



BRUSSELS À JOUR

Market Definition in Light of Globalization and Digitization

Margrethe Vestager announces an update to the European Commission's market definition notice.

Markus Röhrig and Lukas Ritzenhoff report on the latest developments from the European capital of competition law.

In a speech¹ delivered on Monday, 9 December 2019, at a conference in Brussels, Margrethe Vestager, now not only Commissioner, but Executive Vice-President of the European Commission (“EU Commission”), made clear that the tools for competition law enforcement are well designed to deal with the fast changing environment of a globalized and digitized world. However, alluding to musicians fine tuning their instruments before the beginning of a concert, she sees a need to make sure that everything is in tune. This is a reference to (i) the ongoing review of antitrust rules on vertical agreements, (ii) the just-launched review of the horizontal guidelines, and (iii) - which is new - a review of the market definition notice, which dates back to 1997.

Defining the relevant market has the potential to turn cases upside down and is all but trivial. This was the case in 1997, but is even more so today, in a globalized world that is becoming more digital every day. The general trend of the last 22 years is that geographic markets for certain products, which are not cement, for example, have a tendency to be larger in scope now compared to back then. In many cases, markets nowadays are at least EEA-wide. This is due to the advanced implementation of a single market, lower transport costs, harmonization of technical standards digitization of trade, to name just a few.

In order to update its market definition notice, the EU Commission has asked experts for their input. According to their analysis, the geographic market definition should not be an end in itself. This could be accomplished by taking into account competition that might come from outside the geographic market. However, Vestager pointed out that such external factors must be of a certain quality and reliability. This is all but new, since potential

¹ https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en



competition from outside the geographic market is a factor often discussed in the competitive assessment of merger cases, for example. According to Vestager, the EU Commission is considering making this point clearer in an updated market definition notice.

For an updated **product** market definition set, digitization is marked as the main challenge. The SSNIP test, being linked to a change in prices, might not be sufficient to address issues in markets where consumers use a product *for free*. An obvious tweak may be to analyze the customers' reaction to lower quality of the free product or service, as can be seen in the EU Commission's Google Android case. On top of that, Vestager noted that big tech companies may establish ecosystems, making it harder for consumers to switch and which might lock them in. All these aspects will potentially be addressed in the updated market definition notice. In sum, it can be expected that the updated market definition notice may give the EU Commission a little more room for maneuver without changing any basic principles. A lot of the anticipated changes to the current 1997 notice will likely be made to catch up with the reality of market definition today.

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