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## COMMENTS TO THE DRAFT COMMISSION NOTICE ON THE DEFINITION OF THE RELEVANT MARKET FOR THE PURPOSES OF UNION COMPETITION LAW

- (1) The Spanish Association for the Defence of Competition (*Asociación Española de Defensa de la Competencia*, “AEDC”) hereby submits its comments to the Draft Commission Notice on the definition of the relevant market for the purposes of Union competition law (the “Draft Notice”) in the context of the public consultation launched by the European Commission (“EC”) for the review of the existing Notice on the subject.
- (2) These comments have been prepared by a team including economists and lawyers members of the AEDC.<sup>1</sup> They do not necessarily represent the opinion of all the members of the association.

### 1. BACKGROUND AND STRUCTURE

- (3) The process for defining relevant markets is one of the cornerstones of competition law, as it provides with the proper stage to address the existence or inexistence of competition concerns. Therefore, the update by the EC of its 1997 notice on this subject must be warmly welcome. The changes brought forth by the so-called fourth industrial revolution and the burgeoning of new business models based on data and technology have strained the traditional approach to market definition and sometimes led to a certain degree of legal uncertainty. The AEDC considers that this regulatory initiative is therefore essential for bringing Eu competition law up to date, and that the EC has done a very thorough examination of the most relevant issues.

This document reflects on certain elements of the Draft Notice that, in our opinion, would require further development or clarification: Section 2 refers to the process of defining markets, including subsection for product market definition and geographic market definition; Section 3 refers to the market definition in specific circumstances, focusing on digital markets, markets with zero monetary price products and market definition in presence of significant R&D investments; and Section 4 reflects on the issue of market shares.

### 2. PROCESS OF DEFINING MARKETS

- (4) The Draft Notice devotes its Section 2 to the description of the approach to be applied when defining relevant markets and the factors that may be relevant when implementing the market definition exercise. Although, in general terms, the Section is clear and well structured, it would benefit from adding further clarification on different elements, both from the product and geographic market definition.
- (5) Before entering into more detailed comments, the AEDC would like to submit that the Draft Notice is very much welcome since it usefully covers and provides guidance on a number of topics and situations which were not envisaged in the previous Notice. Notwithstanding, as a general comment, in certain paragraphs the Draft Notice seems to understate the importance or need of the relevant market definition in general and the SSNIP test in particular. For instance, in paragraph 7 it says that market definition is not a mandatory step (even if the immediately subsequent

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paragraph it clarifies that it uses market definition for the assessment under Articles 101 and 102 TFEU and under the Merger Regulation). In paragraph 18, it notes that the market definition can be left open not only in situations where the case does not raise competition concerns but also in cases where it raises concerns under any reasonable market definition. In paragraph 32 it puts forward that the hypothetical monopolist test may be difficult to apply in situations where companies compete in parameters different from price and that it might not be possible to obtain reliable information on the losses that an hypothetical monopolist would suffer, while in paragraph 33 it states that it is not mandatory for the Commission to apply this test. In paragraph 46 the Commission notes that a high-level review of the plausible market definitions is sufficient to structure and facilitate the competitive assessment. Finally, in paragraph 86 the Draft Notice says that in differentiated product markets the importance of market shares and thus market definition is reduced.

- (6) In this regard, the AEDC would like to submit that:
- A proper market definition exercise based on the specific facts of the case and aimed at identifying the competitive constraints faced by the parties should be mandatory in relevant competition cases. In particular considering that: (i) it will be difficult to conclude that a case raises competition concerns if there is not a previous thorough analysis of competitive constraints (i.e. a proper relevant market definition); (ii) as noted below, market definition will be relevant even in differentiated product markets. It is worth to note that empirical tests based, e.g., on diversion ratios (as a proxy of closeness of competition) and aimed at estimating directly the impact of a merger on prices (such as UPP or GUPPI) have severe limitations including the fact that they are purely static.
  - The hypothetical monopolist test should be the conceptual framework applied in any market definition exercise. The mere fact that in many instances it cannot be applied empirically does not mean that it is not a valid conceptual framework for the identification of the relevant competitive constraints. Besides, as noted below and in the Draft Notice, in those markets where price is not a key competition variable, variants of the test (e.g., SSNDQ rather than SSNIP) can be applied. More in general, the application of the test would involve assessing the reaction of customers and potential competitors to a deterioration of the conditions of provision of the products or services concerned (in the form of an increase in prices, reduction in quality or level of innovation, etc.).
- (7) The analysis of the case law of the Commission and national competition authorities reveals that in many cases there is not a proper market definition exercise, and that the hypothetical monopolist test is rarely mentioned and seldom applied. The new Notice could therefore be an opportunity to improve the practice of competition authorities in this regard.

## 2.1 PRODUCT MARKET DEFINITION

- (8) The Draft Notice, in line with EU case law, indicates that demand substitution constitutes the most relevant element of the product market definition. It also acknowledges that, in some cases, **supply side substitution** may also be relevant.<sup>2</sup> In this regard, the Draft Notice indicates that supply substitution would only be relevant when it is "*as immediate and effective as demand substitution*". However, the draft communication does not provide any further explanation on what the European

<sup>2</sup> See, for instance, paragraph 25.

Commission would consider being "*immediate*" and being "*effective*" for the demand substitution analysis. It would be useful to understand what are the thresholds the EC would consider for this analysis.

- (9) Even if the minimum thresholds for what the EC considers as immediate and effective were defined, setting the same threshold for demand and supply side substitution could also lead to a situation in which the supply side of the analysis would be irrelevant for the market definition exercise. On the one hand, it is likely that suppliers need to adapt their production process to be able to switch from manufacturing product A to manufacture product B. Even in situations where the modifications required are small, they are unlikely to be as immediate as it could be for customers to switch from product A to product B.
- (10) Secondly, when assessing whether products are **similar** and, in particular, whether their prices are comparable, the Draft Notice considers that quantitative analysis on price co-movements (such as price correlation or stationarity analysis) are in principle more informative when they indicate that two products are in different markets (see paragraphs 50 regarding product markets and paragraph 66 regarding geographic markets). This poses the question whether that type of analysis would only be accepted as relevant evidence by the EC when it points towards separate markets. In our opinion, this element should be considered jointly with other analyses or other evidence so the decision on market definition would be based on a preponderance of evidence approach.
- (11) Thirdly, there are some instances in which the Draft Notice is vague on how relevant would be a particular piece of evidence when assessing the boundaries of the markets. In particular:
- Regarding evidence of **past demand substitution** based on quantitative measures on the substitutability of different products, the Draft Notice indicates that they should be *sufficiently robust* to be reliable.<sup>3</sup>
  - Regarding the evidence to be used when the market definition exercise requires a **forward-looking assessment** and when market definition is based on changes in competitive dynamics, the Draft Notice states that the evidence should demonstrate with a *sufficient level of certainty* that the expected changes will materialize.<sup>4</sup>

We understand it might be difficult to establish a clear threshold of what is considered as "*sufficient*" that may apply to all cases and it would, ultimately, depend on the characteristics of the industry and the nature of the expected changes. Nevertheless, it may be helpful to provide some guidance or examples of what the EC would consider as robust or what type of evidence would be useful at informing about certainty. Perhaps, providing examples of past cases where the evidence was sufficiently robust and cases where it was not. Similarly, providing examples of situations where forward-looking changes might be expected and which was the type of evidence that was helpful in understanding how likely or unlikely were the expected changes.

- (12) Regarding the evidence on **potential demand substitution**, the Draft Notice identifies surveys as a potentially informative tool when the survey is based on a *representative sample of customers*. We would suggest providing some general guidance on what might be considered as

<sup>3</sup> See paragraph 53 of the Draft Notice.

<sup>4</sup> See paragraph 77 of the Draft Notice.

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representative from the EC's perspective. The representativeness of a sample depends on different factors, including the sample size, what is the relevant target population, what are the sociodemographic characteristics used to identify representativity (e.g. gender, age or geographical location for a survey on final consumers or number of employees, main activity or turnover for a survey among companies). We would suggest the Draft Notice explains which of these or other factors are generally considered by the EC when carrying surveys and to provide some guidance on each of them. For instance, regarding sample size, what would be the minimum sample size when assessing a relevant product market at a national level, for local markets, etc.

- (13) Finally, in paragraph 59 the Draft Notice states that a high profit margin implies not only reduced critical losses but also that the elasticity of demand is low. This statement seems too focused on industries where the main parameter of competition is the price and should be removed or qualified. In this regard, it must be noted that in industries where quality or innovation is the main competition parameter profit margins can be high and at the same time the elasticity of demand to variations in quality or innovation can be equally high.

## 2.2 GEOGRAPHIC MARKET DEFINITION

- (14) The AEDC welcomes the detailed guidance on the geographic market definition provided in the Draft Notice, including the explicit recognition of the existence of global markets<sup>5</sup> and the conditions to define them.<sup>6</sup>
- (15) Regarding supply side substitution, the Draft Notice clarifies the approach to assessing imports,<sup>7</sup> trade flows and patterns of shipments, which is also welcomed.<sup>8</sup> However, it does not properly consider how online sales from (neighbouring) countries that can ship products (or provide a service) to the relevant geographic area are to be taken into consideration when defining the geographic market. Also in this regard, the Draft Notice indicates that even studies or econometric analyses estimating import elasticities might be informative. At the same time, and in the same paragraph, the draft communication indicates that the fact that imports are responsive to supply changes do not necessarily imply that the geographic market should be expanded. From an economic perspective, the existence of competitive pressures from imports is a necessary condition for considering expanding the boundaries for the candidate market. However, the draft communication should provide further guidance on what would be the minimum level of responsiveness (for instance, an indication of the minimum import elasticities) that would be considered sufficient for expanding the market or the level of responsiveness under which the pressure from imports would be considered insufficient to expand the market.
- (16) When addressing customer preferences and purchasing behaviour,<sup>9</sup> the EC reasons that differences in demographics or socio-economic background can lead to local, national or regional preferences. However, the EC provides only examples on how language and consumer preference

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<sup>5</sup> See paragraph 40 of the Draft Notice.

<sup>6</sup> See paragraph 70 of the Draft Notice.

<sup>7</sup> See paragraphs 42 to 44 of the Draft Notice.

<sup>8</sup> See paragraph 75 of the Draft Notice.

<sup>9</sup> See paragraph 68 of the Draft Notice.

can lead to national markets. It is unclear how the EC could argue the existence of a local, national or regional market based on demographics or socio-economic background.

- (17) When addressing the barriers and costs associated with supplying customers in different areas,<sup>10</sup> the Draft Notice refers to the barriers or costs that make it impossible or unattractive for a supplier to enter a market. We welcome the EC's acknowledgement that regulatory barriers, and trade barriers are much lower than similar barriers in 1997.<sup>11</sup> However, the EC fails to address properly the impact of online services when addressing these issues, which could actually widen the relevant geographic markets in an unprecedented way.
- (18) When dealing with both the customer preferences and purchasing behaviour and the barriers and costs associated with supplying customers in different areas, we notice the inclusion of language being one of the drivers of geographic market differentiation. However, the EC fails to acknowledge the fact that online sales have made this barrier much less of an issue. When a customer enters a website in a language they do not understand by using, for example, Google Chrome, this website can be translated automatically to the language of their choice. This has an impact not only on consumer behaviour, but also on the markets that a supplier can reach. Moreover, the translation technology is bound to continue to develop and improve in the near future.
- (19) When addressing distance-related factors, transport costs and catchment areas,<sup>12</sup> the EC does not properly take into consideration the fact that transport costs are much lower than in 1997, and are essentially non-existent in relation to services that can be provided online. As a result thereof, wider market definitions should be envisaged.
- (20) Also regarding distance-related factors, the EC considers that "[...] *factors, such as [...]* *sustainability considerations [...]*" may put suppliers that are located at a greater distance from the customer at a significant competitive disadvantage relative to suppliers that are located closer to the customer. It is unclear whether this "sustainability considerations" are on the customers or the company's mind or they relate to regulations; furthermore, it is not clear why sustainability is only considered when addressing distance-related factors, since, if it is to be regarded for geographic market definition reasons at all, it could affect other evidence analysis as well (such as customer preferences, purchasing behaviour, barriers and costs associated with supply; and not only distance related factors).
- (21) The issue of geographic market definition also affects Section 4 of the Draft Notice on "Market definition in specific circumstances" in two ways that should be clarified:
- the fact that the Draft Notice states that price discrimination based on customers' location can also be a reason to define the relevant geographic market in accordance with these locations<sup>13</sup> may be contradictory with the previous statement that the analyses of price levels are rarely decisive, in themselves, for geographic market definition<sup>14</sup> ; and

<sup>10</sup> See paragraph 71 of the Draft Notice.

<sup>11</sup> See paragraph 72 of the Draft Notice.

<sup>12</sup> See paragraphs 73 and 74 of the Draft Notice.

<sup>13</sup> See paragraph 88 of the Draft Notice.

<sup>14</sup> See paragraph 66 of the Draft Notice.

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- it is unclear whether the presence of multi-sided platforms can have an impact on the geographic market definition, since it is the only “specific circumstance” in which there is no particular reference to the geographic element of market definition; we would therefore advocate for including a reference to the geographic aspect of market definition also in the context of multi-sided platforms.
- (22) Finally, as a general comment, the Draft Notice fails to fully take into consideration the impact that Internet has had on the geographic market definition. Nowadays, a consumer does no longer need to physically move from one market to another in order to purchase a product or get a service. In this context, the Draft Notice should further address, when defining a relevant geographic market, how one should consider online sales and services and online platforms. This should allow the EC to better adapt its market definition to each specific case and to avoid its obsolescence in too short of a period.

### 3. MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES

#### 3.1 GENERAL COMMENTS

- (23) As to the comments to Section 4 of the Draft Notice, we shall focus on the non-price elements taken into consideration when defining relevant markets
- (24) Although the Draft Notice provides a generous list of non-price parameters of competition that the EC may consider for defining relevant markets and are customer driven<sup>15</sup>, we think that, given the indisputable current relevance of digital markets and its accelerated pace of development, it should also consider the possibility of including in the list the degree of product (and/or) service interoperability, that in some cases may be key element generating competitive pressures in this market<sup>16</sup>.
- (25) The Draft Notice states that the assessment of the existence of customer switching given a change in product conditions may not only consider price changes but also changes in the quality of products or its level of innovation;<sup>17</sup> however, it also points out that quantitatively measuring quality is not free of challenges, aspect that is certainly true.<sup>18</sup> It would be desirable for the EC to provide some non-binding examples of quantitative measures of quality based on existing case-law.
- (26) The Draft Notice also lists the evidence considered by the EC for the purpose of carrying out the assessment of competition conditions at a given market or market level.<sup>19</sup> It misses out product quality related evidence so relevant for markets such as the health or pharmaceutical ones. For instance, in the first case, evidence related to quantifiable features such as service provision waiting times or the quality of the service itself is fundamental.

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<sup>15</sup> See paragraph 12 of the Draft Notice

<sup>16</sup> The assessment of this parameter as key to market definition would in any case take into account the specific circumstances of the case, and, in particular, the fact that some suppliers might willingly opt for non interoperable products or services without prejudice of the fact that the market might be highly competitive.

<sup>17</sup> See paragraph 29 of the Draft Notice

<sup>18</sup> See note 47 (paragraph 32) of the Draft Notice

<sup>19</sup> See paragraph 41 of the Draft Notice



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- (27) We believe that the Draft Notice should be adjusted as it could lead to the erroneous interpretation that the only purpose of defining markets is to measure market shares when it states: "*A detailed competitive assessment of how closely suppliers compete with each other may reduce the importance of market shares and hence that of market definition*".<sup>20</sup>
- (28) As stressed-out in the introduction of the Draft Notice, the exercise of defining markets serves different and broader purposes. That is, "*to identify and define the boundaries of competition between undertakings*",<sup>21</sup> or "*The Commission commonly uses market definition where there is a need to assess the relative competitive strength of undertakings in a certain area as part of the competitive assessment*"<sup>22</sup> and, most notably, *to assess whether an undertaking holds market power in that area. Market definition is thus a tool to structure and facilitate the competitive assessment [...]*.<sup>22</sup>
- (29) Therefore, in the presence of differentiated products, market definition not necessarily lacks relevance, it can still be appropriate and should be defined for the purpose of assessing the closeness of competition between operators in a market. This is fundamental in markets where competition is quality driven or under highly innovative markets, typical examples of markets with a substantial degree of product differentiation.

### 3.2 DIGITAL MARKETS

- (30) The AEDC welcomes the introduction of criteria and the evidence that the EC intends to use to define digital markets.
- (31) In our opinion, it is critical to ensure consistency between new digital regulations and the Final Notice and to provide sufficient guidance to allow a uniform interpretation by market participants and national competition authorities and to protect the Single Digital Market in the EU and innovation.
- (32) In the following subsections, we will comment on different issues related to the definition of digital markets.

#### 3.2.1 Demand substitution in the definition of digital markets

- (33) As described in the Draft Notice,<sup>23</sup> market operators are subject to three main sources of competitive constraints: demand substitution, supply substitution and potential competition.
- (34) Demand substitution, the substitutability of products from the perspective of the customer is set out as the general methodology for defining product markets in paragraphs 27 and 28.
- (35) However, in digital markets, imperfect substitutes like products or services that could be interchanged but have different characteristics or are based on different underlying technology (e.g., computers and smartphones) should be considered as competitors. We welcome the explicit

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<sup>20</sup> Proposed drafting for paragraph 86 of the Draft Notice

<sup>21</sup> See paragraph 5 of the Draft Notice.

<sup>22</sup> See paragraph 7 of the Draft Notice.

<sup>23</sup> See paragraph 25 of the Draft Notice.

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recognition that products that may have different characteristics may belong to the same product market when evidence shows they compete.<sup>24</sup>

- (36) On the other hand, when products or services have the same characteristics, but demand is dependent on other parameters such as zero monetary prices, competition for users' data or attention, and/or the existence of other sides of the markets or ecosystems, demand substitution boundaries may be blurred or depend on several interconnected parameters at the same time.
- (37) Although the Draft Notice identifies the evidence that should be assessed for defining demand substitution such as barriers and costs associated with switching costs,<sup>25</sup> it fails to describe how switching costs can be impacted, in digital markets, by single/multihoming use or by the existence of an ecosystem. Further guidance on how demand substitution could be affected by all these elements would be useful.

### 3.2.2 Markets with multi-sided platforms

- (38) When addressing the market definition in the presence of multi-sided platforms, the Draft Notice explains thoroughly the notion of these platforms and how they work in practice. The AEDC welcomes the definition of multi-sided relevant markets in the case of platforms.
- (39) The AEDC also welcomes the identification of the factors the EC may consider when defining either one market for all the products offered by the platform or a separate market for the products offered on each side of the platform. The Draft Notice mentions that the presence of indirect network effects hinders the analysis of demand substitution and, particularly, the application of the significant non-transitory increase in price (SSNIP) test.<sup>26</sup> However, the wording of the Draft Notice in this regard is quite ambiguous and does not explain how to overcome said difficulties regarding the analysis of demand substitution by applying the SSNIP test.
- (40) The AEDC suggests that the EC provides additional guidance on how to include network effects in the market definition process of platforms, in particular further clarification on how to consider indirect network effects when assessing demand substitution.<sup>27</sup> It would also be convenient to specify other criteria which will be used by the EC to assess the demand substitution when the SSNIP test is not applied.
- (41) This further guidance should also consider additional elements, not mentioned in the Draft Notice, such as the role of multi/single homing or the role of data in the analysis of the definition of the relevant market of platforms.
- (42) On the other hand, the Draft Notice recognizes that, when separate markets are defined for each side of the platform, network effects and constraints from other sides of the platform may still be considered in the competitive assessment.<sup>28</sup> However, the competitive assessment of the effects and constraints, from the other side of the platform, might be irrelevant once the relevant market is

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<sup>24</sup> See paragraph 50 of the Draft Notice.

<sup>25</sup> See paragraph 57 of the Draft Notice.

<sup>26</sup> See paragraph 96 of the Draft Notice.

<sup>27</sup> See paragraph 96 of the Draft Notice.

<sup>28</sup> See paragraph 95 of the Draft Notice.



narrowly defined and an undertaking decides e.g. to exclude a particular commercial action because it has more than 40% of the narrowly defined market or to consider a vertical agreement not exempted because it has more than 30% of the narrowly defined market.

- (43) In the case of multi-sided platforms, the EC should be looking beyond what it considers the relevant market to assess the impact on competition both in terms of anticompetitive effects and pro-competitive efficiencies. However, the Draft Notice is not addressing whether efficiencies on the other side of the platform, when defined as a separate market, are going to be included in the competitive assessment.
- (44) We, therefore, suggest the EC expressly considers in the Draft Notice that (i) network effects and constraints from all sides of the platform are taken into consideration when defining the relevant market and that (ii) when separate relevant markets are defined, efficiencies on the other sides of the platform will be included in the competitive assessment.

### 3.2.3 Existence of digital ecosystems

- (45) The Draft Notice addresses the issue of digital ecosystems in Section 4.5. This Section also deals with market definition in aftermarkets and bundles.
- (46) In this regard, the Draft Notice succinctly describes the notion of digital ecosystems<sup>29</sup> by explaining the possibility of defining one or several relevant markets depending on the specific circumstances of the case. We also welcome the description of the criteria that will allow a better classification of ecosystems as relevant markets consisting of “system markets”, dual markets or multiple markets.<sup>30</sup> However, the Draft Notice should be more detailed regarding the specific factors and evidence that would be considered to define one or several relevant markets in digital ecosystems because they are not the same as traditional aftermarkets and bundles.
- (47) The AEDC welcomes the recognition in the Draft Notice of digital ecosystems as possible “system markets”, a relevant market where several products are connected. The AEDC suggest that the Draft Notice acknowledges the impact of competitive constraints from other ecosystems competing for user’s time, attention, or data when it defines the boundaries of competition within the ecosystems.
- (48) As a matter of fact, the Draft Notice ignores the role of data as a “multipurpose input” that should be considered as one of the relevant factors of competition, potential competition, competitive constraints, and supply side substitution, specially where access to data is key for competing in connected markets. In particular, the Draft Notice should shed light on whether, and if so in which circumstances, it is appropriate to define a different market for the supply of data and how this analysis would be carried out in practice.

### 3.2.4 Online and offline channels as part of the same relevant market

- (49) The Draft Notice briefly addresses an important topic such as the analysis of online and offline sales channels to determine whether they may be included in the same relevant market.<sup>31</sup> In

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<sup>29</sup> See paragraph 103 of the Draft Notice.

<sup>30</sup> See paragraph 101 of the Draft Notice.

<sup>31</sup> See footnote 64 of the Draft Notice.

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particular, the Draft Notice ought to be more specific when determining in which cases online and offline sales can be considered part of the same relevant market. Furthermore, the Draft Notice mentions some of the elements and evidence that the EC would take into consideration. Nonetheless, it does not explain how the EC would carry out these assessments.

### 3.3 DEFINITION OF MARKETS WITH ZERO MONETARY PRICE PRODUCTS

- (50) The AEDC welcomes that the Draft Notice explicitly acknowledges that it is appropriate/possible to define a relevant market in the case of products that are supplied at zero price.<sup>32</sup> The Draft Notice confirms that the SSNIP test is the usual tool to assess the relevant market.<sup>33</sup>
- (51) However, it explicitly recognizes that practical constraints can make difficult to apply the SSNIP test empirically in the context of zero monetary price products. These constraints can be particularly important in market definition in the presence of multi-sided platforms when one side of the market has zero monetary prices.
- (52) In order to solve this issue, the Draft Notice identifies other potential approaches such as the SSNDQ test when the price is not a key variable of competition.<sup>34</sup> This approach may be appropriate to respond to the new challenges that arise as a result of the development of new technologies and products. Nonetheless, the application of the SSNDQ would be challenging in practice since the Draft Notice does not specify which metrics should be considered to carry out this analysis. It would thus be advisable to provide further guidance on the application of this test. In addition to that, there is, at least, another element that the EC should take into consideration along with the SSNDQ. Surveys, for instance, can allow for collecting useful information for the objective of defining relevant markets. Of course, a careful design of the survey is key for obtaining valid and non-biased information. The Draft Notice identifies other elements such as functionalities, intended use, evidence on hypothetical substitution barriers or costs of switching that could be considered in zero monetary prices products. However, the EC should also take into consideration other factors such as demand (competition) for user's time, attention, or data when defining the relevant market.
- (53) In general, more guidance on how the tools and the tests can be applied, how to use the different elements in a systematic manner or how to measure market shares in zero monetary price markets will help market participants and national competition authorities to approach the matter in a uniform manner.

### 3.4 MARKET DEFINITION IN THE PRESENCE OF SIGNIFICANT INVESTMENTS IN R&D

- (54) The AEDC welcomes the inclusion of a specific section of the Draft Notice referring to the incidence of R&D investments in product market definitions related to highly innovative industries.

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<sup>32</sup> See paragraph 97 of the Draft Notice.

<sup>33</sup> See paragraph 32 and 33 of the Draft Notice.

<sup>34</sup> See paragraph 98 of the Draft Notice.

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- (55) When it comes to pipeline products, the EC refers to the term “sufficient visibility”<sup>35</sup> as the relevant parameter to decide on the inclusion of those products in a given relevant market, either existent or a new one.
- (56) The main difficulty the AEDC perceives with this approach concerns the confidentiality and secrecy inherent to these types of R&D processes and, therefore, the also inherent lack of “sufficient visibility” to conduct such an assessment in non-merger cases.
- (57) Whereas in a merger case, the EC may conduct industry investigations and thereby assess the market substitutability of the merging parties’ pipeline products, this is not possible for instance in the context of a company’s self-assessment of compliance of its individual behaviour or agreements with article 101 or 102 of the TFUE. Other than investing in presumably promising R&D projects and thereby assessing their own potential substitutability with existing products, companies may have no means to evaluate whether other third parties are conducting similar research and, even less, to determine if an R&D project in a separate field may give rise to products which can be substituted to their own existing product or pipeline product.
- (58) Conversely, in the case of self-assessed agreements or practices and their potential benefit from block exemption Regulations<sup>36</sup> parties lack guidance on how to assess their own market power considering their own pipeline products and those of third parties.
- (59) The AEDC would suggest either providing further clarification or just confirming that the relevance of R&D developments for market definitions is mostly limited to merger cases.
- (60) As regards the relevance of so-called innovation initiatives for market definition purposes, the AEDC already stressed in its comments to the EC’s evaluation of EU Competition rules on horizontal agreements between undertakings that in *Dow/DuPont* the EC appears to expand the scope of scrutiny of competition in innovation to early stage R&D efforts –so called “innovation spaces” or “discovery targets” over which firms compete-, where products are years away from reaching the market.
- (61) The EC refers to this concept in paragraph 91 and footnote 107 of the Draft Notice. However, the concept of innovation spaces remains unclear as it is not legally defined in the Draft Notice or elsewhere. Although acknowledging the list of relevant factors included at the end of paragraph 91 of the Draft Notice, most of them will largely be unknown for the parties involved in a given conduct or transaction.
- (62) The AEDC considers that for legal certainty, the notion of “innovation spaces” needs further clarification if relevant for market definition purposes. Again, it may well be that the concept is only relevant, applicable and somehow verifiable in merger cases.
- (63) Otherwise, if applicable, in order to assess market shares, it must be explained if parties competing in innovation should calculate their market shares in such “innovation spaces” only or in terms of R&D efforts in other product markets or in both of them. If applicable, it must be explained how parties should calculate their market shares in “innovation spaces”.

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<sup>35</sup> See paragraph 90 of the Draft Notice.

<sup>36</sup> The concept of potential competitor included in the Regulations in force and both the Draft Specialization BER and the Draft R&D BER does not provide sufficient guidance in this respect.

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- (64) Also, we think it would be advisable for paragraph 91 of the Draft Notice to mention that the assessment of competition conditions in these cases should be performed under a dynamic perspective, given that the relevant question in such matters is related to the potential sources of competition and the expected use and application of a given R&D effort. That is, the analysis should bear into account the fact that the result of the innovation -or the process itself- is not static so, given its nature, the assessment of competitive conditions should, or could, have a reasonable time-varying dimension.
- (65) Similarly, as future developments are uncertain by nature, it would be desirable to give in the Draft a set of examples when competitive pressures stemming from future innovation are borne into account<sup>37</sup>. This would offer more clarity and reduce potential uncertainty when interpreting the Draft.

#### 4. MARKET SHARES

- (66) In relation to the market shares section, the AEDC welcomes that metrics other than sales for the purposes of market shares calculation got mentioned. However, and appreciating that the appropriate metrics for each case may inevitably evolve over time, the Draft Notice could usefully provide guidance on the weight placed on different metrics where available.
- (67) When mentioning that the number of tenders awarded might be an appropriate metric to calculate shares in bid markets, it should be notice that there has not always been a consistent view on this regard. While there are precedents where the Commission has relied on the bidding nature of the markets to place a relatively lower weight to high shares in the analysis of competition conditions,<sup>38</sup> in other cases the Commission and the General Court have disregarded the bidding nature of the markets due to “persistently high” market shares.<sup>39</sup> Against this background, it would be helpful that the Draft Notice reviewed the existing case law and provided further guidance on the circumstances in which the Commission will rely on the bidding nature of the markets.
- (68) Additionally, the Draft Notice could usefully clarify the circumstances in which captive sales are relevant for calculating market shares in “merchant” markets. Under the merchant market rule, there is an inherent assumption that the supplier will not redirect captive use production in reaction to a price increase and will thus not exert a competitive constraint on the newly created entity post-transaction. Yet this may not always be true, in particular, with respect to fast-moving markets or those markets that are characterised by virtually no limits on capacity and low variable costs, which renders the application of the rule extremely uncertain. Clarifying the application of the merchant market rule would provide legal certainty for market participants in a range of intermediate industries where such issues are common including infrastructure and mining, as well as fast moving digital markets.
- (69) Similarly, it would be useful if the Draft Notice could clarify the approach to the calculation of market shares in cases where a significant part of the sales is made through medium-long term contracts.

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<sup>37</sup> These examples could be included in paragraph 93 of the Draft Notice, similarly to those included later in paragraph 101.

<sup>38</sup> See e.g., RWE/Essent Case M.5467 of 23 June 2009, Oracle/PeopleSoft Case M.3216 of 26 October 2004, WPP/TNS Case M.5232 of 23 September 2008.

<sup>39</sup> See General Electric Company vs. Commission, para. 149 et seq.

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In these cases, the market shares calculated over *recent* transactions/sales (rather than on *total* sales) can provide a more accurate view of the current competitive position of the companies in the market.

- (70) It would be useful if the Draft Notice could also provide guidance on the relevant metrics for the calculation of market shares in cases where some market players charge a price for the products/services provided while others provide them for free. For instance, in software markets, where open-source developers do not charge a price for their products, indicators based on shipments rather than sales can provide a more useful indication of the competitive position of the parties than shares based on revenues. In other cases, the relevant metric is less straightforward, if customers engage in multi-homing or combine free and pay products/services.
- (71) As per rapid innovation, mainly (but not necessarily) fostered by digitalisation, where available market shares may not be relevant or representative for the upcoming years, we would welcome an indication in the Draft Notice that the Commission is able to adapt the application of the principles in the Notice flexibly to consider dynamic changes to the structure of a relevant markets including by taking account of the parties' predictions on how the markets will likely evolve. Moreover, and given the constant change of digital markets that poses significant challenges for the assessment of market power, it would be welcome a description or guidance of other tools that can be used to adequately address market power when market shares are not a good indicator of said power (see, for instance, European Commission's reasoning in Microsoft/Skype<sup>40</sup>).
- (72) Finally, it would be useful if the Commission could acknowledge the difficulties associated to calculating market shares in markets where there is a large number of medium-small competitors (a fragmented competitive fringe). In these cases, reconstructing the market using information obtained directly by the Commission from market players may be difficult or even impossible, given that in some instances it is not possible to obtain a comprehensive list of all players involved. In these cases, market shares calculated dividing the sales of the parties over an estimate of the total size of the market may provide a more accurate view of their market position, provided that the methodology used to estimate market size is reasonable and based on rather conservative assumptions.

Madrid, 13 January 2023

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<sup>40</sup> See Case COMP/M.6281 - Microsoft/ Skype, Commission Decision of 7 October 2011.