



IBA ANTITRUST COMMITTEE COMMENTS IN RESPONSE TO THE PUBLIC QUESTIONNAIRE FOR THE EVALUATION OF THE COMMISSION NOTICE ON THE DEFINITION OF RELEVANT MARKET FOR THE PURPOSES OF COMMUNITY COMPETITION LAW

1. Introduction and Purpose of Submission

1.1. Introduction

The International Bar Association's Antitrust Committee sets out below its submission on the Evaluation of Commission Notice on the definition of relevant market for the purposes of Community competition law (the "Notice"). Specifically, the submission has been prepared by members of the Unilateral Conduct and Behavioural Issues Working Group and the Cartel Working Group (the "Working Groups").

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It is interested in the development of international law reform and seeks to shape the future of the legal profession throughout the world by providing assistance to the global legal community.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, the IBA is in a unique position to provide an international and comparative analysis in this area since it unites jurisdictional backgrounds and professional experience spanning all continents. Further information on the IBA is available at <http://ibanet.org>.

1.2. Purpose of Submission

The IBA Antitrust Committee welcomes the opportunity to respond to the most relevant issues raised by the Public Questionnaire and is supportive of the European Commission's initiative to evaluate the important topic of whether the Notice remains accurate and up-to-date considering the many economic and market changes that have taken place in the past two decades.

2. General issues raised by the Questionnaire

2.1. Relevance (do the objectives of the Notice match current needs or problems?)

The Working Groups believe that a Notice plays a useful role in ensuring legal and economic rigour in the enforcement of competition rules, where the role of market definition as a relevant framework for further analysis is highly relevant. Updating the current Notice so as to provide guidance considering market developments since 1997 would make the Notice more useful still.

2.2. Effectiveness (does the Notice meet its objectives?)

While the Notice's basic principles are still valid, it will only remain a useful instrument for practitioners, authorities, courts and interested parties if it acknowledges the market developments in the past two decades, including the emergence of online sales and digital markets and globalisation.

With regard to digitalisation, the following issues are particularly relevant.

- Ever-growing online sales make the competitive constraint exercised by digital players on more traditional business of urgent relevance. Similarly, and amongst other things that will be detailed below, the new notice should also take into account the competitive pressure exerted online by complementary and non-substitute products, services, and business models in digital markets.
- In digital markets, and in particular two or multi-sided markets, goods or services are frequently provided “free” or at least without any direct monetary price being paid. In these situations, there is no “price” in the traditional sense, such that the SSNIP test referred to in the Notice is no longer directly applicable, at least in the way that it has been traditionally understood.
- The constant change of digital markets and often their two sided nature pose significant challenges for the definition of markets, and the assessment of market power, and call for 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*¹).

¹ Case COMP/M.6281 - *Microsoft/Skype*, Commission Decision of 7 October 2011.

On the other hand, the trend toward the globalisation of the markets has only accelerated ever since the publication of the Notice. As a result, more detailed assessment and guidance in this regard would be welcome.

Finally, and as a general comment, economic techniques and methods of analysis related to market definition have become significantly more sophisticated. As a result, some concepts set out in the Notice have undergone changes to adapt traditional analyses to new business models and new markets. In this sense, a more in-depth economic analysis should be considered in the evaluation of the Notice.

2.3. Efficiency, coherence and added value

The Working Groups believe that an updated Notice will provide significant added value. Although the issues discussed in this submission have been dealt with extensively in jurisprudence and other instruments, the existence of a Notice is an efficient manner of providing a reference for stakeholders of all kinds across the EU (and, admittedly, even in a more international context) in a coherent fashion, reducing costs and simplifying the process of market assessment for businesses and helping ensure a uniform application of the antitrust rules throughout the EU.

3. Major trends and developments that have affected the application of the Notice

We include below a list of the major trends and developments that the Working Groups believe have affected the relevance of the Notice in recent years:

3.1. The evolution of economic techniques and methods of analysis since 1997

Over time, the European Commission's economic techniques and methods of analysis have become more sophisticated regarding the definition of relevant markets. Some concepts established by the Notice have undergone changes to adapt traditional analyses to new business models and new markets.

In this sense, there is a constant need to adapt the way the relevant market is defined. A more in-depth economic analysis should be considered in an eventual new notice to take into consideration all the factors in both merger and conduct cases for more sound decisions by the European Commission in respect for the right of defence of the parties.

Below are some examples of the market definition issues that have been addressed in decisions both by the European Commission and the Courts and which the Working Group consider could helpfully be factored into a new notice:

- Rigour in assessing demand-side substitution based on evidence: recently, the General Court annulled a dominance decision, when analysing the case involving *Servier*², as it interpreted that the Commission’s decision conducted a traditional analysis of the market failing to take into account the specificities of the pharmaceutical sector³.
- Tendency to define the relevant product market as narrowly as possible: to avoid Type 1 errors, a more in-depth economic analysis should be taken when dealing with digital markets. Such tendency is noted in cases such as *Google Shopping* and *Google Android* decisions⁴/ *Qualcomm* (Exclusivity Rebates) and *Qualcomm* (Predation)⁵, in which the decisions did not acknowledge some specific aspects of the multi-sided markets involved.
- Qualitative evidence: the rise of qualitative evidence, including factors such as product characteristics and intended use (for instance: *Wanadoo*⁶, *Microsoft*⁷ and *Google Shopping*⁸) can appear subjective and lacking in the objectivity of economic analysis.
- Market definition in two-sided/multi-sided markets: most probably due to few cases challenging the approach at 1997, the Notice does not set out any considerations for market definition in two-sided markets.

Given that economic techniques have been used increasingly in antitrust and merger cases both by the Commission in its analysis and considered by the Courts on appeal the new notice ought to be open enough to allow greater scope for using such tools. This will assist the Commission and stakeholders to move away from a

² Case T-691/14, *Servier SAS, Servier Laboratories Ltd, and Les Laboratoires Servier SAS v Commission*, EU: T:2018:922. The case is currently pending on appeal before the Court of Justice (under No. C-201/19 P).

³ The Commission’s finding was that perindopril was different in terms of therapeutic use from the 15 other ACE inhibitors in the same therapeutic class. In summary, the Court criticized two main points: (i) the Commission gave undue importance to the fact that patients do not generally pay for the medicines they consume: non-price competition in the form of therapeutic substitution was the critical issue in pharmaceutical markets; and (ii) the Commission gave too much importance to prescriber/patient “inertia” to switching to other ACE inhibitors.

⁴ Case AT.39740, *Google Search (Shopping)*, Commission Decision of 26 June 2017; and Case AT.40099, *Google Android*, Commission Decision of 18 July 2018.

⁵ Case AT.40220, *Qualcomm (Exclusivity Rebates)*, Commission Decision of 25 January 2018; and Case AT.39711, *Qualcomm (Predation)*, Commission Decision of 18 July 2019.

⁶ Case COMP/38.233, *Wanadoo Interactive*, Commission Decision of 16 July 2003.

⁷ *Microsoft*, OJ 2007 L 32/23, paras. 411–25; upheld on appeal in Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.

⁸ Case AT.39740, *Google Search (Shopping)*, Commission Decision of 26 June 2017, Section 5.2.1.2.

rigid set of rules for relevant market definition towards a more modern approach with parameters adapted to the new challenges ahead.

3.2. Geographic market definition – Globalisation

Although globalisation was an important emerging factor in international trade already at the time of the issuance of the current Notice, the trend toward more and more integrated international markets accelerated significantly over the last 20 years enabled by significant advances in technology, lower tariffs, and improved transport. For instance, worldwide exports of goods and services, a typical measure of globalisation, multiplied grew by approximately 350% between 1997 when the Notice was adopted and 2019.⁹

The Working Groups consider that that increased level of globalisation requires a more in-depth and detailed consideration of the impact of global competition and greater care in analysing whether markets limited to the EU or EEA really exist.

Whereas the Working Groups do not propose any attempt to favour so called “European champions”¹⁰, legal certainty and the constraints on European market players require the provision of further clarity and detail in respect of the precise parameters for establishing global markets, whether in the context of Article 101 cases (where self-assessment is the main rule), Article 102 cases and merger control matters.

In particular, the Working Groups would welcome more detailed assessment and guidance in the new notice in respect of the following questions:

- the treatment of a situation, where there is a potential for extra-EU suppliers to sell into the EU, in the form of imports, and thus to constrain prices in the EU¹¹;
- 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 may reveal important new trends as

⁹ Exports of goods and services, current USD (<https://data.worldbank.org/indicator/NE.EXP.GNFS.CD>).

¹⁰ See in particular the Commission’s decision in M.8677 SIEMENS/ALSTOM and the debate ensuing that decision: A Franco-German Manifesto for a European industrial policy fit for the 21st Century, Modernising EU Competition Policy (German-French-Polish „triangle”) and the numerous related academic and press articles.

¹¹ This issue was already discussed in the study „Geographic Market Definition in European Commission Merger Control” prepared for DG Competition by Amelia Fletcher and Bruce Lyons (https://ec.europa.eu/competition/publications/reports/study_gmd.pdf), p 14.

well, it also entails 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 problematic in fast-moving, digital industries;

- 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.

4. Areas for which the Notice currently does not provide any guidance but which would be desirable

Additional guidance would be helpful specifically regarding product market definition in digital/digitalising markets. The following considerations are relevant in our view:

4.1. Analysis of two-sided markets in general

Two-sided markets are by no-means a new phenomenon. TVs and newspapers, payment cards, stock or commodities exchanges, shopping centres, and classified advertising are all examples of two-sided markets¹².

While there is no universal definition of two-sided or multi-sided markets, it is generally accepted that two-sided markets are markets where a firm (i) acts as a platform that services two or more distinct groups of customers; and (ii) there are indirect network effects affecting at least one of the sides of the platform¹³. Indirect network effects exist where the increases in usage by the customers on one side of the platform increases the value of the platform for the customers in the other side of the platform.

The key question arising in connection with two-sided markets from a market definition standpoint is whether they involve a single overall relevant market or several separate relevant markets. Many have suggested that a distinction should be made between “transaction” vs. “attention” platforms.

¹² Rethinking Antitrust Tools for Multi-Sided Platforms, OECD (2018).

¹³ *Ohio v. Am. Express Co.*, 138 S.Ct.2274, 2280 (2018). Antitrust Analysis of Platform Markets; Why the Supreme Court Got it Right in American Express; David S. Evans, Richard Schmalensee, p. 15.

In “transaction” platforms, the platform offers different products or services to two different groups of customers, who both depend on the platform to intermediate between them in order to conclude a transaction. Traditional examples of this type of platforms include stock exchanges, credit card systems and travel reservation systems. Given that the users on both sides of the platform access the platform with the intention to enter into a transaction, there is a strong presumption that transaction platforms have strong indirect network effects¹⁴.

“Attention” platforms rely on content to attract customers or audience on one side of the platform to get the attention of advertisers on the other side of the platform. These range from traditional newspapers and magazines to online platforms. In these cases, the platform also acts as an intermediary, but not to facilitate a concrete transaction, but rather to place advertisements to the attention of consumers¹⁵.

In *American Express*¹⁶, the US Supreme Court explicitly endorsed that distinction and found that American Express was a “transaction” platform and therefore the relevant market was one overall market for “credit card transactions” involving two sides, the merchants and the card holders. This approach has far reaching implications, as any alleged competitive harm on the merchant side – which was the anti-steering provisions contained in American Express’ arrangements with merchants – may be counterbalanced against any pro-competitive effects on the cardholder side of the market, which is what happened in *American Express*. In other words, the Supreme Court found that it was not sufficient to find that *American Express* had implemented an anticompetitive price increase vis-a-vis the merchants, but it was also necessary to show that this would lead to an overall increase in price or reduction of output for all credit card transactions. The Supreme Court dismissed the government claimant’s action as a result.

In contrast with the US, the “transaction” vs. “non-transaction” distinction has not been acknowledged by the European Commission or the European Courts, and the decisional practice shows that there is not a consistent approach in dealing with two-sided markets.

On the one hand, there are a few examples where the Commission – in the context of the EU merger regulation – has identified a single relevant market for a two-

¹⁴ Antitrust Analysis of Platform Markets; Why the Supreme Court Got it Right in *American Express*; David S. Evans, Richard Schmalensee, p. 13.

¹⁵ Antitrust Analysis of Platform Markets; Why the Supreme Court Got it Right in *American Express*; David S. Evans, Richard Schmalensee, p. 14.

¹⁶ *Ohio v. Am. Express Co.*, 138 S.Ct.2274, 2280 (2018).

sided platform, including *Travelport/Worldspan* (2007)¹⁷, involving the market for electronic travel distribution services and *Google/DoubleClick* (2008)¹⁸, involving the online advertising intermediation market.

On the other hand, there are several other cases particularly in the financial sector, where the Commission defined separate markets in in cases involving multi-sided platforms. In the more recent *Mastercard* (2009) and *Visa* (2010) cases, both concerning the setting of MIFs (multi-lateral interchange fees), the Commission refused to define an overall market including cardholders and merchants, but instead identified separate markets on each side of these markets. This approach was upheld in *Mastercard v. Commission*, where the General Court (2012)¹⁹ and then the Court of Justice (2014)²⁰ both focused only on the impact of the MIFs on the merchant side of the market (the acquiring side), without taking into account the indirect network effects on the cardholder side (the issuing side). The Court of Justice held that as these were separate markets, the restrictive effects on the acquiring side of the platform (merchant side) could not be counterbalanced against pro-competitive effects on the other issuing side of the platform (cardholders) but that such benefits could only be assessed under Article 101(3) TFEU. The same separate market approach was further corroborated in the *Cartes Bancaires* judgment (2014)²¹ and the *Budapest Bank* judgment (2020)²² of the Court of Justice.

Based on the foregoing, the key issues on which the Working Groups would welcome guidance from the new notice include the following:

- Whether the Commission will consider using the “transaction” platform criterion and/or strong indirect network effects as factor(s) in order to define a single market with two sides or several different markets; and
- What other factors the Commission will take into account in defining one vs. multiple markets involving two-sided platforms.

¹⁷ Case No COMP/M.4523

¹⁸ Case No COMP/M.4731

¹⁹ Case T-111/08

²⁰ Case C-382/12 P

²¹ Case C-67/13 P

²² Case C-228/18

4.2. Analysis of markets for online platforms

Many online or digital platforms are also two-sided or multi-sided platforms. The key differences are that (i) digital platforms can have extraordinary economies of scale and scope due to extreme returns to scale, network externalities; and the key role of data²³; and (ii) that digital markets are dynamic and fast evolving, and can be characterised by strong direct and indirect network effects. The strong direct and indirect network effects are a double edged sword: on the one hand, they can help digital platforms reach prominence very quickly; on the other, they can also lead to the very quick decline of very large platforms, particularly if users from one side of the market decline significantly (as has happened to well-established platforms like MySpace).

Against this background, the Special Advisors Report seems to adopt to some extent the distinction between transaction vs. non-transaction or attention platforms, by suggesting that pure matching or transactional platforms that merely involve enabling transactions or “matching” between users on one side of the market and the other side of the market should be normally be viewed as one single market²⁴.

The same report notes however that digital platform markets are highly dynamic and not always clearly delineated, and that it would be safer to “start with several markets”. More generally, the report concluded that *“less emphasis should be put on the market definition and more emphasis on theories of harm and identification of anticompetitive strategies.”*²⁵

The shortcoming of the “separate” market definition for two-sided or multi-sided markets is that it does not necessarily reflect the commercial realities: a platform will establish its strategies based on the interdependencies on both sides of the platform, and not only on the impact on one side of the market. Indeed, a separate market approach focusing on each side of the market in isolation would not take into account the feedback effects from the other side. These feedback effects could be either pro-competitive or anti-competitive. While these feedback effects could be taken into account as part of the assessment of the effects, they are unlikely to play

²³ Competition Policy for the digital era, a report by Jacques Cremer, Yves-Alexandre de Montjoye et Heike Schweitzer (2019), p.2.

²⁴ Competition Policy for the digital era, a report by Jacques Cremer, Yves-Alexandre de Montjoye et Heike Schweitzer (2019), p.45-46.

²⁵ Competition Policy for the digital era, a report by Jacques Cremer, Yves-Alexandre de Montjoye et Heike Schweitzer (2019), p.46.

an equally prominent role if they relate to markets outside the narrowly defined relevant markets.

Based on the foregoing, the key issues on which the Working Groups would welcome guidance from the new notice include the following:

- Whether the Commission is planning on adopting a different market definition approach on two-sided markets involving online platforms;
- What would be the criteria for defining one- vs. multiple- markets in online platforms;
- If the Commission opts for separate market definition for each side of the market how would it assess the feedback effects from the other side of the market; and
- Whether the Commission would take a different approach to market definition in abuse cases vs. merger cases when it comes to online platforms.

4.3. Analysis of “Ecosystems” as relevant markets

Competition in the digital world often takes place on an ecosystem basis, in which ecosystems are collections of complementary products, and the product/ecosystem may be constrained by competing ecosystems. Indeed, the largest digital platforms have created entire ecosystems where third party developers develop third party applications that operate within that ecosystem. Google and Apple have millions of applications on their respective mobile ecosystems while Amazon has almost half a million of applications. Because Google is an open ecosystem, its members also include OEMs who are licensees of the Google’s Android Mobile Operating System.

The Commission adopted a seminal decision involving ecosystems in the recent *Google Android* decision (2018)²⁶. Google’s Android platform is a multi-sided platform involving many separate groups, including (but not limited to) handset OEMs, Mobile Network Operators, app developers, consumers. In that decision, the Commission took a narrow market definition approach by focusing on the Android OS and app store, and did not take into account competition from Apple’s iOS – which was identified as a key competitor to Android in Google internal

²⁶ Case AT.40099.

documents - primarily on the basis that Apple's iOS was not licensable and therefore not a real option for handset OEMs²⁷.

Against this background, the Special Advisor's report in 2019 noted that classic market definitions may fail to capture the ecosystem's overall strategy, given that ecosystems have privileged access to consumers through which they gather data and deliver content. If the customers are locked-into a particular ecosystem, the owner of the ecosystem would become the gatekeeper²⁸. The report concludes that a market for ecosystems might have to be defined.

Against this background the key issues that might be addressed in connection with ecosystems include the following:

- Whether the Commission would consider identifying a separate market for ecosystems, and if so under which conditions.
- To what extent lock-in effects would be relevant in identifying ecosystem-specific aftermarkets.
- To what extent and under what criteria would competition between ecosystems be taken into account.

4.4. Application of the SSNIP test in markets for “free” digital services

The particular characteristics of digital markets, and in particular two or multi-sided markets, mean that frequently goods or services are provided “free” or at least without any direct monetary price being paid. The zero monetary price may be explained either by (i) the presence of other market players on two or multi-sided markets who subsidize those paying zero and/or (ii) the existence of non-monetary payment *e.g.* supply of personal data (sometimes expressed as loss of privacy), or payment in the form of attention/time spent watching advertising.

In these situations, there is no “price” in the traditional sense, so the SSNIP (Small but Significant Non-transitory Increase in Price) test referred to in the Notice is not applicable, at least in the normal way. It would be helpful if the revised Notice indicated how to deal with this.

²⁷ Case AT.40099, paras 217 et seq.

²⁸ Competition Policy for the digital era, a report by Jacques Cremer, Yves-Alexandre de Montjoye et Heike Schweitzer (2019), p.48.

Issues that might be addressed and on which the Working Groups would welcome guidance include the following:

- The fact that users on one side of a platform pay zero does not necessarily prevent the SSNIP test being applied to any subsidizing parties on other sides. In the case of platforms which link buyers and sellers, or readers and advertisers, the sellers and advertisers respectively generally pay money to use the platform. The SSNIP test can therefore 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. How is this best done?
- Given that a decrease in quality is in many ways equivalent economically to an increase in price, is there a viable alternative to the SSNIP test which substitutes the former for the latter, and how should such an analysis be carried out? In particular, how is quantification achieved? This approach has sometimes been referred to as the SSNDQ (Small but Significant Non-transitory Decrease in Quality) test.
- Similarly, given that products are rarely entirely “free” as they have associated costs, can a test be applied that is based on a hypothetical cost increase? This has been referred to as a “decrease in privacy” test, or SSNIC (Small but Significant Non-transitory Increase in Costs) test. “Costs” here refers to non-monetary costs such as time/attention given to looking at advertisements, or supply of personal data. Again this raises difficult issues, and in particular that of quantification.

4.5. Relevance of network effects, data access, ability to analyse data

Paragraph 10 of the Notice refers to the objective of the EU merger regulation in controlling structural changes in the supply of services or products to prevent the “*creation or reinforcement of a dominant position*”, which is characterized as “*usually*” arising where a firm accounts for a large share of supply in a given market “*provided that other factors [...] (such as entry barriers, customers' capacity to react, etc.) point in the same direction*”. Even though the Commission has over the years increasingly looked at other factors than market shares to assess a firm’s market power (and ultimately “actual or potential dominance”), and also one has to take into account that the purpose of EU merger control has also evolved since 1993 to include all significant impediment to effective competition since 2004 it is fair to say that market shares

remain a central part of the Commission's analysis when dealing with merger reviews and Article 102 investigations.

Considering the technological developments since the adoption of the Notice, it would be extremely helpful if the Commission were to provide guidance on how the access to and ability to process or analyse data can play a role and possibly confer market power even in the absence of high market shares. At the very least, access to data and artificial intelligence should be included as a relevant factor when determining market power.

In relation to data, questions may arise as to whether one can define a distinct market for the access to or supply of data. This may in particular come up when dealing with online advertising markets. We would welcome guidance from the Commission as to how “data market(s)” should be analysed (to the extent they exist):

- How traditional ways of defining markets work when dealing with data (see also our comments in relation to the SSNIP test in markets for “free digital services”);
- In what circumstances can data be considered as non-replicable / barrier to entry?

In the digital economy companies increasingly compete to draw consumers into specific ecosystems and traditional market definitions may be less relevant to assess market power where competition is focused on “locking” consumers into digital ecosystems. The Working Groups would welcome guidance from the Commission as to:

- the relevance and assessment of such ecosystems; and
- whether in certain cases competition takes place between digital ecosystems rather than specific service or product markets. This will involve the analysis of network effects and guidance on their relevance when determining the scope of a given market.

More generally, the Working Groups would welcome the Commission’s thoughts and guidance as to whether traditional market definition (and calculation of market shares) may be less relevant when dealing with certain digital markets, as for

example suggested by the authors of the report on “Competition Policy for the digital era” commissioned by the EU Commission and published in 2019²⁹.

4.6. When and to what extent do digital players exercise a competitive constraint on more traditional business models?

A relevant market is defined as “*a place where supply and demand for a specific product or service meet*”. On a relevant market, units supplied should be substitutable for customers who can then choose between suppliers when there is more than one, or at least view the said suppliers as alternatives to choose between to meet the same demand. When it is the case, those suppliers are deemed to exercise a competitive constraint on each other.

In the context of ever-growing online sales, the question of the competitive constraint exercised by digital players on more traditional business is of a significant relevance.

4.6.1 While part of the demand is substitutable, the rest seems to be addressable by more traditional businesses only

Some competition authorities have highlighted the substitutability and interchannel shift.

In the *FNAC/Darty* decision (2016)³⁰ in France, market tests and surveys showed that Amazon was FNACs 3rd largest competitor behind Darty but ahead of other brick-and-mortar distributors. When faced with a uniform price raise from 5-10% in store, a large portion of customers chose to buy online, mainly from Boulanger (click-and-mortar shop) and certain pure players such as Amazon or Cdiscount (shifting rate somewhere between 21,1% to 46% depending on the products).

In *Egmont/Bonnier* (2007)³¹ and *Bertelsmann/Planeta/Circulo* (2010)³², the European Commission took an *a contrario* view, by stating that no element had been brought forward to conclude that a distinct “distant sale” market, including book clubs, mail orders and sales via Internet, could be identified within the overall market for the sale of books to final consumers.

²⁹ By Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer.

³⁰ Decision no. 16-DCC-111 of 27 July 2016 of the French “Autorité de la concurrence” (“FCA”) on Fnac's acquisition of sole control of Darty.

³¹ Case no. COMP/M.4611 of 27 August 2007, *Egmont/Bonnier* (regarding the Danish market).

³² Case no. COMP/M.5838 of 5 July 2010, *Bertelsmann/Planeta/Circulo* (regarding the Spanish market).

Other competition authorities, such as the Dutch national competition authority in the *Audax Group B.V. / Bruna B.V* case (retail sale of toys market)³³, seem to have followed the same approach.

Substitutability seems to vary according to sectors and geographical/cultural biases and competition authorities are not always inclined to consider online sales as part of the same market as offline sales. In some regions, online shopping is not as frequent and accepted as others³⁴.

Additionally, according to the OECD³⁵ and the E-Commerce and Mail Order Sales Federation (FEVAD)³⁶ in France, some sectors are more adverse than others to online purchasing.

In past decisions and even recently, competition authorities have highlighted these discrepancies due to products-related or services-related specificities. The following examples are illustrative:

- Food industry (*Casino/Monoprix – 2013*³⁷): the share of online sale is very low and the progression of e-commerce does not follow the same pattern as the rest of the e-commerce.
- Gardening/DIY/landscaping (*In Vivo/Jardiland – 2018*³⁸): very low market penetration of online sales in this sector. A posteriori (2020 study on e-commerce) the French competition authority explains this with the excessive weights of certain gardening accessories.
- Cosmetics (*Advent/Nocibé – 2014*³⁹): obstacles to online sales including the absence of physical advice and risk of buying counterfeit products.
- Branded consumer batteries (*Energizer/Spectrum Brands – 2018* ⁴⁰): the European Commission pointed out the fact that (i) e-commerce only

³³ Autoriteit Consument en Markt, no. ACM/19/037542, *Audax Group B.V. / Bruna B.V.*

³⁴ OECD, *Implications of E-commerce for Competition Policy*, DAF/COMP(2018)3, 21 February 2019, page 7.

³⁵ OECD, *Implications of E-commerce for Competition Policy*, DAF/COMP(2018)3, 21 February 2019, page 8.

³⁶ E-Commerce And Mail Order Sales Federation (Fevad), Barometer Fevad/CSA, January 2019.

³⁷ Decision no. 13-DCC-90 of 11 July 2013 of the FCA relating to the acquisition of exclusive control of Monoprix by Casino Guichard-Perrachon, paragraph 93.

³⁸ Decision no. 18-DCC-148 of 24 August 2018 of the FCA relating to the acquisition of exclusive control of Jardiland by InVivo Retail, paragraph 52.

³⁹ Decision no. 14-DCC-71 of 4 June 2014 of the FCA relating to the acquisition of exclusive control of the Nocibé group by Advent International Corporation, paragraph 17.

⁴⁰ Case no M.8988 of 3 December 2019, *Energizer/Spectrum Brands*.

represented a small share of total battery sales and that (ii) the impact of online sales on the traditional retail segment appears to be limited across the different national markets.

- Gambling (*Ladbrokes/Coral* – 2016⁴¹): the British competition authority evidenced that the growth of the online channel and the fact for customers to shift to this online channel do not mean that those who currently choose to gamble offline would divert to the online channel to a sufficient degree to make a price increase.
- Insurance agency (*netrisk/biztositas.hu* – 2019⁴²): the Hungarian competition authority reviewed whether and to what extent the activities of offline insurance agencies may affect online agencies.

4.6.2 Shopping online adds an extra layer of competitive pressure on traditional players

Competitive pressure exerted by digital players also stems from the fact that they offer advantages that traditional business models cannot replicate, with online shopping becoming less and less burdensome: there is an increasing richness of information related to products sold online be it professional advice or user feedback; delivery becomes more and more efficient (making it possible to choose a delivery date and time slot, reduction of delivery times, decreasing fees); and after sales service is identical or, at the very least, very similar to the after sales services provided for in brick-and-mortar-shops.

Not only can online shopping be less burdensome than instore shopping, but it can also be more advantageous. Thus, before even purchasing anything, online shopping experience presents significant advantages: (i) in terms of prices: customers have immediate access to several offers for a given product which enables them to compare prices before making any decisions; (ii) in terms of variety of the offers: to the detriment of customer experience offered by “physical” markets, online shopping grants access to a wider variety of offers: for a given product: customers have access to several vendors at the same time; and for different products: online shopping allows customers to have access to goods that are only

⁴¹ Competition Market Authority, *Ladbrokes and Coral*, A report on the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited, 26 July 2016.

⁴² Decision No. Vj-12/2019 (*netrisk/biztositas.hu*) of 12 December 2019 of the Hungarian Competition Authority. English language press release available at: https://gvh.hu/en/press_room/press_releases/press_releases_2019/the-gvh-authorised-the-merger-of-netrisk-and-biztositas.hu

available online (ex: online advertising/VOD or catch-up TV) or that are on too little demand to be sold offline; and (iii) in terms of comfort: online shopping provides for a comfortable shopping experience that cannot always be provided for by traditional markets: shopping on a 24h/7 days per week basis, ordering from one's own house with no transportation.

4.6.3 Reaction of traditional brick-and-mortar players

In reaction to the pressure exerted by digital players, traditional brick-and-mortar players: (i) adapt their business models: to address this trend, traditional players tend to modify their traditional business models towards a more hybrid one click-and-mortar/bricks-and-clicks/*phygital* retailers. This includes developing an omnichannel strategy as a response to the competitive pressure and the consumer mobility between online sales and offline sales; (ii) adapt their pricing policies: traditional shops take into account the conducts of digital players and base their pricing policies on the prices of digital players.

In this regard, a study shows⁴³ that it is difficult for a click-and-mortar retailer to charge different prices in a store and on its website, therefore creating a constraint on the retailer's ability to discriminate on price between the two stores.

4.6.4 Given that any manufacturer can set up an on-line shop, are all manufacturers potential competitors of their distributors?

Potential competition typically occurs when market entry has not yet taken place (and may never do) but is of sufficient extent to significantly constrain the behaviour of market players. Its mere existence may give rise to competitive pressure on the undertakings currently operating in that market. This pressure is represented by the likelihood that a new competitor will enter the market if the market becomes more attractive⁴⁴.

The question posed here raised apparently a different issue as manufacturers and distributors do not compete at the same level. However, situations where horizontal competition is observed seem to have been multiplied. In addition to manufacturers that sell directly their products via marketplaces⁴⁵, the 2017 EU Report on the E-

⁴³ A. Cavallo, *Are Online and Offline Prices Similar? Evidence from Large Multi-channel Retailers*, *American Economic Review*, Vol. 107, No. 1, pp. 283-303, January 2017.

⁴⁴ General Court (Fifth Chamber), *Visa Europe Ltd and Visa International Service v European Commission*, T-461/07, 14 April 2011, paragraph 169.

⁴⁵ This would concern 17% of the manufacturers according to the Final report from the Commission dated 10 May 2017 on the E-commerce Sector Inquiry, Commission Staff Working Document, paragraph 459.

commerce Sector Inquiry shows that 64% of manufacturers opened their own online shops in the last ten years as a reaction to e-commerce growth⁴⁶.

That does not necessarily mean that all manufacturers are potential competitors to their distributors.

Entry costs must be reasonable. They mainly concern logistic costs⁴⁷, marketing costs (especially when manufacturers have little or no reputation, cf. *infra*), or costs related to the payment method (e.g. 3D Secure systems). Most of them are variable and can be outsourced. According to the EU 2017 Report, many manufacturers acknowledge that their decisions to vertically integrate are largely due to the fact that, with relatively small investments, they can benefit from the advantages of online sales.

Additionally, certain regulatory barriers prevent manufacturers from entering the downstream markets by setting up their own online shops⁴⁸. For instance, regulatory barriers such as a ban on selling medicines or cigarettes online prohibit the extension of the manufacturers' activity online. In this case, manufacturers would not be in a position to exert any potential competition to their distributors online.

Moreover, competitive pressure that manufacturers are likely to exert by penetrating those markets varies depending on some of their specific features: (i) product categories: figures show that the incentive for manufacturers to be vertically integrated depends on the product category (the proportion of manufacturers also active at retail level in cosmetic and healthcare products amounts to 85%, similarly to manufacturers active in sports and outdoor products -83%- , whereas those dedicated to household appliances, for instance, only represent 41%)⁴⁹.

This is confirmed by the fact that manufacturers consider channels where the brand image is altered, such as marketplaces, to have adverse impact on their business⁵⁰;

⁴⁶ Final report from the Commission dated 10 May 2017 on the E-commerce Sector Inquiry, Commission Staff Working Document, paragraph 178.

⁴⁷ Costs (i) in the upstream market regarding supply, quality control, storage, packaging, preparation of orders, labelling, (ii) in the downstream market (shipping) and (iii) in the return flow management linked, for example, to the exercise of the right of withdrawal, to after-sales service or to recycling.

⁴⁸ However, this does not prevent manufacturers from reselling through other channels.

⁴⁹ Final report from the Commission dated 10 May 2017 on the E-commerce Sector Inquiry, Commission Staff Working Document, paragraph 185.

⁵⁰ Final report from the Commission dated 10 May 2017 on the E-commerce Sector Inquiry, Commission Staff Working Document, paragraph 172.

(ii) balance of power between manufacturers and distributors: competitive pressure also depends on the balance of power between manufacturers and their distributors. Manufacturers with little notoriety would face increased difficulties to efficiently penetrate a downstream market by setting up their own online channel of distribution; and (iii) prices: the elimination of double marginalisation for manufacturers may in theory enable them to offer lower retail price on their own website. Manufacturers could lead an aggressive pricing strategy. Nevertheless, the above is not necessarily true for the following reasons: (a) although price is a key competition parameter, product quality and brand image are considered the most important parameters of competition by manufacturers⁵¹; (b) new costs generated by vertical integration could lead the manufacturer to offer higher prices online, if its entry costs had turned out to be high in the end.

In sum, the Working Groups believe that the new Notice should consider the fact that the possibility to sell online has increased the number of situations where horizontal competition is observed, and, as such, guidance on how to adequately define the boundaries of competition between firms, correctly identifying the competitive constraints that undertakings face nowadays taking into account today's challenges, would be helpful.

October 9, 2020

⁵¹ Final report from the Commission dated 10 May 2017 on the E-commerce Sector Inquiry, Commission Staff Working Document, paragraphs 137 and following.