reciprocal or unilateral. It was further suggested that it should detail, or even quantify, the degree of substitutability that must be achieved by two products or services in order to be considered as belonging to the same market. Lastly the APDC suggested to provide additional elements regarding the sufficient portion of demand required to judge whether or not two products or services are substitutable<sup>15</sup>.

**The Market Definition Notice partially addresses this suggestion.** As regards reciprocal or unilateral substitutability, no details are provided. It should be noted that the draft revised notice contains a reference to paragraph 97 of the AstraZeneca case (cited by the APDC in its proposal) to illustrate the case where "*competitive constraints between undertakings are asymmetric*" which may lead to different market definitions depending on the firms concerned (**point 15 and footnote 26**).

The Market Definition Notice provides details for assessing the degree of substitutability required without quantifying it. Thus:

- **Points 27 to 30:** demand-side substitutability is sufficiently strong when customers can "easily" switch to "readily available" substitutes that exert "sufficient constraint", with the notion of "effective substitutes" and the method of adding in descending order of the degree to which customers would substitute the products of the undertaking(s) concerned with these substitutes.
- **Point 42** on the geographic market: "[...] *When customers in two areas consider mostly the same suppliers as alternatives and can readily switch purchase volumes between them, this may indicate, together with other factors, that conditions of competition between both areas are sufficiently homogeneous and thus that the two areas should be part of the same relevant geographic market [...]*".
- **Point 75:** the Commission explains that it is possible to quantify the degree of competitive pressure exerted by suppliers located outside the candidate geographic market - given the sensitivity of trade flows to changes in relative supply conditions.

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<sup>15</sup> APDC response to Question V.4 of the Commission's online questionnaire (Contribution dated 8 October 2020).

The Market Definition Notice provides limited guidance for assessing the sufficient portion of demand and does not quantify it:

- **Footnote 42:** *"In certain markets, demand may not be driven – or not solely driven – by the ultimate consumer of a product, but may be shaped by other stakeholders, whose interests are not necessarily aligned with those of the ultimate consumer. For example, in pharmaceutical markets, patients are the final consumers of medicines, doctors choose the prescription medicine or may advise patients on which over-the-counter medicine to use, and insurance schemes will typically cover all or part of the cost for the administered medicine. The Commission considers such particularities when defining the relevant market".*
- **Point 79:** Several evidence is considered *"to establish whether an economically significant proportion of customers considers two products as substitutable"*.

### 3. PROCESS OF DEFINING MARKETS

#### 3.1. General approach to market definition in practice

29. Comments. The APDC notes that, in line with its previous contribution, the Market Definition Notice clarifies the methodology and procedures used to reach a conclusion on the relevant market (**point 47**) without, however, subjecting them to a rigid hierarchy (**point 76**).

According to the Market Definition Notice (**point 46**), the Commission is generally able to identify the main relevant market(s) on a preliminary basis, in particular on the basis of its decision-making practice. However, contrary to what is stated in the Market Definition Notice, the number of possible relevant markets is often relatively large, given the importance of the decisions in which the market definition is left open.

30. Proposals. Given the importance of decision-making practice in defining the relevant market(s), the Market Definition Notice should specify, as indicated above (see section 1.3, §12-13), that (i) the Commission's previous decision-making practice constitutes the starting point for the analysis of relevant markets and (ii) competition authorities may refer to other national competition authorities and regulatory authorities' decisions. However, the Market Definition Notice should also underline the limits inherent in such an exercise and recall that the relevance of using the market definitions previously identified in its decisions should be verified, in particular for the oldest ones.

## 3.2. Evidence to define product markets

### 3.2.1. Evidence relevant for demand substitution

31. Comments. The APDC notes that, in line with its previous contribution<sup>16</sup>, the Market Definition Notice clarifies the methodology followed with respect to the analysis of demand-side substitutability and makes an effort to prioritize evidence:

- **Points 52** related to the possibility for companies to *"collect relevant information on demand substitutes during the ordinary course of business"*;
- **Point 53 and footnote 72** related to the possibility of *"deriv[ing] quantitative measures on the substitutability of different products "* where *"there is sufficient data on past substitution"*;
- **Point 54** which reflects an effort to prioritize evidence: *"evidence on hypothetical substitution can be less reliable than evidence on actual substitution"* especially when it comes to the *"views of market participants"*.

However, with regard to economic tests, the Commission only refers to the use of the "SSNIP" test, in particular for the analysis of the "critical loss", whereas other economic tests have been developed over the years and analyzed in the decision-making practice (see section 2.2, §§22-23, above, and section 4.4, §46, below).

32. Proposals. With regard to economic tests, the Market Definition Notice could refer to the various other possible economic tests (UPP, GUPPI, etc.), specifying the appropriate use cases as well as the main methodological principles.

### 3.2.2. Evidence relevant for supply substitution

33. The APDC notes that, in line with its previous contribution<sup>17</sup>, the Market Definition Notice clarifies the methodology followed in relation to the analysis of supply-side substitutability, and makes an effort to prioritize evidence. Thus, **Point 60** in the section on evidence relevant for supply-side substitutability states: *"Evidence of past redeployment of production or supply to the products in question in response to exogenous changes in supply or demand conditions is particularly relevant."*

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<sup>16</sup> APDC response to Question III.3 of the Commission's online questionnaire (Contribution dated 8 October 2020).

<sup>17</sup> APDC response to Question III.3 of the Commission's online questionnaire (Contribution dated 8 October 2020).

### 3.3. Evidence to define geographic markets

34. Comments. In the Market Definition Notice, the Commission provides a main criterion for identifying a global market (**Point 70**: "*when customers around the world have access to the same suppliers on similar terms regardless of the customers' location*") without, however, defining precisely the methods for taking transport costs into account in determining the relevant geographic market (beyond their mention in **Point 73**). These methods may indeed vary from one case to another in the decision-making practice.

The examples given in **footnotes 58, 82, 83** and in **point 45** do not appear to be sufficient to provide sufficiently general guidance.

However, it must be noted that in several recent cases, the undertakings concerned notified their merger on the assumption that a worldwide market delimitation would be adopted. Conversely, the Commission's determination of a narrower geographic market ultimately led to the prohibition of these transactions.

35. Proposals. In line with its previous contribution<sup>18</sup>, the APDC considers it necessary to ensure the predictability of the guidelines set out in the Market Definition Notice, in particular with regard to the conditions under which the Commission is likely to define a global market. For example, by defining more precisely, as recommended by Amelia Fletcher and Bruce Lyons<sup>19</sup>, the **way in which transport costs are taken into account** in determining the relevant geographic market.

Indeed, it should be recalled that the Market Definition Notice aims at ensuring transparency whereby « *companies and their advisers [will be] able to better anticipate the possibility that the Commission may raise competition concerns in an individual case. Companies could, therefore, take such a possibility into account in their own internal decision-making when contemplating, for instance, acquisitions, the creation of joint ventures, or the establishment of certain agreements.* »

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<sup>18</sup> APDC response to Question III.5 of the Commission's online questionnaire (Contribution dated 8 October 2020).

<sup>19</sup> Amelia Fletcher and Bruce Lyons, *Geographic Market Definition in European Commission Merger Control*, January 2016.

### 3.4. Gathering and evaluating evidence

#### 36. Comments:

- (i) With regard to anti-competitive practices, the Market Definition Notice does not specify **the degree of the burden of proof** which rests on the investigating authorities in demonstrating their delimitation of the relevant market (e.g., in terms of the evidence used to establish a relevant market other than that defined by the parties) in order to enable the courts to exercise their control over this delimitation.
- (ii) The Market Definition Notice does not provide for **collaboration between DG COMP and other Commission services, nor with national competition authorities**. It only provides that the Commission may take into account the views and information provided by sectoral authorities when defining relevant markets (**paragraphs 56 and 81**).

The Market Definition Notice **does not provide for the consideration of texts and policies applicable to particular sectors**. It only provides that the Commission may take into account the views and data provided by the sectoral authorities (**Points 56 and 81**) but the "cooperation" with them does not go further.

In particular, it does not mention the principle of "cooperation" with the different DGs of the Commission, let alone the definition of a **methodology for this purpose**.

- (iii) The APDC notes that, in line with its previous contribution, the Market Definition Notice provides clearer details of the methodology followed for market definition with an effort to prioritize the evidence, notably **point 77** and **footnote 90** (reliability of evidence, multiple sources, recent...), as well as **points 78 to 82** (procedures for gathering evidence).
- (iv) The Commission underlines the importance of the reliability of the evidence used to define markets (**Point 77**), in particular with regard to evidence from market participants with conflicting interests. At the same time, however, the Commission states that it cannot be required to verify all information it receives, in the absence of evidence that the information provided to it is inaccurate (**Footnote 90**).

In doing so, and even though the information obtained from suppliers and customers is often decisive in enabling the Commission to draw conclusions, the Market Definition Notice does not specify how the Commission takes into account the specific interests of each contributor, whereas a competitor questioned will often have little interest in the implementation of a transaction and will therefore tend to orient its answers accordingly.

37. Proposals of the APDC in line with its previous contribution<sup>20</sup>:

- (i) In the case of abuse of a dominant position (infringement proceedings focusing on the past, in which the Commission has the burden of proof), the definition of the market is a first and key stage in the classification of the infringement, which requires, from the outset, the mobilization of significant resources including all the elements of the analysis (in addition to the analysis of the demand side, that of the supply side, potential competition, entry barriers, etc.) in order to determine, on this basis, whether or not a dominant position exists. The same observation can be made with regard to anti-competitive agreements by effect (or even, for agreements by object, in the determination of the penalty, the assessment of the effects to determine the seriousness of the infringement presupposes a precise delimitation of the relevant market). In the field of anti-competitive practices, the Market Definition Notice should therefore specify the level of evidence that must be provided by the investigating authorities in demonstrating their delimitation of the relevant market, in order to enable the courts to exercise their control over this delimitation.
- (ii) When comparing market delineations under anti-competitive practices law with those under merger control or regulatory law, there is no need for consistency (see section 1.3, §10, above). These bodies of law have distinct objectives. The aim is to coordinate them, but not to make them similar. The methods used to delimit markets and the results obtained do not have to be identical, but must be consistent with the objectives pursued by each set of rules within which they are integrated. This is why:
  - The Market Definition Notice should make clear that DG COMP not only takes into account but also **collaborates** in the delineation of markets **with all Commission services, with all authorities responsible for the regulation of a sector** (transport, agriculture, communication etc.) as well as, where appropriate, with **national competition authorities** (see section 1.3, §§12-13, above). It is also important that these elements are accessible to undertakings in the context of the procedure for the implementation of Articles 101 and 102 TFEU;
  - The Commission must be vigilant about the need to ensure consistency between the Market Definition Notice and Community policies relating to particular sectors. The Market Definition Notice should therefore provide that the rules applicable to market delineations take account of **texts and policies relating to sectors** such as health, agriculture, telecoms, energy, transport, audiovisual, media, advertising and the environment, **and develop a methodology for this purpose**;

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<sup>20</sup> APDC response to Questions II.1, III.3 V.1 and V.5 of the Commission's online questionnaire (Contribution dated 8 October 2020).

- The Market Definition Notice should provide that the rules applicable to market delineations take into account the **sector enquiries** to be carried out;
  - The Market Definition Notice should provide for the establishment of **cooperation with the sectoral Authorities and/or with the various Directorates General** that make up the European Commission according to a transparent methodology that it would define.
- (iii) The Market Definition Notice should provide that, with regard to contributions from market participants with conflicting interests with those of the merging parties, the Commission should be under an obligation to verify the reliability of the information obtained and/or, at the very least, to provide prompt and continuous transparency to the notifying parties (as early as in Phase I) in order to allow them to comment on such information.

#### 4. MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES

##### 4.1. Market definition in the presence of significant differentiation

##### Proposals on points 86 to 87 and footnote 98 related to the competitive assessment of differentiated markets

38. Proposals. The Commission should elaborate on the distinction drawn between differentiated product “*segments*” and distinct “*product markets*” in order to help interested parties identify the boundaries of the relevant market in which they compete (**Point 86 and footnote 98**).

In particular, the Commission should set reference switching levels/diversion ratios at which (i) two products are considered to belong to identical “*segments*” within a broader product market; (ii) two products are considered to belong to two distinct segments of an identical product market and (iii) two products are considered to belong to two distinct product markets.

As regards chains of substitution (**Point 87**), the Commission should set clear standards to help interested parties identify “*breaks*” in geographic and product continuums delineating distinct product markets.

In particular, the Commission should elaborate on how “*breaks*” in the chain of substitution are identified when geographic markets are based on catchment areas.

Conversely, the notion of “*direct substitutability*” that the Commission introduces here should be clarified, in particular how it could be different from the concept of substitutability used elsewhere in the Market Definition Notice.

#### **4.2. Market definition in the presence of price discrimination**

##### **Proposals on point 88 related to the occurrence of a price discrimination situation**

39. Proposals. In theory, price discrimination does not relate to the ability to charge different prices in the absolute but different prices that do not vary based on the same factors. Two products can have different prices and still belong to the same market when a variation in the price of one product leads to a change in the price of the other product<sup>21</sup>. Accordingly, the reference to customer groups being charged “*different prices*” could be clarified.

In addition, the Commission should set a reference period for the assessment of the “*lasting nature*” of a price discrimination.

#### **4.3. Market definition in the presence of significant investments in R&D**

40. This section is primarily based on precedents related to pharmaceutical markets. The Commission should clarify whether the concepts used in this section (pipeline products, *etc.*) are relevant across all sectors.

##### **Proposals on point 91 and footnote 107 related to the translation of earlier innovation efforts into tradeable products in order to identify a relevant product market**

41. Proposals. The Commission should clarify where the limit between an “*innovation product market*” and the “*innovation spaces*” within which innovation efforts are undertaken is set, and the method for setting the boundaries of such innovation spaces. This is crucial for legal certainty purposes, as it will be very difficult for interested parties to self-assess their market position with no clear guidance.

In addition, the Commission should clarify the relevant metrics through which relative market power will be assessed in innovation spaces (as opposed to full-fledged R&D markets, which are more mature), taking into account the specific challenges of obtaining reliable information on R&D activities (identifying competing undertakings could in itself be a challenge, especially in sensitive sectors such as the defense industry).

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<sup>21</sup> *E.g.*, a low price, private label, product may compete with a more expensive product sold under a national brand, so that for instance, a discount offered on the branded product leads to demand diversion from the private label to the branded product.

#### 4.4. Market definition in the presence of multi-sided platforms

42. Comments. With regard to platforms in particular, the question of market delineation has already been considered by the competition authorities.

Digital platforms offer an intermediation service between different groups of users. They are present in many sectors in the form of marketplaces or community platforms. From an economic point of view, they are understood under the notion of "two-sided market" or "multi-sided market", which designates a market in which an actor facilitates interactions between the users it seeks to recruit on the different sides of the market (Rochet J.-C. and J. Tirole (2003), "Platform competition in two-sided markets"). Digital platforms have many particularities that make the definition of a market complex in several respects. The different sides have different interests and economic models, while being interdependent. There are direct network effects between users (within the same group) and indirect network effects (between different user groups). Furthermore, many platforms offer a free service on at least one side, making a market definition based on an analysis of monetary factors inoperative. Non-monetary factors such as service quality or innovation may play a central role in demand. Finally, as with other digital markets, digital platforms are evolving very rapidly.

Until now, competition authorities have decided to adopt a pragmatic approach by adapting existing tools to the specificities of platforms. With regard to these "multi-sided" markets, the first difficulty concerns the number of markets to be considered. Is it preferable to start with a market definition per side and to take into account, only at the stage of the competitive analysis, the existing interactions and interdependencies between the sides?

Furthermore, the use of traditional tools such as the SSNIP test raises difficulties. The APDC underlined this issue in its previous contribution<sup>22</sup>. Indeed, this test may not allow the overall value of the product to be captured since the demand for one side may be conditioned by the demand for the other side independently of the price factor. The application of the SSNIP test was thus rejected by the Commission in the Google Shopping case in favour of an examination of the functionalities of the services offered within the framework of an analysis of the substitutability of services which is, however, less rigorous than the SSNIP test.

In terms of mergers, the Logic-Immo/Se Loger deal in France and the Just Eat/Hungryhouse deal in the UK are interesting illustrations of the pragmatic approach of competition authorities.

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<sup>22</sup> APDC response to Questions III.11 and III.12 of the Commission's online questionnaire (Contribution dated 8 October 2020).

Both the French Competition Authority (ADLC) and the Competition Market Authority (CMA) have defined single, two-sided markets. In the first case, it was the market for online property classifieds in which each of the user groups seeks access to a property classifieds intermediation service. In the second case, the CMA defined a market for food ordering and related services involving two distinct customer groups, restaurant owners and consumers whose interests are interdependent.

The question of geographic market definition was also adapted by the ADLC and the CMA, which considered a dual dimension to these markets. The local dimension of the online property classifieds market, from the point of view of consumer demand, and the national dimension of this market, from the point of view of supply, were analysed. The CMA defined the market for online food platforms as national in scope, while taking into account local aspects such as the local nature of demand in its analysis.

43. Proposals related to **points 97 and 98** of the Market Definition Notice.

The market definition of digital platforms both in terms of product and geographic market definition needs to be very flexible to adapt to constantly changing markets.

The Commission should set a clear reference framework and metrics for assessing substitutability in zero monetary price markets, or at least provide concrete examples. Setting clearer guidelines is crucial for legal certainty purposes, as it will be very difficult for interested parties to self-assess their market positions in markets where undertakings with radically different business models or functionalities may be substitutable for consumers (*e.g.* streaming services vs download services).

The Commission should clarify when it is appropriate to define separate relevant markets for zero-price products and positively priced products (or, to put it differently, when zero-price products and positively priced products may be included in the same market).

The Commission could elaborate on whether the “SSNIC” (“*small but significant and non-transitory increase in cost*”, whereby a hypothetical monopolist raises the cost of its service by increasing the time or space devoted to advertisements) test could be considered as an alternative to the SSNDQ (or SSNIP) framework (see section 2.2, §§22-23, and section 3.2.1, §31, above). The Commission could also elaborate on the SSNDQ,<sup>23</sup> which was implemented by the Commission in the Google/Android case.

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<sup>23</sup> However, this test can also be criticized as it assumes that quality is a measurable parameter and faces the difficulty of capturing an overall decrease in the quality of the product or service on all sides.

#### **4.5. Market definition in the presence of after markets, bundles and digital ecosystems**

44. Comments. In terms of digital transformation, European competition authorities have already considered to some extent a number of questions, in particular those relating to data and big data, intermediation platforms, and criteria for assessing the market power of digital giants who master considerable masses of data and are continually strengthening their positions through network effects. Other questions are less explored today but bring about major changes in terms of the functioning of competition. They include for instance the new generations of tools based on artificial intelligence or the questions raised, from the strategic point of view as well as from the economic and competitive points of view, by the arrival of “blockchains”, which are distributed and decentralized models.

The question of digital specificity is not neutral. While competition law is still largely based on the delimitation of relevant markets and the analysis of the effects of identified practices on these markets, when it comes to digital transformation, the traditional boundaries tend to blur:

- the different components of digital transformation, while intertwined, are not all at the same stage of maturity;
  - these different components form a protean ecosystem but are all more or less interdependent from each other, which makes competitive analysis and market delimitations difficult to envisage clearly. For example, the collection of data by operators or platforms feeds into the other sides of multi-sided markets, and algorithms and other predictive tools, which in turn produce competitive effects in terms of active marketing or pricing. It may also be in the interest of platforms to rely on blockchain technology for their transactions, even though it is this same technology that could eventually render their intermediation role meaningless by allowing economic relations without intermediaries and the automation of contractual relations (smart contracts);
  - these different components almost all have ambiguous competitive effects, being potentially beneficial for global welfare, or even in some cases pro-competitive, and potentially negative.
45. Two specific topics deserve particular attention concerning the anticipation of possible market delineation issues:
- The first is the so-called “attention market”, for which time is a new relevant variable for measuring demand substitutability and competitive pressure through the attention/time variable. In line with its previous contribution<sup>24</sup>, the APDC believes that this should be taken into account at the stage of the definition of the relevant product markets or at least at the stage of the analysis of potential competition.

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<sup>24</sup> APDC response to Questions III.11 and III.12 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

- The second is the blockchains, for which the question of market delimitation remains to be fully explored, as suggested by the APDC in its previous contribution<sup>25</sup>. The main question is whether other protocols, distributed or not, can be considered as substitutes for blockchains; the underlying idea is that market delineation (and thus market share determination) could be considered not on the blockchain itself, but on the type of application it will support.

46. Proposals as regards **point 103** of the Market Definition Notice.

The Commission should clarify under which conditions a digital ecosystem would qualify as consisting of a primary market tied to one or several after markets or of a bundle constituting a relevant market of its own. It should also clarify when a “*digital ecosystem*” exists as compared to a “*multisided market*”, as both can imply that a single intermediary would connect with different customer groups (*e.g.*, an operating system could amount to (i) an “ecosystem”, as the operator of that OS provides various services to consumers; and (ii) a multisided platform, as it also provides services to software developers).

In addition, the Commission should explain how each factor cited at paragraph 103 (“*network effects, switching costs and (single and/or multi)-homing decisions for the purpose of defining the relevant product market(s)*”) would play a role in assessing whether the markets fit (i) an aftermarket approach, (ii) a bundle approach, (iii) an ecosystem approach or (iv) none of these approaches. These clarifications are key to enable better self-assessment by interested parties (which may or may not be dominant depending on the selected approach) and their various clients.

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<sup>25</sup> APDC response to Questions III.11 and III.12 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

## 5. MARKET SHARES

47. Comments. The Market Definition Notice has rightly addressed a number of concerns raised during the previous consultation<sup>26</sup>. In particular, points 105 to 108 give a good summary of the multiple criteria that can complement market shares in situations where they are not representative of the market power of the undertakings.

Tender and digital markets are directly mentioned in the Market Definition Notice, which is a welcome improvement as their specificities are now acknowledged. The development of alternative metrics, such as the number of patents or R&D expenditures mentioned point 107, will in particular help to better assess the situation of innovative markets. However, the Market Definition Notice does not encompass all situations in which market shares should be put into perspective. The cases of small markets with volatile market shares or markets where a “shrinkage effect” is possible are still ignored.

The “shrinkage effect” is a situation in which the merger might lead to combined market shares of the notifying parties inferior to the sum of their pre-merger individual market shares. Such a situation can happen in particular when there are no barriers to entry and when customers have the incentive and the possibility to ease the entrance of a new competitor as a reaction to the merger. Acknowledging that such a situation is possible would improve the Market Definition Notice and nuance the quite automatic method which consists in simply adding the individual market shares of the parties to assess the impact of the merger.

The Commission should also consider very small markets where market shares are extremely volatile and unrepresentative. Indeed, in such markets, the gain or loss of a customer can have a huge impact on market shares.

The Market Definition Notice (**point 111**) now directly addresses the issue of the period for which market shares should be provided. The decisional practice quoted in the Market Definition Notice illustrates flexibility in that regard which is necessary as the relevant period depends on a lot on the considered market. Longer reference periods (such as 5 or even 10 years) are indeed particularly relevant for tender markets.

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<sup>26</sup> APDC response to Question III.6 of the Commission’s online questionnaire (Contribution dated 8 October 2020).

The issue of captive sales is however still absent from the Market Definition Notice. There is still an ambiguity in the Commission's decisional practice as to whether captive sales should be included in the analysis. Most of the time, the reflex is to ignore them. Nevertheless, it stems from the case law of the General Court in the *Schneider/Legrand* case<sup>27</sup> that there are situations in which captive sales should be taken into account to assess the market power of undertakings. Given the potential importance of this issue for some markets, it would be useful to mention this case law in the Market Definition Notice and to have the Commission's position about the way to interpret it.

As a whole, the Market Definition Notice brings important and most welcome innovations especially in relation to digital markets. It could however be improved by a few additions which leads to some proposals.

48. Proposals. With regard to the calculation of market shares, the Market Definition Notice could address in particular the following methodological points:

- the fate of captive sales: the Commission should take into account the *Schneider/Legrand* case law of the General Court and point out that captive sales are not, as a matter of principle, excluded from the analysis; and
- further develop hypotheses in which market shares do not adequately represent the market power of the undertakings. This has been partially done through the welcome treatment of bidding and digital markets in the Market Definition Notice, but the effort could be usefully completed by including:
  - markets that may be subject to a "shrinkage effect": this is the case, for example, when the customers of the firms concerned can very easily sponsor the entry of a new entrant post-transaction, so that the parties' actual market shares will be lower than the sum of their pre-merger market shares;
  - very small markets for which market shares are extremely volatile and not very representative; and
  - markets which are about to undergo a structural market transition due to an impending technological or regulatory change.

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<sup>27</sup> General court, 22 October 2002, T-310/01.