

MEMORANDUM

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From: Vogel & Vogel

Ref: Observations of Vogel & Vogel on the Commission's proposal for a Notice on the definition of the relevant market for the purposes of EU competition law

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The following are the observations of Vogel & Vogel on the draft revision of the Commission's Notice on the definition of the relevant market for the purposes of EU competition law (hereinafter, "*the draft notice*") in which we highlight (I) the welcome and positive advances of the notice. However, the Firm considers it necessary to note that certain points of the notice could be improved in order to ensure (II) greater legal certainty for businesses and a better fit with economic reality (III). Finally, the firm offers suggestions that the Commission may wish to consider in its next revision of the notice on relevant markets. (IV)

I. WELCOME AND POSITIVE PROGRESS OF THE DRAFT NOTICE ON THE DEFINITION OF RELEVANT MARKETS

Vogel & Vogel welcome the willingness to update the Notice in light of the profound market changes that have occurred since then and to validate the stated objective of adapting the current text to the challenges posed by the digitalization of the economy and the new modes of supply of goods and services, as well as the increasingly interconnected and globalized nature of international trade.

A. The Commission's new approach to market definition

The 1997 notice adopted a very formalistic approach in which the definition of markets was the necessary prerequisite for the competitive analysis. The draft notice has a new approach by including external constraints emanating from third parties to the market and favors an effects-based approach for the analysis of so-called "*differentiated*" product markets.

- Re: external constraints, the Commission states that it takes into account in its competitive analysis "*all competitive constraints (immediate or not)*", and that "*market definition allows for the distinction between competitive constraints from within and from outside the market, by including only the immediate competitive constraints in the relevant market*" (pt. 14 of the draft notice).
- Re: the 'differentiated' product markets, where there is no homogeneity, an effects-based analysis is preferred. Indeed, according to point 86 of the draft notice: "*[w]hen products are differentiated, market shares may provide a less reliable indicator of market power and the Commission normally analyses whether the undertaking(s) involved and other suppliers compete closely, as part of its competitive assessment. 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*".

Point 109 of the draft notice provides that: "*in the case of a significant degree of product or geographic differentiation, market shares tend to be less informative, and it may be more relevant to assess the degree of substitutability in a competitive assessment. The Commission may, where appropriate, rely on shares for segments of the relevant market and take those into account when assessing how closely undertakings compete with each other and with their competitors.*"

This break with the traditional approach is welcome and is in line with the vision of the United States and the United Kingdom with regard to mergers. Indeed, their guidelines favor the assessment of unilateral effects, to the detriment of the assessment of the degree of concentration by market shares.

B. New factors included in the draft notice taking account of the digitalization of the economy

- In particular, the draft notice enshrines the concept of asymmetric competition (pt. 15 of the draft notice) as an element that can vary the definition of a market when it concerns the same economic activity in terms of products and geography. This parameter has already been used by several national competition authorities, including the French Competition Authority (hereinafter "*Adlc*"). In a decision of 17 November 2020, the Adlc found this form of competition for the small retail market (outside Paris), considering that "*while hypermarkets and supermarkets compete vigorously with small retail outlets (less than 400 sq.m.), the opposite is almost never true.*"¹ . Asymmetrical competition can be used in the digital sector because it competes strongly with certain traditional activities (online versus physical commerce; online versus offline advertising in traditional media) even if the reverse is not necessarily true or not true to the same degree.

¹ ADLC, 17 November 2020, No. 20-DCC-164, point 19.

- Similarly, the notice provides in point 16 of the draft that the Commission may "*take into account expected transitions in the structure of a market when the case calls for a forward-looking assessment*". The consideration of market transitions is a positive step in order to take into account the digital revolution that has taken place since the 1997 Communication.
- Interestingly, price is no longer the only parameter of the competitive analysis; indeed, point 32 of the Communication states that "*when undertakings compete on parameters other than price, such as quality or level of innovation, this makes the application of the SSNIP test difficult, in particular, in the context of zero monetary price products*". Thus, quality or the level of innovation must also be included in the analysis in the context of zero-monetary-price products (pt 32 of the draft notice). Here, the draft illustrates this development with the Google Shopping decision², in which the Commission had examined whether manufacturers, users and app developers would switch from Android app stores to app stores of other mobile operating systems in the event of a small but significant and non-transitory degradation in quality. This is the "*Small But Significant Non-Transitory Decrease of Quality*" (SSNDQ) test. The emphasis on this decision reflects the Commission's willingness to broaden the definition of markets to the digital sector.

Vogel & Vogel is therefore in favor of these new features proposed by the Commission regarding the definition of relevant markets in the context of a competition law analysis.

II. CLARIFICATION NEEDED FOR SOME POINTS REGARDING GREATER LEGAL CERTAINTY FOR UNDERTAKINGS

A. Lack of clarity makes it difficult for undertakings to evaluate their contracts

The Commission recalls its usual practice of studying all possible definitions when the market definition is left open (pt. 18 of the draft notice), which in practice leads to the study of many extremely narrow hypothetical markets. Such an approach has the effect of making the preparation and examination of notification files considerably more cumbersome; clarification of the limits on the Commission's ability to multiply the number of segments would be welcome.

It is also stated that the Commission can leave the question of market definition open both in situations where there are competition concerns and in situations where there are no competition concerns. It adds that the depth of the competitive analysis can vary from one market to another. These last two elements are unclear and do not provide undertakings with a clear line of conduct on how to proceed, thus creating considerable legal uncertainty. It would be useful to specify in which cases a market should or should not be subject to an in-depth study, and the rationalizations that lead the Commission to carry out a market definition or not.

B. A very broad toolbox at the disposal of the Commission but without sufficient legal certainty as to its use in specific cases for businesses

1) The tools used in the framework of the definition of markets under usual conditions

² AT.40099, Google Android.

The text continues to offer the Commission a wide margin of maneuver, but without accompanying its options with sufficiently strict conditions of application that could guide undertakings and guarantee their rights. Thus, the draft states in turn that the outcome of market definition applies generally to both merger control and anticompetitive practices (pt. 11 of the draft notice), but footnote 20 immediately contradicts this principle by stating that in some cases it may be different, without explaining which ones. Moreover, point 32 of the draft notice highlights the difficulties arising from the application of demand-side substitutability depending on the "*type of analysis carried out*", i.e. merger analysis or dominance. It would therefore be useful to clarify the relationship between the principle and the exceptions.

Furthermore, it would have been worth noting in the draft notice that the definitions of the relevant market for regulated sectors (telecoms, energy, etc.) are not necessarily the same as those for competition law, given that the objectives of competition law and regulatory law differ.

2) The tools used in the framework of the definition of the markets under specific conditions

Market definition in the context of multi-sided platforms can, according to the draft (pt. 95 of the draft) be carried out by the Commission in two ways, either a product market for the products offered by a platform as a whole or a separate relevant product market for the products offered on each side of the platform. It would be helpful for the Commission to clarify when one approach will be preferred by the Commission over the other.

In the context of multi-sided platforms, the definition of a market in case of provision of a zero monetary price product is unclear (pt. 98 of the draft notice). The draft proposes to refer to "*intended use*" of the product, "*evidence of hypothetical substitution*" or "*competitive constraints based on industry views*", and "*barriers or costs of switching*", but these components do not seem to represent a substitute value for a monetary price. It would be interesting if the draft notice could be more precise regarding these references and address, for example, user data that could add greater value to the sale of online advertising.

The three possible ways to define aftermarkets are addressed: (i) the system market comprising both primary and secondary products, (ii) multiple markets, i.e. a market for the primary product and separate markets for the secondary products associated with each brand of the primary product, and (iii) dual markets, i.e. the market for the primary product and the market for the secondary product (pts. 100-102 of the draft notice). However, the draft gives too much flexibility as to the conditions for classification in a particular category, which results in some aftermarket products still being analyzed by brand even though multi-branding is nowadays the norm.

It would be beneficial if the Commission would consider all of these remarks in order to make the notice more precise for the benefit of national and European authorities as well as undertakings, as stakeholders in the economy.

III. ADJUSTMENTS ARE NEEDED TO MAKE THE SYSTEM MORE CONSISTENT WITH ECONOMIC REALITY

A. Too much weight given to past decisions, but without any guarantee of certainty for undertakings

The draft continues to allow the analysis of current or future markets on the basis of past decisions (pt. 11 of the draft notice), which are often old and obsolete. This way of proceeding can lead, in the field of merger control, to the reiteration of market definitions that are disconnected from reality. From a certain age of precedents, which could be defined, it would be more efficient to analyze the relevant markets *de novo*, without prejudice, and to compare the results with past decisions in a second phase. Above all, as far as anticompetitive practices are concerned, the position of undertakings is quite disadvantageous and unfair: the Commission is in no way bound by its past decisions (pt. 11 of the draft notice), while undertakings relying on them have no right to assert legitimate expectations (footnote 21). The draft notice refers to a judgment of the General Court of the European Union of 7 May 2009³, stating that “[i]n particular, the applicants cannot have entertained such a legitimate expectation on the ground that the Commission had defined markets in a particular way in a previous decision, since the Commission - and, a fortiori, the Court - is not bound by the findings made in such a decision”. However, the non-recognition of a legitimate expectation in a prior market definition appears unbalanced if the Commission itself can depart from its previous decision-making practice in an imbalanced manner with no rights for undertakings. At the very least, an undertaking that has relied in good faith on a precedent should be granted immunity or a reduction of the fine in the event of an infringement.

Point 15 of the draft notice recalls that “*the markets defined are often the same across cases and assessments when the same economic activity in terms of products and geography is concerned*”. Footnote 24 of the draft illustrates this principle giving airlines and online advertising sectors as examples. However, these risks setting the definition of those markets in stone, in contradiction with the principle set out above (pt. 11 of the draft notice) that past decision-making practice does not determine the definition of markets for the future. Footnote 24 should be deleted.

B. Concepts in the draft notice that could be made more compatible with the economic life of undertakings

1) Aspects requiring clarification so that the undertakings can apply them in practice

First of all, the notion of “*purchasing market*” is provided for in point 6 of the draft notice but it is not specified in which cases a purchasing market may be preferred to a selling market. It would be helpful to understand the possible choices for undertakings and to state whether there is a hierarchy between the two.

³ EU Court of Justice, Case T-151/057 NVV and Others v. Commission, Judgment of 7 May 2009, paragraph 136.

Secondly, the draft provides in point 15, in the "*time period considered*" element that can result in a difference in the definition of markets, for the possibility of convergence of markets over time for the geographic definition of markets. It would be useful for the Commission to add this hypothesis for the definition of a product market.

In addition, supply-side substitutability is always considered very peripherally without sufficient explanation. The draft states that "*Supply substitution can also be relevant for the definition of the relevant market in some cases, namely when it is also immediate and effective on the demand side*" (pt. 25 of the draft notice). The relationship between supply-side substitution and demand-side substitution, as well as the conditions under which supply-side substitution can be used, should be clarified, as the text is unclear as it stands.

Similarly, the consideration of transitional effects (pt. 16 of the draft notice), which is welcome, is subject to an excessively high standard of proof that makes this concept difficult to apply in practice. The only example cited is that of the appearance of generic drugs (through the Generics decision⁴ of the Court of Justice) whose effect on the relevant markets is widely known and documented. It would be interesting for the Commission to provide illustrations other than in the pharmaceutical sector.

Finally, the Commission has introduced in point 22 of its draft notice "*temporal considerations*" as an element of product and geographic market definition where certain factors "*affect customer preferences or the structure of supply*". Given that variation in supply and demand over time is a widespread characteristic, it would be desirable to add that this element can "*substantially affect*" customer preferences or supply structures.

2) The primacy of objective quantitative tests over more subjective qualitative tests as a means of proof should be provided for in the notice

The draft does not recognize the superiority of quantitative tests, such as the SSNIP test, over highly subjective qualitative modes of evidence (such as requests for information from the sector). This can lead to flawed market definitions prevailing. Moreover, the application of the SSNIP test is ranked as the last relevant evidence after hypothetical substitution evidence or "*industry views*" (pt. 56 of the draft notice), which are often not very objective and are too often biased. While it is true that the data needed to calculate quantitative tests are often lacking, when they do exist, quantitative tests and in particular the SSNIP test should take precedence over qualitative tests.

It is undeniable that quantitative tests allow us to nuance the subjective approaches that constitute the returns from market tests. The responses to market tests contain serious strategic biases such as the desire of certain respondents to harm the development of a competitor, the desire to avoid a shift in the balance of power between suppliers and buyers, the retaliation of candidates who have been excluded from a transfer process, the desire to exert pressure on a trading partner, etc. Operators with a positive or even a neutral opinion have little incentive to respond, which leads to an over-interpretation of negative opinions.

⁴ CJEU Case C-307/18 Generics, Judgment of 30 January 2020.

The draft notice appears to be more demanding regarding the evidence used for the definition of relevant markets (pts. 49 et seq. of the draft notice), whereas it does not appear from the draft notice that this principle applies to the returns from market tests (pts. 56 and 78 of the draft notice). This is surprising given that such evidence is more subjective than quantitative tests. It is therefore a necessity that the Commission asserts the superiority of quantitative tests over qualitative tests in order to obtain market definitions that better correspond to economic reality.

Taking these elements into account would create a notice more in line with the economic reality of business life.

IV. SUMMARY OF PROPOSALS FOR THE REVISION OF THE NOTICE ON RELEVANT MARKETS

In summary, a list of changes is proposed that the Commission could take into account in the revision of the Notice on relevant markets:

- 1) As regards the possibility for the Commission to leave the definition of a market open, it would be useful to specify in which cases a market should or should not be subject to an in-depth study and the justifications that lead the Commission to define or not to define a market.
- 2) The draft states that the market definition applies generally to both merger control and anticompetitive practices but provides an exception in footnote 20. It would be necessary for the Commission to clarify the relationship between the principle and that exception.
- 3) In the context of the definition of a multi-sided market, two approaches to market definition are possible, and it would be useful for the Commission to specify in which cases one approach is favored over another.
- 4) The references used by the Commission for the definition of a market in the case of a zero monetary price should be clarified.
- 5) From a certain age of precedents (used for the definition of markets), which could be defined, it would be more efficient to analyze the markets in question *de novo*, without prejudice, and to compare the results with the precedents in a second phase.
- 6) If an undertaking has relied in the operation of its business on the definitions previously established in Commission decisions, it should at least be granted immunity or a reduction of the fine in the event of an infringement, if it has relied in good faith on such a precedent.
- 7) In respect of evidence, it is necessary to recognize the primacy of quantitative over qualitative methods, as the former are the result of proven economic analyses while the latter are generally more subjective.



- 8) In order to be more in line with the economic reality of business life, footnote 24 should be deleted, as it could set in stone that the markets cited as examples are fixed and cannot evolve over time, whereas they are subject to an unprecedented revolution.
- 9) The relationship between supply-side and demand-side substitution, and the conditions under which to use supply-side substitution, should be clarified, as the text is unclear as it stands.
- 10) Given that the variation of supply and demand over time is a widespread feature, it should be stated that "*temporal considerations*" can "*substantially*" affect customer preferences or supply structures.
- 11) The concept of a purchasing market is provided for in the draft, but the Commission has not explained in what situations the definition of a purchase market might be preferred to the definition of a selling market. It may be helpful for the Commission to illustrate this point.
- 12) A possibility of convergence in the definition of a market with a geographical dimension is provided for; it would be useful to add this possibility for a market with a "*product*" dimension.