



January 13, 2023

To

The European Commission

Directorate-General for Competition, Unit A2

Merger Registry

1049 Bruxelles / Belgium

HT.5789

Ref. Public consultation regarding the revised draft for the Market Definition Notice

Dear Sir/Madam,

We have great pleasure in enclosing a submission on behalf of the Unilateral Conduct and Behavioural Issues Working Group, the Cartels Working Group and the Mergers Working Group of the Antitrust Committee of the International Bar Association (IBA).

The Co-chairs and representatives of the Antitrust Section would be delighted to discuss the enclosed submission in more detail with the representatives of the Hon'ble Commission.

Yours sincerely,

Samantha Mobley
Co-Chair Antitrust Section

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Co-Chair Antitrust Section



IBA ANTITRUST SECTION COMMENTS ON THE DRAFT DRAFT REVISED MARKET DEFINITION NOTICE

I. INTRODUCTION

The International Bar Association (“IBA”) is the world's leading international organization of legal practitioners, bar associations and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, and it has considerable expertise in providing assistance to the global legal community. Further information on the IBA is available at <http://ibanet.org>.

The IBA’s Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The comments set out in this document have been prepared by the Unilateral Conduct and Behavioural Issues Working Group, the Cartels Working Group and the Mergers Working Group of the IBA’s Antitrust Committee (jointly referred to herein as the “Working Groups”) and draw on that combined experience.

This submission is made to the European Commission (“Commission”) on behalf of the Antitrust Section. The Section welcomes the opportunity to comment on the Commission’s public consultation (“Public Consultation”) regarding the revised draft for the Market Definition Notice (“Draft Notice”).

We offer in the following topics our comments and suggestions in the hope that they will assist the Commission in the further development of the Draft Notice.

II. INTRODUCTION

The comments below are focused on suggestions to clarify some of the provisions of the Draft Notice and on additional information that could be included or further developed in the Draft Notice for a more complete approach, enhancing transparency, predictability and legal certainty on the topics presented on the document.

III. GENERAL COMMENTS ON THE DRAFT NOTICE

The Working Groups commend the Commission for not only seeking comments on the Draft Notice, but also giving feedback on the initial comments received so as to allow commentators to provide additional inputs. This is important given the importance of the topic and changing market dynamics due to technological innovation, the emergence and growth of new markets and impact of globalization since the first edition of the Market Definition Notice in 1997.

The Working Groups support the revised version of the Draft Notice which took into account many of the comments provided by the IBA Antitrust Section on October 09, 2020, during the first round of discussions. The Working Groups now offer additional comments about further clarifications that could be useful for those consulting the Draft Notice and reiterate certain aspects of the comments provided on October 9, 2020.

Generally, the Working Groups' main comments relate to Sections 2 and 4 of the Draft Notice, especially in relation to content which suggests that the Commission may be willing to place increased reliance on qualitative evidence when defining relevant markets.

Although the Working Groups acknowledge the importance of qualitative evidence, especially in the context of a fast moving economy and relatively new markets, the Working Groups also believe that objective parameters could be included in the Draft Notice in order to create more predictability and legal certainty, while also assuring more efficient outcomes, which is in line with the purposes listed in Section 1 of the Draft Notice.

IV. COMMENTS ON SECTION 2 – CONCEPT OF THE RELEVANT MARKET AND GENERAL METHODOLOGY

General methodology for defining product markets

Section 2.2.1.1. of the Draft Notice (para. 33 and 34) states that it is difficult to use the SSNIP test in the context of zero monetary price products. From the Working Groups' perspective, the fact that users on one side of a platform do not pay for the services provided does not necessarily prevent the SSNIP test being applied to the subsidised parties on other sides.

For instance, in the case of platforms which link buyers and sellers, or readers and advertisers, sellers and advertisers (respectively) generally pay a fee to use the platform. In this sense, the SSNIP test could theoretically still be applied either to the market on which paying users purchase the services of the platform, or to the combined two/multi-sided market, taking into account the network effects.

Similarly, given that products are rarely entirely “free” as they have associated costs, one could argue that a similar test could be applied based on a hypothetical cost increase. This has been referred as the “decrease in privacy” test, or SSNIC (Small but Significant Non-transitory Increase in Costs) test and “costs” would also include non-monetary costs such as time/attention given to looking at advertisements, or supply of personal data¹.

In this sense, the Working Groups respectfully suggest that (a) the draft Notice should not automatically rule out the use of the SSNIP test for situations that involve zero monetary price products and (b) the Draft Notice indicates alternatives that could be used, either by adapting the SSNIP test or by using alternative test (such as the SSNIC test).

Supply substitution

Section 2.2.1.2. of the Draft Notice provides an extensive review of what the Commission takes into account when assessing the substitutability of products from the perspective of suppliers (supply substitution) and the Working Groups welcome the Commission's efforts in including concrete

¹¹ As an example of this discussion, please refer to [https://one.oecd.org/document/DAF/COMP/M\(2018\)2/ANN7/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2018)2/ANN7/FINAL/en/pdf)

examples of cases (e.g., stainless steel manufacturers' case) to illustrate how the theory has been used by the authority in practice.

To provide more clarity, the Working Groups suggest an adjustment to the wording of paragraph 35 to provide a more flexible approach to the assessment of supply side substitution:

"... most, if not all, suppliers [that] are able to switch production between products in the range of related products, while incurring only insignificant additional sunk costs or risks, have the incentive to do so when relative prices or demand conditions change, and can market them effectively in the short term".

General methodology for defining geographic markets

Section 2.2.2. of the Draft Notice explains how the Commission will deal with import sales when defining the relevant geographic markets. The Working Groups welcome the Commission's efforts in this regard, especially given the increasing importance of globalization and the growth of international trade. However, the Working Groups consider that it would be helpful to have further clarification on how the Commission will approach cases that involve relevant export sales from Europe, e.g., when it involves a European producer which is a net exporter of certain product (i.e., the local production is higher than the local demand) and a relevant part of these export sales may not necessarily be targeted to Europe.

Additionally, and in a similar vein manner, the Working Groups consider that it would be helpful if the Draft Notice could provide some examples of situations where a market should be considered as global. This is because the Working Groups are of the view that the increased level of globalisation requires a more in-depth and detailed consideration of the impact of global competition and greater care in analyzing whether markets should still be limited to the EU or EEA (even if in the past they were).

V. COMMENTS ON SECTION 3 – PROCESS OF DEFINING MARKETS

The Working Groups welcome the Commission's effort to provide clarification on the type of evidence which will be considered during the process of defining markets. The Working Groups

reiterate some suggestions provided on October 09, 2020, aiming at encouraging the Commission to address the following questions:

- a. the relevant time horizon that is taken into account for possible market entry (*i.e.* the time required for potential competition to materialise in the future). In this respect, although it is clear that a longer relevant time horizon may strengthen certain existing trends and reveal important new trends, it also leads to a more uncertain assessment. As a result, such a longer time horizon may be more suitable in industries characterised by longer contract and production times and with higher barriers to entry, while these could prove more problematic in fast-moving, digital industries; and
- b. in case of state-owned companies established in third countries, if and to what extent the overall trade and industrial policy approach of such countries, as well as whether subsidies provided to such companies are relevant in assessing the competitive pressure exercised by such companies and the consideration of possible barriers to entry the market.

As a final remark, the Draft Notice (on para. 56) makes reference to “industry views” as “useful information” and acceptable evidence for assessing demand substitution or competitive constraints or. In that respect, the Working Groups believes that there may be situations where these views may not as objective as they should, especially when we look at the view of competitors or customers that may be part of a competing group. In this sense, the Working Groups suggest that para. 56 could include similar language to para. 54, to state that views of market participants might not be sufficiently reliable, and that this should be a case-by-case assessment.

VI. COMMENTS ON SECTION 4 - MARKET DEFINITION IN SPECIFIC CIRCUMSTANCES

Market definition in the presence of product differentiation

The Draft Notice properly states that market shares may be less instructive in the presence of significant differentiation between (or among) products. The Working Group believes, however, that the alternative means described in the Draft Notice may create uncertainty as it relies purely on semantic description: an “assessment of how closely suppliers compete with each other”. In this sense, the Draft Notice could benefit from examples on the factual and economic assessment that may should be carried out in place of market definition in this situation. For instance, the Working Groups believe

that footnote 98 provides a useful insight by identifying relevant economic tests to be considered. The specific language of footnote 98 should be brought into the body of the Notice and used as the primary basis for discussing the assessment of markets involving significant product differentiation.

In the same sense, Section 4.1 of the Draft Notice discusses the approach that Commission plans to take in differentiated markets, meaning that some products may be seen as closer substitutes than others (para 84), because of the importance of non-price attributes for the customer's choice. In differentiated product markets, a "detailed competitive assessment" of closeness of competition may reduce the importance of market shares and therefore of market definition, in accordance with the recent Wieland-Werke case law². The Working Groups acknowledge that in such markets the question on whether the merging parties are close competitors or not would likely be an important factor not only for market definition but also for the competitive assessment itself. In this sense, the Working Groups believe that the Draft Notice could benefit from a more detailed guidance and practical examples of the elements, factors and types of evidence that could be used in order to assess closeness of competition, beyond what is already contained in paras. 28-30 of the Horizontal Merger Guidelines. The Working Group's also believe that such guidance should ideally reflect the Commission's decisional practice since 2004, while at the same time should be fully aligned with the Horizontal Merger Guidelines.

Market definition in the presence of price discrimination

Section 4.2 discusses the product market definition in the presence of price discrimination. In this part, the Working Groups believe that the Draft Notice could benefit from further clarification and practical examples about the circumstances when the existence or possibility of price discrimination should be taken into account for the purposes of the relevant market definition. Specifically in relation to footnote 102 of the Draft Notice, which mentions the possibility of a different relevant market definition due to expected changes in the competitive conditions brought by the concentration under review, the Working Groups believe that identifying narrower markets based on expectation of future price discrimination could create uncertainty, especially on the feasibility assessment of merger transactions.

² Please refer to footnote 94 of the Draft Notice.

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

The Working Groups appreciate the Commission providing specific guidance for market definition in the presence of significant investments in R&D, but would like to submit the following additional suggestions which the Working Groups believe could be helpful in bringing more predictability to the assessment of cases.

First, in relation to para. 89, the Working Group believe it would be helpful to mention what factors the Commission will consider for determining that innovation is a key competitive parameter. R&D exists virtually in all sectors, so it will be important to provide more guidance on which industries will be more prone to closer scrutiny from an R&D perspective (although the Working groups acknowledge that the list should not be exhaustive and could change over time).

Second, in relation to pipeline products as discussed in paras. 90 and 92, the Working Groups believe it would be helpful if the Commission could provide further guidance on the criteria - other than intended use - that it will likely use to assess whether two pipeline products would be viewed as forming part of the same relevant product market and to what extent the stage of development, including clinical trials, might play a role in this assessment. As the Commission is aware (for instance, based on the *Takeda/Shire* case³), there have been instances where the Commission has agreed to the waiver of divestiture commitments following failed Phase III clinical trials for a pipeline product. More guidance around the assessment of pipeline products in terms of the stage of clinical trials or more generally the likelihood of success would bring much more predictability to the merger assessment.

The Working Groups also believe that the Draft Notice would benefit from further guidance on the circumstances and the criteria that the Commission will use to define “innovation spaces”, as well as the circumstances in which the Commission will assess innovation at the level of the industry as a whole. This concept, which the Commission used in *Dow/Dupont*⁴, could impact the use of market definition itself and has not been tested before the European Courts. In addition, the Working Groups believe that more guidance would be welcome in para. 107 of the Draft Notice, in terms of the market

³ See *Takeda/Shire* Case M.8955, Decision on the implementation of the Commitments - Waiver of the Commitments (28 May 2020).

⁴ See *Dow/Dupont*, Case M.7932, at para. 352.

share methodology that the Commission will use in innovation cases, and specifically the methodology in which it will rely on to calculate market shares (for instance, number of patents or patent citations).

Market definition in the presence of multi-sided platforms

The Working Groups welcome the Commission's efforts in this part, especially the guidance for the assessment of multi-sided platforms in Section 4.4. However, the Working Groups believe that the Draft Notice would benefit from further clarification as to whether the Commission would take a different and/or similar approach to market definition when it comes to online platforms in merger cases *vis a vis* investigations into alleged abuse of dominance.

As it currently stands, the Working Groups believe that the Draft Notice still leaves a degree of uncertainty about the criteria that the Commission will use to determine whether a multi-sided platform will comprise a single market (as the U.S. Supreme Court did in *Amex vs. Ohio*⁵) or will involve two or more separate markets. The distinction presented by *Filistrucchi et al*, which distinguishes between transactional vs. non-transactional platforms could provide valuable guidance for companies and add more predictability in the merger assessment.⁶

In the same section, when the Commission indicates that it may also consider alternatives to the SSNIP framework, such as the SSNDQ test, the Working Groups believe that the Draft Notice would benefit from further clarification as to what exactly is meant by a "deterioration in quality" and what type of evidence/data would be used in such an assessment, even though the General Court did not require more clarity in that respect in *Android*⁷.

Market definition in the presence of aftermarkets, bundles and digital ecosystems

Significant Product Differentiation

The Working Groups welcome the Commission's efforts in stating that market shares may be less

⁵ *Ohio v. American Express Co.*, 585 U.S. (2018), available at https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf

⁶ See Support Study accompanying the evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law, Final Report, EC, Section 3.1.1.

⁷ As mentioned in footnote 47 of the Draft Notice.

instructive in the presence of significant differentiation between (or among) products. The Working Groups, however, believes that this topic could be further developed in order to provide more clarify and examples of the factual and economic data that would be taken into account in an “assessment of how closely suppliers compete with each other”. As mentioned above, although the Working Groups acknowledge that useful analysis is provided in footnote 98, which identifies relevant economic tests to be considered, the Working Groups believe that the specific language of footnote 98 should be brought into the “main body” of the Draft Notice, as the tests in the footnote could be used as the primary basis for discussing the assessment of markets involving significant product differentiation, which does not mean that it could not be complemented by other examples the Commission finds useful for this specific topic.

Ecosystems

The Draft Notice provides one paragraph (para. 103) on ecosystems, where it refers to long-established principles on aftermarkets and bundling. The Working Groups consider, however, that given the importance of ecosystems and the challenges related to any competition assessment related to it, this section could be further developed to provide more guidance on the assessment of ecosystems. For instance, the Commission could include a view on how it intends to assess whether two products are part of the same ecosystem. The Working Group also believes that explaining what type of evidence would be considered would also be useful, as well as guidance on how lock-in effects may be relevant to identifying ecosystem-specific aftermarkets in cases where the ecosystem can be considered as a separate market. In this sense, the Working Groups believes that the Commission should consider, and to the extent possible reflect, the conclusions of the OECD Competition Committee Hearing on Competition Economics of Digital Ecosystems held in December 2020.⁸ The conclusions, relevant to the topic of relevant markets definition, include:

1. Digital ecosystems of complementary products and services centered around core service offer a line of products and services with a technological linkage increasing the complementarity among them.
2. Large economies of scope and scale across markets and network effects facilitating the development of ecosystems on the supply side, while consumers synergies due to technological linkages playing an important role on the demand side.

⁸ See materials available at <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm>

3. Competition in ecosystems differing from competition between traditional firms. For example, digital ecosystems may exhibit intensive competition among firms that do not necessarily offer substitutable products or services.
4. Dynamic capabilities of an ecosystem, among others factor, being critical to its survival and success.
5. Digital ecosystems having benefits from economies of scope and scale, and demand side synergies enhancing the value of the products and services for consumers.

Multi-homing

The Draft Notice includes in section 4.4 a paragraph that mentions multi-homing (para. 95). However, in a similar way to ecosystems, the Working Groups believe that the Draft Notice should provide further guidance on how the Commission intends to assess multi-homing in the context of relevant market definition. In this sense, the Working Groups believe it would be useful for the Commission to include examples of the key factors that the Commission will take into account when establishing whether products used in a multi-homing setting fall within the same relevant market. For instance, customers sometimes use multiple platforms because they offer different services, in which case platforms may constitute two distinct product markets. However, platforms can be used in parallel by customers because they offer similar services or functionalities, in which case these platforms are more likely to be part of the same market. Another example on how this aspect that may be relevant is that in multi-homing scenarios customers, by using several platforms in the market, contribute to the reduction of the potential lock-in effect of network effects, thus reducing entry barriers for new entrants.

VII. COMMENTS ON SECTION 5 - MARKET SHARES

Captive sales

Section 5 of the Draft Notice explains the Commission's approach to market shares when assessing market power. On this topic, the Working Groups believes that the Draft Notice should provide further clarification on whether captive sales should be included or excluded from market share calculations. The Working Groups believes that the draft Notice would benefit from a clear statement as to whether captive sales should be considered part of the market or not, so as to avoid

inconsistencies regarding the figures to be provided by the parties and consequently to avoid inconsistent decision-making in relation to similar situations or markets.

Product differentiation

The Draft Notice suggests that, in case of a significant degree of product or geographic differentiation, market shares tend to be less informative (as mentioned in Sections 4.1 of the Draft Notice). The Draft Notice also explains that, in these circumstances, the Commission usually considers sales values as this measure seems to be relevant to assess the degree of substitutability, further mentioning that the Commission may rely on shares split into different segments of the relevant market.

The Working Groups consider that, given the complexity involved in identifying and determining whether some products would be different enough to follow such rules, as well as the complexity involved in identifying the different “segments of the relevant market” that should be considered, the currently proposed wording may create uncertainty around the calculation of market shares.

Not all product differentiation is the same. For example, two or more products may have physical differences; different manufacture technologies, different technologies for operation (e.g. film vs. digital cameras); different inputs (e.g. flexible packaging materials); different and substantial IP protection (e.g. computer programs); engineering or design differences; and others. The current wording of the Draft Notice may lead to the idea that market shares’ assessment in the case of market with product differentiation would be seen as binary system (firms are either “in” the market and counted as perfect competitors, or “out” the market, which means they are not counted at all), which may result in a gradual move away from exclusive reliance in market definition and market shares and more towards direct/economic measures (assuming that the data needed to implement them are available).

On the other hand, if the Commission considers that market shares should still be assessed in product differentiated markets, even with certain caveats, the Working Groups believe that it would be helpful to clarify which features would be taken into account to assess the effects of a merger and particularly the price effects of the merger in differentiated markets. For that purpose, the Working Groups respectfully reiterates its suggestion to expand the information on footnote 98, by providing a clear instruction as to the approach that will be taken in product differentiated markets. For example, it would be helpful to determine the circumstances when the Commission will rely on shares for

segments (e.g. what type of differentiation would demand an analysis of segments of the relevant market) and whether other economic data would be accepted to replace market share data, if submitted by the parties.

VIII. CONCLUSION

The IBA Working Groups appreciates the opportunity provided by the Commission to comment on the Draft Notice.

The Working Groups would be pleased to respond to any questions that the Commission may have regarding these comments; or provide additional comments or information that may assist the Commission.