

# Commission Notice on the definition of the relevant market for the purposes of Union competition law

## Contribution of the Catalan Competition Authority to the Commission Notice

In the framework of the review process launched in April 2020, the European Commission (“EC”) has requested comments on the draft Notice on the definition of the relevant market for the purposes of Union competition law (“draft revised Market Definition Notice”). This document sets out the position of the Catalan Competition Authority (“ACCO”) on the draft revised Market Definition Notice, as well as its observations and proposals for action.

### Introduction

The EC has published a public consultation in the framework of the review process of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997 (“**Notice**” or “**Notice on the definition of relevant market**”). The document subject to public consultation contains updated guidance on the application of the concept of relevant market in the context of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) and Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“**Merger Regulation**”).

The ACCO is a competition authority of the European Union (“**EU**”) that aims to guarantee, improve and promote the conditions of free competition and transparency in the markets with respect to economic activities and sectors in Catalonia<sup>1</sup>. In the exercise of its functions, specifically, in the analysis of the relevant market, it has been considering the general principles established in the aforementioned Notice on the definition of relevant market.

### The ACCO’s position on the draft revised Market Definition Notice

The ACCO welcomes the fact that, twenty-five (25) years after its adoption, the EC has devoted efforts to update the Notice on the definition of relevant market, providing additional elements and criteria to those initially set out in the above-mentioned document. The existence of an updated Notice is of particular importance for EU competition authorities, such as the ACCO, that do not have analogous legal acts at

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<sup>1</sup> Article 2 of Law 1/2009, of 12 February, on the Catalan Competition Authority.

national level, as it allows them to assess the concept of relevant market in line with EC practice<sup>2</sup>. The ACCO therefore commends the EC's decision to conduct a public consultation on the draft revised Market Definition Notice.

In this respect, the ACCO takes a positive view of the changes made to the Notice and agrees that they will contribute to increasing the transparency of the EC's policy and decision-making with regard to the application of EU competition law. In particular, the ACCO welcomes the guidance on possible sources of evidence and their probative value, based on the Commission's material experience and fact-based approach to market definition.

However, in the context of the public consultation, some considerations should be made about the definition of relevant market, in view of what is set out in the draft revised Market Definition Notice.

## **The role of the draft revised Market Definition Notice in defining labour markets**

In paragraph 1.2. of the draft revised Market Definition Notice (Role of market definition), the EC indicates the following: *"The same considerations apply when defining relevant markets for the purchasing of certain products in a certain area ('purchasing markets')<sup>3</sup>, by identifying in a systematic way the immediate competitive constraints that the undertaking(s) involved face when purchasing those products. In that case, market definition leads to the identification of the relevant competitors of the undertaking(s) involved when purchasing the products as well as the relevant suppliers. The remainder of this notice will not discuss purchasing markets further, but the guidance set out in this notice also applies to purchasing markets"*.

This paragraph may be understood as a statement of the application of the future draft revised Market Definition Notice to purchasing markets within the meaning of the precedents analysed by the EC (merger cases where the EC has identified markets for the purchase or supply of "traditional" goods and services). However, it is important that an instrument which will also be used in the application of Articles 101 and 102 of the TFEU clarifies the definition of "purchasing markets".

In particular, the ACCO considers that the draft revised Market Definition Notice would have to provide sufficient information or at least refer to the application of market definition principles to labour markets.

The draft revised Market Definition Notice does not seem to elaborate, in the above-mentioned paragraph, on issues that are considered relevant, such as: (i) whether the reference to purchasing markets is to be understood as extending to labour markets; or

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<sup>2</sup> The ACCO supports the view expressed in the Summary of the NCA's contributions to the review of the Market Definition Notice (*"An NCA not having a notice on market definition of its own flagged that it was much more efficient for a small NCA to rely on European case law or European soft law than to issue their own guidelines"*). Please see the following link: [https://competition-policy.ec.europa.eu/system/files/2021-03/summary\\_of\\_contributions\\_NCA.pdf](https://competition-policy.ec.europa.eu/system/files/2021-03/summary_of_contributions_NCA.pdf).

<sup>3</sup> For examples of purchasing markets see cases M.10201 Ahold Delhaize / Deen Assets, paragraphs 20-25 and cases cited; M.9847 Aldi / FPLPH Assets, paragraphs 19-22 and M.9409 Aurubis / Metallo, section 7.1.

(ii) whether the EC will consider the use of alternative instruments for the definition of such markets.

From the ACCO's point of view, the draft revised Market Definition Notice should explicitly mention whether the concept of purchasing market refers exclusively to the types of markets that have been analysed so far by the EC or to purchasing markets in a broad sense, including labour markets. As can be seen from the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons<sup>4</sup>, a conception of labour markets as purchasing markets is deduced<sup>5</sup>.

Consequently, in order to adopt an instrument that reflects the EC's willingness to address anticompetitive practices affecting working conditions or the freedom to hire workers<sup>6</sup>, the future draft revised Market Definition Notice should incorporate a nuanced notion of purchasing markets, which takes into account labour markets. Otherwise, the future Notice could present a hypothetical risk for economic operators (since they would not be able, with some legal certainty, to identify the general principles that national competition authorities could use in defining labour markets) and, equally, for the national competition authorities (insofar as the draft revised Market Definition Notice does not define "purchasing markets").

## **The ACCO's application of the Notice in the investigation of anticompetitive practices in labour markets**

The ACCO has had the opportunity to analyse a no-poach agreement<sup>7</sup>, by means of which the freedom of certain economic operators to recruit human resources was restricted. To define the relevant market affected by this type of conduct, the ACCO considers that the considerations on the concept of relevant market established in the Notice are also applicable. In this regard, the ACCO considers it necessary to make the following comments:

- Firstly, in recent years, conducts related to practices affecting competition and workers (no-poach agreements<sup>8</sup>) have been analysed in several EU countries.

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<sup>4</sup> In the framework of the EC consultation on the draft Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, the ACCO submitted the following contribution: [http://acco.gencat.cat/web/.content/80\\_acco/documents/arxiu/actuacions/20220224\\_consulta\\_acords\\_collectius\\_autonomos\\_eng.pdf](http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20220224_consulta_acords_collectius_autonomos_eng.pdf)

<sup>5</sup> "These Guidelines do not cover decisions by associations or agreements or concerted practices between undertakings outside the context of negotiations (or preparations for negotiations) between solo self-employed persons and their counterparty/-ies to improve solo self-employed persons' working conditions. In particular, they do not cover agreements which go beyond the regulation of working conditions or determine the conditions (in particular, the prices) under which services are offered by solo self-employed persons or the counterparty/-ies to consumers, or which limit the freedom of undertakings to hire the labour providers that they need".

<sup>6</sup> This is evident from the speech by M. Vestager at the annual conference of the Italian Antitrust Association "A new era in cartel enforcement", and from the above-mentioned Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons.

<sup>7</sup> Although this is an ongoing procedure, information on the procedure published on the ACCO's website can be found here: [http://acco.gencat.cat/ca/detall/article/20220203-Exp.-109-2021-Incoacio-Comunicat-web#googtrans\(calen\)](http://acco.gencat.cat/ca/detall/article/20220203-Exp.-109-2021-Incoacio-Comunicat-web#googtrans(calen))

<sup>8</sup> The Spanish National Markets and Competition Commission ("CNMC") has, on two occasions (Cases S/0120/09 – Freight Forwarders and S/0086/08 – Professional Hairdressers), analyzed no-poach

Given the current context, and taking into account that the investigation of this type of conduct is increasingly becoming a priority for EU competition authorities, as indicated by recent EC actions or the investigation conducted by the ACCO, it would be coherent that the instruments to be adopted at European level, i.e. draft revised Market Definition Notice, reflect the objective of achieving “*a highly competitive social market economy, aiming at full employment and social progress*”<sup>9</sup>.

- Secondly, the scheme (market definition and market share) provided for in the Notice may apply not only to product and service markets, understood in a traditional sense, but also to purchasing markets. However, when it comes to labour markets, the draft revised Market Definition Notice may not be appropriate, as it has not been adapted. It does not refer to labour markets nor does identify workers as providers of labour or labour services. At the same time, it does not set out the criteria and guidelines that should be taken into account for the definition of labour markets.
- Thirdly, and in relation to the above, some of the elements that could be taken into account in defining labour markets are:
  - The collective agreement of the sector, given that it is real proof of the undertakings and workers directly affected by the anticompetitive practice under investigation.
  - Other indicators or elements, such as data on workers’ preferences, labour mobility in the sector and the evolution of wage levels (data available to the competent labour authorities), can be useful in defining the substitutability of the different jobs offered by the undertakings.
- Finally, the draft revised Market Definition Notice states that the EC usually does not define the relevant market when assessing agreements that have as their object the prevention, restriction or distortion of competition, such as cartel agreements, and is not under obligation to do so (Judgment of 8 July 2004, Mannesmannröhren-Werke v Commission, T-44/00, EU: T:2004:218, paragraph 132; and Judgment of 28 June 2016, Telefonica SA v Commission, T-216/13, EU:T:2016:369, paragraph 214). The ACCO also follows this approach when assessing “by object” cases.

## Proposals for action

Taking into account that the EC has recognised the application of competition law (in particular Article 101 of the TFEU) to practices of economic operators that affect working conditions (mainly, prices) or limit the freedom to recruit human resources<sup>10</sup>, and considering that the draft revised Market Definition Notice can contribute to improving the efficiency and effectiveness of the actions of the EU national competition authorities

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agreements. It should be noted, however, that these agreements were assessed in the context of broader agreements falling within the definition of a cartel.

<sup>9</sup> Article 3 of the Treaty on European Union.

<sup>10</sup> As mentioned above, the Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons.

in the analysis of labour markets<sup>11</sup>, the EC could consider the following proposals for action:

- Include an explicit definition of the concept of “purchasing markets”, clarifying paragraph 1.2. of the draft revised Market Definition Notice (*Role of the market definition*).
- To clarify, in order to provide greater legal certainty to economic operators, whether the draft revised Market Definition Notice can be used to analyse labour markets, without prejudice to the recent development of this area at European level and any practice that may develop in the future.
- Develop a section 4.6. on the definition of markets in the presence of labour markets, setting out (for illustrative purposes, i.e. including hypothetical examples of the application of the concept of relevant market) the data and criteria that could be considered in the analysis of labour markets. This could facilitate the uniform use of the concept of relevant market by national competition authorities of the EU.
- Further promote cooperation between the EC and EU competition authorities, as well as the exchange of experiences and practices relating to the evolution of the concepts of relevant product market and relevant geographic market, allowing for an update of the future Notice as regularly as possible and, at the latest, within a period of five (5) years.

**The ACCO would like to underline its commitment to collaborate and contribute to EU competition policies in order to promote the proper functioning of markets for the benefit of economic operators and society as a whole.**

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<sup>11</sup> In this respect, the ACCO is of the opinion, in line with the response of different competition authorities indicated in the Summary of NCA's contributions to the review of the Market Definition Notice ([https://competition-policy.ec.europa.eu/system/files/2021-03/summary\\_of\\_contributions\\_NCA.pdf](https://competition-policy.ec.europa.eu/system/files/2021-03/summary_of_contributions_NCA.pdf)), that the cost-benefit of having a notice is positive (“*There is consensus among the 25 NCAs that expressed a view on efficiency that the net benefits of the Notice are positive. In other words, NCAs consider that the benefits of having the Notice in place exceed the costs thereof*”).