

European Commission  
DG COMP

13 January 2023

## **The Danish Chamber of Commerce’s consultation response regarding the draft revised Market Definition Notice**

The Danish Chamber of Commerce welcomes the opportunity offered by the European Commission to comment on the draft Commission Notice on the definition of the relevant market for the purposes of Union competition law (the “draft Notice”) published on 8 November 2022.

### **General remarks**

The Danish Chamber of Commerce believes that healthy and strong competition in the internal market is imperative for European companies’ ability to compete internationally: “*Competition starts at home*”.

By providing the basis for the application and interpretation of European – and to a great extent also national – competition law, the Commission Notice has ensured the legal certainty and predictability necessary for businesses to operate and compete on both EU and national markets and has established itself as a fundamental piece of competition law legislation.

The current Commission Notice dates back from 1997, and the world, the markets and the business economy have developed scientifically in in the past 25 years, becoming increasingly more digital and global. The Danish Chamber of Commerce therefore strongly supports the Commissions initiative to update the 1997 Notice, to reflect the digital and global reality in which European companies operate.

The Danish Chamber of Commerce welcome the fact that the draft Notice has maintained the general standard methodology offered by the 1997 Notice and provides guidance on the principles and best practices of how the Commission applies the concept of relevant product and geographic market in its enforcement of EU competition law.

The Danish Chamber of Commerce emphasizes the importance of ensuring, that the revised Notice is a usable document for the companies using it, allowing for companies to carry out a self-assessment based on the criteria and elements included in the Notice. For that purpose, the Danish Cham-

ber of Commerce greatly support the incorporation of recent case law developments as well as provides additional guidance on specific circumstances, including multi-sided platforms and digital ecosystems, in the draft Notice. The Danish Chamber of Commerce would however still invite the Commission to consider expanding or supplementing the draft Notice with guidelines like those known from the existing block exemptions guidelines on vertical- and horizontal agreements.

## **Specific remarks**

### **Section 1 – Introduction (paragraphs 1-18)**

#### Purpose of the notice

- 1.1. The Danish Chamber of Commerce shares the Commission's views on the purpose of the notice and the importance of competition policy in preserving a well-functioning market, as well as contributing to the twin green and digital transitions by addressing relevant market failures and supporting the resilience of the single market.
- 1.2. The Danish Chamber of Commerce supports the Commission's efforts to update the notice, to reflect the significant developments of the past twenty years, specifically around digitalization, globalization and the ever-growing expansion of e-commerce.

#### Role of market definition

- 1.3. The Danish Chamber of Commerce welcome the new addition to the draft Notice, providing guidance on the role of the Notice as well addressing in which situations it is relevant or necessary to define the market.
- 1.4. The Danish Chamber of Commerce further support the clarification of the Notice relevance specifically as it relates to the definition of dominance, assessments under 102 and 101 (where relevant), mergers, and effect on trade between member states.
- 1.5. The Danish Chamber of Commerce recognises that the market definition in principle plays less of a role in the Commission's State aid enforcement. However, the necessity to define markets in state aid cases to avoid distortion on the internal market is important. The assessment of which distortions may arise in the internal market when state aid is given, is more important than ever. Given the rather extended use of state aid through successive crisis as well as the Important Projects of Common European Interest and in general a more permissive stance on state aid – it is important to underline that distortion in the internal market will not be accepted even in the face of potential distortions in global markets.

#### General principles of market definition

- 1.6. The Danish Chamber of Commerce support the clarification in the draft Notice, that the market definition is based on the facts of the case, and agrees in principle, that the European Commission is consequently not bound to apply the definition from past decision in future cases. However, the Danish Chamber of Commerce believe that deviation from previous case law, should be the absolute exemption, as this may otherwise create significant legal uncertainty and significantly diminish the useability of the Notice.

- 1.7. Paragraph 12 introduces notions such as sustainability and durability as parameters of competition, which the Commission may consider when defining the relevant market for a specific product. The Danish Chamber of Commerce believe these are all important factors but is concerned that these may give cause to uncertainty when using the notice, as these concepts are subjective and have no agreed definition. For such reasons, the Danish Chamber of Commerce ask the Commission to include sufficient explanation to ensure consistency in the application of the Notice and to ensure that the examination is of the market as it is, not that it is envisioned to be(come).
- 1.8. Paragraph 16 refers to “expected transitions” as one of the parameters that the Commission may consider when the market definition calls for a forward-looking assessment, but no examples or further description of what “expected transitions” is included in the draft Notice. The Danish Chamber of Commerce believe relevant examples would greatly benefit the transparency, useability, and predictability of the Notice, especially as this parameter does require the Commission to predict the future. As a minimum, the draft Notice should include more information on what a “strong indication” and “sufficient probability” entails.

## Section 2 – Concept of the relevant market and general methodology (paragraphs 19-45)

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

- 2.1. The Danish Chamber of Commerce support the update of the draft Notice to reflect the case law of the Court of Justice, and the General Court of the European Union, as well as the Commission’s case-practice.
- 2.2. Paragraphs 20 and 21 restates the fact that, the substitutes remain the starting point when defining the relevant product market, while areas in which there are a sufficiently homogeneous conditions of competition, remain the starting point when defining the relevant geographic market.

### General methodology for defining product markets

- 2.3. The Danish Chamber of Commerce welcome the clarification by the Commission on the general methodology to assess demand and supply substitution.
- 2.4. The Danish Chamber of Commerce believes that the issue of substitution is not only relevant from a demand and supply point of view, but also from a channel substitution point of view, e.g., buying versus leasing or renting, brick-and-mortar versus online, which is becoming more and more common. For this reason, the Danish Chamber of Commerce invite the Commission to clarify that channel substitution should be part of the standard assessment when looking into consumer markets.

### *Demand substitution*

- 2.5. The Danish Chamber of Commerce is on principle concerned about the focus on price and the SNIPP-test, as the predominant factors when assessing the market, despite the draft Notice

acknowledging the limitations of the SNIPP-test, especially considering the expansion of zero monetary price products.

- 2.6. The Danish Chamber of Commerce believe that there are products which may have such strong customer loyalty and be so integrated into customers preferences, both in B2B and in B2C relationships, that they are in fact unavoidable for sellers in the given market. As such companies which do not themselves met the standard criteria for dominance, may still in fact, own or control a product or service, which is so significant and important, that the product or service itself may imitate a “must carry product” or “essential facility” type of product. The Danish Chamber of Commerce would invite the Commission to include such considerations.
- 2.7. The Danish Chamber of Commerce emphasize the need for the draft Notice to – to a greater extent – address customer preferences and changes go to consumer behaviour, when assessing the relevant market.

#### *Supply substitution*

- 2.8. The Danish Chamber of Commerce recognise the relevance of supply substitution when defining the market and welcome the reference made to typical situations, where sufficiently strong supply substitution may arise, as well as situations in which the market will not be widened. The Danish Chamber of Commerce would however invite the Commission to include guidance on the lessons learned during the recent covid-epidemic, more specifically situations where an undertaking shifts production out of community spirit, and not from a desire to change business model.

#### General methodology for defining geographic markets

- 2.9. The Danish Chamber of Commerce believe the high degree of substitution existing between online versus offline, as digitalization, low switching costs and the development of the internet, has resulted in online shopping becoming much more common, should have a more prominent place when assessing the geographic market.
- 2.10. Regarding the treatment of imports, we welcome the Commission’s clarification on how these will be assessed when defining a relevant market.

### Section 3 – Process of defining markets (paragraphs 46-82)

#### Evidence to define product markets

- 3.1. Reference is made to our comments above in section 2, as they relate to this issue.

#### *Evidence relevant for demand substitution*

- 3.2. Regarding demand substitution, the Danish Chamber of Commerce emphasizes that while characteristics such as prices, intended use and general customer preferences are generally useful to identify range of substitutes, there are situations in which products may appear to be demand substitutes, but which – due to the consumers’ value of the product attributes – are not. Examples could include hockey skates vs. figure skates, snowboards vs. skies, and

bananas vs. apples. As such, the Danish Chamber of Commerce would invite the Commission to include additional guidance on this.

- 3.3. The Danish Chamber of Commerce welcomes the guidance on how to assess competition between different distribution channels (online and offline).
- 3.4. The Danish Chamber of Commerce welcomes the draft Notice's comments on the applicability of hypothetical substitution, especially in relation to the reliability of customer surveys, as well as the relevance of barriers and costs associated with switching demand to potential substitutes, when assessing the relevant product market.
- 3.5. Channel substitution such as buying versus leasing or renting, brick-and-mortar versus online, is becoming more and more common. For these reasons, the Danish Chamber of Commerce would invite the Commission to clarify that channel substitution should be part of the standard assessment when looking into consumer markets.
- 3.6. The Danish Chamber of Commerce further invites the Commission to reflect on the substitutability between sectors (e.g., retail and hospitality) in market analysis for consumer markets. For instance, as consumers increasingly eat out of home (at restaurants), buy takeaway ready-made meals from the hospitality sector or explore options such as meal kit subscriptions, retailers are increasingly competing with the out-of-home food market and meal delivery/meal kit platforms. Another example is the trend towards the collaborative economy, e.g., renting /sharing of products, so that bike retailers now compete with bicycle-for-hire platforms.

*Evidence relevant for supply substitution*

- 3.7. Referring to clause 2.8 above, the Danish Chamber of Commerce would invite the Commission to include additional guidance on this.

Evidence to define geographic markets

- 3.8. Reference is made to our comments above in section 2, as they relate to this issue.
- 3.9. The Danish Chamber of Commerce welcomes the clarifications made in this section of the Notice.
- 3.10. Concerning the relevance of market share, the Danish Chamber of Commerce agrees that market shares, may not always be sufficient to determine whether conditions of competition are sufficiently homogeneous.
- 3.11. The Danish Chamber of Commerce supports the Commission's focus on customer preferences and purchasing behaviour as guiding principles when assessing the geographical market.
- 3.12. The Danish Chamber of Commerce believes that the relevant market often changes from sector to sector, and from product to product, and may in fact also change within a specific market depending on buyer preferences. In some situations that market is local (e.g., driving

school) or national (e.g., newspapers), while it is in other situations European (e.g., tulips) and in other situations global (e.g., wind turbine and even certain consumer products). While a global market will in most cases be a step to far, it must in all cases depend on an individual and thorough assessment of the relevant market. For these reasons, the Danish Chamber of Commerce welcome the Commissions point that the assessment of the geographical market is likely to be based on an examination of customers' current geographic pattern of purchases.

- 3.13. The Danish Chamber of Commerce welcome the focus on barriers and costs associated with supplying customers in different areas, when assessing the geographical market, keeping in mind, that while consumers may purchase products from anywhere within the EEA (B2C), companies may not always have that same opportunity (B2B), as markets may be (legally) divided within a company group or by use of selective distribution systems.
- 3.14. The Danish Chamber of Commerce support the inclusion of distance-related factors, such as e.g., distance and transport costs when assessing the geographical market, but emphasizes that distance and price of transport may in certain situations be second to customer preference, loyalty and tradition.
- 3.15. Regarding consumer markets, the Danish Chamber of Commerce welcome the further guidance on this issue and the use of catchment areas but would invite the Commission to recognize the significant impact digitalisation and e-commerce has – and is –having, and the fact that what was previously local or maybe regional, may now be national or even European, and in very specific situations global.

#### Gathering and evaluating evidence

- 3.16. Reference is made to our comments above in section 2, as they relate to this issue.
- 3.17. The Danish Chamber of Commerce welcome the clarification on this issue but would invite the Commission to include additional clarification on the assessment of qualitative empirical evidence.
- 3.18. The Danish Chamber of Commerce welcome the guidance on the treatment of different types of evidence.
- 3.19. The Danish Chamber of Commerce emphasizes that empirical quantitative evidence such as data on customer purchasing patterns should be regarded as highly relevant; especially compared to e.g., customer surveys which may not necessarily translate into actual purchasing behaviour.

#### Section 4 – Market definition in specific circumstances (paragraph 83-103)

- 4.1. The Danish Chamber of Commerce welcome the further guidance provided on issues in this section, such as defining relevant markets for platforms, ecosystems and aftermarket.

Market definition in the presence of significant differentiation

4.2. The Danish Chamber of Commerce welcome the clarification that in situations of product- and geographic differentiation, market share may provide a less reliable indicator of market power.

Market definition in the presence of significant investments in R&D

4.3. The Danish Chamber of Commerce welcome the clarification on this issue but would invite the Commission to include additional clarification and examples.

Market definition in the presence of multi-sided platforms

4.4. Large – but not dominant – companies leveraging assets such as users, data and/or revenue, from one market or service to another market or service, thereby making it possible for the large – but not dominant – company, to close off or limit the market for new or other companies in the market, is a challenge with especially multi-sided platforms.

4.5. The Danish Chamber of Commerce welcome the clarification on defining the relevant market when dealing with multi-sided platforms, especially the inclusion of indirect network effects between user groups on different sides of the platform when defining the relevant markets and/or in the competitive assessment.

4.6. The Danish Chamber of Commerce support the clarification that a relevant product market may be defined for the products offered by a platform as a whole, in a way that encompasses all (or multiple) user groups, or it may define separate relevant product markets for the products offered on each side of the platform.

4.7. Regarding the “sale” of products at a zero monetary price, the Danish Chamber of Commerce welcome the clarification that when dealing with multi-sided platforms, such “price” does not imply that there is no relevant market for that product and the importance of substitution in these situations.

Market definition in the presence of after markets, bundles and digital ecosystems

4.8. The Danish Chamber of Commerce believe the integration within a given market, as well as the ecosystem the companies operate in, should be considered when assessing the relevant market.

4.9. The Danish Chamber of Commerce welcome the clarification of the relevant market in connection with primary- and aftermarkets and the distinction between (i) system markets; (ii) multiple markets; or (iii) dual markets.

4.10. The Danish Chamber of Commerce further welcome the clarification of the relevant market in connection with digital ecosystems.

Section 5 – Market shares (paragraphs 104-111)

5.1. The Danish Chamber of Commerce welcome the further guidance provided on the calculation of market shares.

- 5.2. The Danish Chamber of Commerce believe that the emergence of business models without monetary counterparts, including the provision of “free” services in exchange for customer time, data and/or attention, or where a service provider has grown so large, that it is effectively unavoidable for companies wishing to do business in the given market, are all examples of situations, where a company’s turnover does not provide an adequate picture of that company’s market share or influence.
- 5.3. The Danish Chamber of Commerce therefore welcome the clarification that market share, is not the sole indicators of an undertaking’s strength in a given market and that other factors may be equally important and the inclusion of other metrics, including number of (active) users, number of visits, number of downloads and updates, number of interactions, or volume or value of transactions concluded over a platform, may be relevant in determining the relevant market.

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The Danish Chamber of Commerce is of course available if there are any questions about the answers given in the consultation.

Best regards,

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