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Abstract

The 1997 Notice on market definition is one of the oldest guidance notices adopted by the Commission in the area of competition law. Although its main principles appear still valid and uncontroversial, there is arguably scope for further guidance in controversial areas such as the identification and definition of aftermarkets, two-sided markets, and new and rapidly evolving markets.

La Communication de 1997 sur la définition du marché en cause est l'une des plus anciennes de la Commission en matière de concurrence. Ses principes généraux sont toujours d'actualité mais certaines notions nécessitent d'être plus approfondies comme la définition et l'identification de marchés secondaires, de marchés duaux ou encore de marchés émergents à développement rapide.

Professor David Bosco, Nice University,
is the Editor of this collection of short papers.

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Market definition: Is there a need for new guidance?

THE 1997 COMMISSION NOTICE ON MARKET DEFINITION: ITS TIME HAS COME?

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I. Introduction

1. Over a decade ago, the European Commission adopted its guidance Notice on market definition¹. Untouched for some 13 years, the Notice is one of the oldest guidance notices adopted by the Commission in the area of competition law. Against this background, and in light of the increased use of complex economic analysis in the application of competition law, it seems legitimate to consider whether revision of the Notice is needed. Before answering this question, however, it is useful to recall the surrounding context and motivations that led to the Commission's adoption of the notice.

2. Long before the adoption of the Notice on market definition, the Commission had been criticized for its excessive formalism and lack of adequate economic analysis in applying competition rules. As such criticism targeted the field of vertical restraints in particular², this was one of the drivers behind the Commission's Green paper on vertical restraints of 22 January 1997³, which reflected the Commission's desire to adopt an approach to the application of competition law that was more strongly based in economic analysis. Soon following the Green paper, the Notice on market definition emphasized the importance of rigorous economic analysis in the definition of relevant markets, giving a further signal from the Commission of its commitment to embracing economic analysis in competition law.

3. The Commission's rethinking of competition law continued on with the 1999 White paper on the modernization of EU competition law⁴, which eventually led to a self-assessment system to replace the previous (burdensome) notification system. In view of the shift towards a self-assessment system, the Commission faced the task of enhancing transparency and clarifying its policy in this area by revealing its procedural processes and, in particular, by indicating the relevant criteria and evidence for defining relevant markets⁵. In this regard, the Notice on market definition proved to be an extremely important tool for companies seeking to assess the risk of application of EU competition law to their conduct.

¹ Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9 december 1997, pp. 5-13.

² B. E. Hawk, "System Failure: Vertical Restraints and EC Competition Law", 35 *Common Market Law Review* 973 (1995).

³ Green paper on Vertical restraints in EC Competition policy, of 22 January 1997, COM (96) 721 final.

⁴ White paper on Modernisation of the rules implementing articles 81 and 82 EC, 1999 OJ (C 132) 1.

⁵ See speech by Mario Monti, European Commissioner for Competition Policy, Market definition as a cornerstone of EU Competition Policy, Workshop on Market Definition – Helsinki Fair Centre, Helsinki, 5 October 2001, available on the Commission's web site. See also the Notice, paragraphs 4 and 5.

II. The importance of market definition in EU Competition Law

4. Indeed, apart from restrictions of competition “by object” – such as cartels – which invariably fall within the prohibition of article 101(1) TFEU without the need to engage in market analysis, market definition is a preliminary, indispensable step for any EU competition law assessment.

5. A market definition analysis is indeed necessary to determine whether an agreement between undertakings is likely to significantly restrict competition within the meaning of article 101(1) TFEU or whether it falls within the scope of a block exemption regulation.

6. According to the Commission’s *de minimis* notice⁶, provided they do not contain certain hard-core restraints, agreements between (actual or potential) competitors are not caught by article 101(1) TFEU when the combined market share of the parties does not exceed 10% on any relevant market. Similarly, agreements between non-competitors, which do not contain hard-core restraints, are not caught by article 101(1) TFEU when the market share of each party on any relevant market does not exceed 15%.

7. Since the late 1990s, nearly all EU block exemption regulations and Commission guidelines on the application of articles 101 and 102 have followed a market share threshold approach similar to the *de minimis* notice. Thus, for instance, research & development agreements between competitors benefit from the safe harbor of a block exemption regulation if the parties’ combined market share does not exceed 25% and if the agreement does not contain certain hard-core restraints⁷. The same principle applies to: (i) specialization agreements between competitors, when their combined market share does not exceed 20%⁸; (ii) technology licensing agreements between competitors, when their combined market share does not exceed 20% on the affected relevant technology and product market, or between non-competitors, when their individual market share does not exceed 30% on the affected relevant technology and product market;⁹ and (iii) distribution agreements, when the market share of the supplier and of the buyer (on the market where they respectively provide or purchase the contract products) does not exceed 30%.¹⁰

8. Market definition plays an even more important role in the area of abuse of dominant position. According to the Commission, dominance is not likely if the undertaking’s market share is below 40% in the relevant market¹¹, while a market share below 10% normally excludes the existence of such a position¹². By contrast, according to settled case law, very significant market shares constitute in themselves, except in exceptional circumstances, evidence of the existence of a dominant position¹³. In particular, undertakings that consistently hold over 50% of the relevant market for at least three years can be presumed to hold a dominant position on that market; in such case, the burden of proving the contrary rests on that undertaking¹⁴.

9. Also in the area of merger control, market share thresholds, and therefore market definition, are decisive in determining whether certain markets are “affected” or “reportable”, which may have important implications in terms of the extent of the information that notifying parties should provide to the Commission in their notification. Also in the competitive assessment, market definition plays an important role, although its importance has probably declined since the change of the substantive test from dominance to the significant impediment of competition. Under this new test, the Commission will primarily focus on the consequences of the merger on post-merger prices, rather than the level of concentration resulting from the merging parties’ combined market shares¹⁵.

10. Against this background, it is clear that market definition plays an essential role in EU competition law and that some guidance from the Commission on defining markets is probably even more helpful today than it was 13 years ago. The question, therefore, is not whether a notice on market definition is still necessary today, but whether the Notice adopted by the Commission in 1997 needs to be revised and updated.

III. Scope for further guidance

11. The Notice on market definition is based on principles that continue to appear valid and uncontroversial. These are essentially three principles: (1) the starting point for any market definition should be demand-side substitutability,

6 Commission Notice on agreements of minor importance which do not appreciably restrict competition under article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368 of 22 december 2001, pp. 13-15.

7 Commission Regulation no 1217/2010 of 14 december 2010 on the application of article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, OJ L 335, 18 december 2010, p. 36.

8 Commission Regulation no 1218/2010 of 14 december 2010 on the application of article 101(3) of the Treaty to categories of specialisation agreements, OJ L 335, 18 december 2010, p. 43.

9 Commission Regulation (EC) no 772/2004 of 27 april 2004 on the application of article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27 april 2004, p. 11-17.

10 Commission Regulation no 330/2010 of 20 april 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23 april 2010, p. 1-7.

11 Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24 february 2009, pp. 7-20, paragraph 14.

12 Case 75/84, *Metro v. Commission*, [1986] ECR 3021, paragraph 85.

13 Case 85/76, *Hoffmann-La Roche v. Commission*, [1979] ECR 461, paragraph 41; Case C-62/86, *AKZO Chemie v. Commission*, [1991] ECR I-3359, paragraph 60; Case T-30/89, *Hilti v. Commission*, [1991] ECR II-1439, paragraph 92; Case T-83/91, *Tetra Pak v. Commission*, [1994] ECR II-755, paragraph 109; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, *Compagnie Maritime Belge Transports SA and others v. Commission*, [1996] ECR II-1201, paragraph 76.

14 Case C-62/86, *AKZO Chemie v. Commission*, [1991] ECR I-3359; cfr. Case 85/76, *Hoffmann-La Roche v. Commission*, [1979] ECR 461, paragraph 58; R. Whish, *Competition law*, 2009, pp. 177-178.

15 International Chamber of Commerce, *Comments on the Reform of the application of article 82 of the EC Treaty*, prepared by the Commission on Competition, available at <http://www.iccwbo.org>, p. 7.

measured pursuant to the SSNIP test¹⁶ (also known as the “hypothetical monopolist test”); (2) supply-side substitutability¹⁷ may be taken into account when its effects are equivalent to those of demand-side substitution in terms of effectiveness and immediacy¹⁸; and (3) potential competition, *i.e.*, the ability of new firms to enter the relevant product and geographic market, should be taken into account not when defining the relevant market, but at the stage of the competitive assessment.

12. However, it is unclear to what extent, in practice, the Commission has taken supply-side substitutability into account for the definition of relevant product markets since the adoption of the Notice. The Notice states that supply-side substitution “*may also be taken into account when ... its effects are equivalent to those of demand substitution*”. The use of the term “*may*” indicates that the Commission sought to maintain discretion in this respect. Moreover, the current Notice contains only a hypothetical example of supply-side substitution, with no reference to any specific case where the Commission has effectively used it to define a product relevant market.

13. According to some commentators, it is probably due to its “*focus on demand-side considerations to the near exclusion of supply-side factors*” that the Commission has adopted a very narrow market definition in a number of cases¹⁹. To dispel similar doubts, a revised notice on market definition could provide additional guidance on the circumstances in which supply-side substitutability should be taken into account, and it could also refer to specific Commission precedents where this factor was effectively taken into account to define the relevant market.

14. Another area where further guidance would be useful is that of the so-called aftermarkets or secondary markets. Companies need more guidance on how to assess whether the repair or maintenance of their primary products, or the supply of spare parts or refill parts compatible with their primary products, could be considered a relevant market distinct from the market of the primary products. Complaints are regularly filed with the Commission or national antitrust authorities, contending that suppliers of primary products have a dominant position in the alleged markets for the secondary products compatible with those primary products²⁰.

16 SSNIP stands for “small but significant non-transitory increase in prices”. The test consists of examining the reaction of customers in a given geographic area to a hypothetical small but significant and non-transitory increase in the price of a product (of about 5 to 10%). If, as a reaction to the hypothetical price increase, most customers would be ready to switch to substitute products or areas, to such an extent that the price increase would become unprofitable because of the resulting loss of sales, these additional substitutes and areas should be included in the relevant market until the set of products and geographic areas is such that small, permanent increases in relative prices would be profitable.

17 That is the ability of producers to satisfy demand of product or services different from those they are currently producing or to satisfy demand in geographic areas different from those they currently supply.

18 This would be the case when suppliers are able to switch production to the relevant products and geographic markets in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

19 International Chamber of Commerce, Comments on the Reform of the application of article 82 of the EC Treaty, prepared by the Commission on Competition, available at <http://www.iccwbo.org>, p. 7.

20 See, for instance, summary of Commission decision of 13 december 2011 in Case COMP/39.692 – IBM Maintenance Services, OJ C 18/6 of 21 january 2012. See also judgment of 15 december 2010, Case T-427/08, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, not yet published.

15. The current notice on market definition contains only one paragraph that deals quite concisely with this complex topic. The DG Comp staff Discussion paper on exclusionary abuses by dominant undertakings of 2005 devoted a full section on aftermarkets²¹. This section, however, was removed from the final version of the Guidance on article 102 adopted by the Commission in 2008. Further guidance on this topic in a revised Commission notice on market definition would therefore be a welcome development.

16. A revised notice on market definition could also provide guidance on how to identify and define two-sided markets²². Indeed, in cases involving two-sided platforms, “*market definition and market power analyses must take into account several economic issues that do not arise in other contexts*”²³. The current Notice on market definition contains no reference to the concept of two-sided markets. The reason is simple: the literature on this topic has developed only in the last 10 years²⁴.

17. Finally, a revised notice on market definition could also provide guidance on a number of other issues such as:

→ how to define markets and assess market shares in new and rapidly evolving markets (such as information technology markets),

→ when and to what extent branded and unbranded products can be considered as belonging to the same product market,

→ how to consider captive sales, and

→ whether competitive conditions in retail markets can be used as a proxy to define and assess wholesale markets.

IV. Conclusion

18. In conclusion, although the current Notice appears to have stood the test of time, there is arguably scope for further guidance and clarification, in particular in areas such as supply-side substitution, the identification and definition of aftermarkets, the identification and definition of two-sided markets, and the definition of markets and assessment of market shares in new and rapidly evolving markets (such as information technology markets). Given the controversial nature of these topics, however, it remains to be seen whether the Commission feels ready to engage in a debate at this stage, or whether it prefers to acquire more experience before providing further guidance in another future amendment to the Notice. ■

21 The staff paper is available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

22 According to the economics literature, a two-sided market is “a market in which a firm acts as a platform and somehow connects distinct but interdependent customer groups (the so-called ‘sides’) in a way that generates value for at least one of the two customer groups” (L. Filistrucchi, D. Geradin and E. Van Damme, Identifying Two-Sided Markets (21 february 2012), TILEC discussion paper no. 2012-008, p. 4; available at SSRN: <http://ssrn.com/abstract=2008661> or <http://dx.doi.org/10.2139/ssrn.2008661>).

23 D. S. Evans, Two-Sided Market Definition (11 november 2009), ABA Section of Antitrust Law, Market definition in antitrust: theory and case studies, Forthcoming; available at SSRN: <http://ssrn.com/abstract=1396751>.

24 Filistrucchi, Geradin and Van Damme, Identifying Two-Sided Markets, *op. cit.*, p. 3.

DÉLIMITER LES MARCHÉS PERTINENTS ? AUTANT GRATTER UNE JAMBE DE BOIS JUSQU'À CE QU'ELLE SAIGNE !

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Introduction : Un concept juridique mobilisant des outils économiques

1. La délimitation des marchés pertinents est une étape préalable systématiquement mise en œuvre par les autorités de concurrence dans le cadre du contrôle des concentrations ou de l'examen d'éventuels abus de position dominante. Elle permet en effet de calculer les parts de marché et joue le rôle d'un premier filtre permettant de ne pas consacrer inutilement de ressources à l'examen de situations ne soulevant vraisemblablement pas de problèmes de concurrence.

2. La définition juridique d'un marché pertinent fait appel à des concepts issus de la théorie économique. Il s'agit en effet d'étudier le fonctionnement concurrentiel du marché et le comportement des agents économiques (consommateurs et entreprises). L'analyse économique a donc largement contribué à l'élaboration de méthodes de plus en plus sophistiquées permettant de délimiter rigoureusement les marchés pertinents, au prix d'efforts substantiels en termes de collecte et d'analyse de données (I).

3. La sophistication des techniques de délimitation des marchés pertinents s'est paradoxalement accompagnée d'une remise en cause croissante de l'utilité de l'exercice (II).

I. Des élasticités croisées aux pertes critiques : Une sophistication croissante des techniques de délimitation des marchés pertinents

1. Les limites d'une approche fondée sur les élasticités-prix croisées

4. En pratique, lorsqu'on cherche à délimiter un marché pertinent, le premier réflexe est d'étudier la substituableité entre les biens. La Commission européenne nous y

invite explicitement puisqu'elle indique²⁵ qu'"un marché de produits en cause comprend tous les produits et/ou services que le consommateur considère comme interchangeables ou substituables en raison de leurs caractéristiques, de leur prix et de l'usage auquel ils sont destinés". On inclut ainsi dans le marché pertinent les biens substituables au premier bien considéré.

5. Cependant, dans un monde de produits différenciés, la substituableité des biens est une variable continue. Les biens sont plus ou moins substituables. Leur degré de substituableité est mesuré par l'élasticité-prix croisée (i.e., de combien augmentent les ventes du bien A lorsque le prix du bien B augmente ?). Pour identifier les biens substituables, il convient donc de les classer en fonction de leur degré de substituableité et de retenir un seuil en deçà duquel on considèrera que la valeur de l'élasticité croisée est trop faible pour inclure le bien dans le marché pertinent.

6. La délimitation du marché pertinent fondée sur l'estimation des élasticités croisées séduit par sa relative simplicité. Elle se heurte cependant à d'importantes limites notamment car elle emporte le risque de conduire à des délimitations restrictives des frontières du marché pertinent. Par exemple, à la suite de la hausse du prix du bien qu'ils achetaient, les consommateurs se reportent généralement vers plusieurs biens. Or, plus le nombre de substituts est important, plus l'élasticité croisée est diluée. Cela peut conduire à une situation où chaque substitut pris individuellement n'exerce qu'une contrainte très faible alors qu'il existe bien une forte contrainte concurrentielle globale. Le choix du seuil en deçà duquel on considère que la valeur de l'élasticité croisée est trop faible pour inclure le bien dans le marché pertinent reste subjectif.

7. En outre, les élasticités-prix croisées ne permettent pas de prendre en compte les contraintes indirectes, ce qui entraîne à nouveau un risque de sous-estimation de la taille du marché pertinent. Imaginons que l'on cherche à déterminer le marché pertinent auquel appartient la Sandero de Dacia. Si on analyse uniquement les élasticités croisées, on exclura vraisemblablement la Mini du marché pertinent car aucun acheteur potentiel de Sandero ne se tournerait vers une Mini

²⁵ Communication de la Commission sur la définition du marché en cause aux fins du droit communautaire de la concurrence, JO C 372 du 9 décembre 1997.

II. Concentrations, position dominante... Vers l'abandon de la délimitation préalable des marchés pertinents ?

16. La délimitation des marchés pertinents et le calcul des parts de marché qu'elle permet fondent la première appréciation portée par les autorités de concurrence sur le risque qu'une opération de concentration engendre des effets anticoncurrentiels ou sur l'existence d'une position dominante. Or, c'est le renforcement du pouvoir de marché à la suite d'une fusion ou par une pratique anticoncurrentielle qui est à l'origine de tout effet anticoncurrentiel et le calcul des parts de marché constitue généralement un bien mauvais indicateur du pouvoir de marché de la nouvelle entité ou de l'entreprise susceptible d'être dominante.

1. De nouveaux tests dans le cadre du contrôle des concentrations

17. Dans le cadre du contrôle des concentrations, la délimitation des marchés pertinents sert principalement à calculer les parts de marché et les indicateurs structurels qui en dérivent (e.g. concentration du marché estimée par le calcul du IHH³⁰). La première appréciation des services d'instruction sur le risque d'effets anticoncurrentiels d'une opération de concentration se fonde souvent sur ces indicateurs. Or, ces derniers constituent de bien mauvais outils car ils ne permettent en général pas d'apprécier correctement les sources de pression concurrentielle.

18. Bien évidemment, les autorités de concurrence prennent soin d'indiquer que les parts de marché et la concentration ne constituent qu'une première indication qui doit être complétée par l'analyse d'autres éléments importants, tels que la nature de la concurrence, le positionnement relatif des parties à la concentration ou la pression concurrentielle exercée par les autres concurrents. Quel est alors l'intérêt de mobiliser un premier indicateur, certes synthétique, mais finalement si peu informatif sur la probabilité qu'une opération de concentration emporte des effets unilatéraux significatifs ? Ne serait-il pas possible d'utiliser un indicateur plus pertinent ?

19. C'est notamment la voie ouverte en 2010 par les autorités de concurrence aux États-Unis et au Royaume-Uni : leurs dernières lignes directrices³¹ confirment le rôle accru de l'analyse économique dans l'appréciation des effets unilatéraux, au détriment des approches traditionnelles fondées sur la définition des marchés pertinents et l'évaluation du degré de concentration via les parts de marché.

30 L'Indice de Herfindahl-Hirschmann est calculé comme la somme du carré des parts de marché. Pour un monopole, il vaut 10 000. Pour un duopole symétrique, il atteint 5 000. En présence de 10 concurrents ayant chacun 10 % du marché, l'IHH vaut 1 000.

31 US Department of Justice & Federal Trade Commission (2010), *Horizontal Merger Guidelines*. Competition Commission and the Office of Fair Trading (2010), *Merger Assessment Guidelines*.

Elles mettent en particulier l'accent sur l'intérêt d'analyser les incitations de la nouvelle entité à augmenter ses prix à l'issue d'une fusion.

20. D'un point de vue général, une fusion horizontale produit deux effets opposés qu'il convient de comparer afin d'être en mesure d'évaluer son effet net sur le bien-être. D'une part, elle est susceptible de produire des gains d'efficacité qui peuvent se traduire par la baisse des coûts de production de l'entité fusionnée et bénéficier, au moins en partie, aux consommateurs, sous la forme d'une baisse de prix. D'autre part, elle rend plus profitable une hausse de prix par la nouvelle entité en éliminant la concurrence qui prévalait entre les parties (la nouvelle entité ne craint plus de perdre les clients qui auraient quitté l'une des parties pour l'autre) et en augmentant ainsi le pouvoir de marché de l'entité fusionnée. Cette incitation à l'augmentation du prix dépend de l'ampleur du report de demande entre les deux produits, qui peut être mesurée par le ratio de diversion.

21. Le ratio de diversion mesure la proportion de consommateurs du bien A qui, à la suite d'une augmentation de son prix, se mettent à consommer le bien B. Il est évidemment très lié au concept économique de l'élasticité croisée, dont il n'est qu'un dérivé. Disposer d'une estimation fiable du ratio de diversion fournit une première appréciation de l'effet d'une opération de concentration résultant de la disparition des contraintes concurrentielles que les parties exerçaient l'une sur l'autre : toutes choses égales par ailleurs, plus le ratio de diversion entre les parties à la concentration est élevé, plus le risque que l'opération engendre des effets unilatéraux est grand. Cette analyse peut être menée indépendamment de toute délimitation du marché pertinent, et le ratio de diversion peut être estimé par différents moyens. Même si, mathématiquement, le ratio de diversion est lié par une équation aux élasticités-prix directe et croisées de la demande au prix, il est en pratique possible de l'estimer directement, sans avoir à collecter de grandes quantités de données. Certaines entreprises disposent en effet d'enquêtes réalisées auprès de leurs clients, par exemple sur le fournisseur précédent de leurs nouveaux clients. Dans les marchés fonctionnant par appels d'offres, il est en général relativement facile de recenser les consultations ayant conduit à un changement d'opérateur. Le ratio de diversion peut alors être estimé par l'analyse de la direction des changements observés.

22. Le ratio de diversion apporte une première indication intéressante permettant d'apprécier la proximité concurrentielle des parties à une concentration. Toutes choses égales par ailleurs, une concentration sera susceptible d'engendrer des effets unilatéraux d'autant plus significatifs qu'elle concerne des concurrents proches. Une fois le ratio de diversion évalué, il est possible de calculer un indicateur synthétique mesurant l'incitation de la nouvelle entité à accroître ses prix.

23. Prenons l'exemple d'une fusion entre deux supermarchés situés relativement proches l'un de l'autre. Avant la fusion, chacun maximisait son profit individuel. Après la fusion, la nouvelle entité maximise le profit joint. Elle va donc tenir compte de la possible cannibalisation entre les deux

supermarchés. En baissant les prix du supermarché A, la nouvelle entité devra tenir compte du fait que cela cannibaliserait les ventes du supermarché B. À l’opposé, en augmentant les prix du supermarché A, la nouvelle entité tiendrait compte du fait qu’une partie des clients arrêtaient de fréquenter le supermarché A se reportera vers le supermarché B. Plus le ratio de diversion du supermarché A vers le supermarché B est élevé (autrement dit, plus les deux supermarchés sont des concurrents proches), plus la nouvelle entité sera incitée à augmenter ses prix. En outre, plus la marge réalisée par le supermarché B sera élevée, plus la nouvelle entité sera incitée à accroître le prix du supermarché A car les consommateurs divertis de A vers B généreront une marge élevée.

24. À partir d’une estimation des marges et du ratio de diversion, on peut estimer un premier indicateur de mesure de l’incitation brute à la hausse de prix³². Par exemple, si l’on suppose que le ratio de diversion de A vers B est égal à 30 %, que le taux de marge du supermarché B s’élève à 20 % et que le niveau des prix des deux supermarchés est similaire, l’incitation brute à la hausse des prix est alors de 6 %. Comme l’incitation brute ne tient compte que de l’effet de la disparition de la concurrence entre les deux entreprises fusionnantes, on peut le compléter par le calcul d’un indicateur net³³ des incitations à la baisse des prix résultant des gains d’efficacité de l’opération (rappelons qu’en l’absence de gains d’efficacité, toute opération de concentration horizontale se traduirait par un effet net négatif pour les consommateurs). On obtient alors un résultat du type : compte tenu d’un ratio de diversion de A vers B égal à 30 % et des taux de marge de 20 %, il faut que les gains d’efficacité soient supérieurs à 7,5 % pour que l’opération se traduise par un effet net de baisse des prix (l’incitation à baisser les prix engendrée par les gains d’efficacité l’emportant sur l’incitation à les augmenter à la suite de la disparition de la contrainte concurrentielle qui s’exerçait avant l’opération).

25. En résumé, il est relativement facile de calculer des indicateurs donnant une première appréciation du risque qu’une fusion horizontale engendre des effets unilatéraux. Avec une estimation du ratio de diversion et du taux de marge, on obtient un indicateur synthétique permettant d’identifier les opérations les plus susceptibles d’engendrer des effets anticoncurrentiels sensibles. Bien évidemment, il ne s’agit que d’indicateurs servant de premiers filtres et ils ne remplacent en aucun cas une analyse approfondie mobilisant d’autres outils permettant de déterminer les effets probables d’une opération soulevant des doutes. Cependant, en première étape, ces indicateurs remplacent avantageusement le calcul des parts de marché et de l’indice de concentration : ils sont plus informatifs sur les risques d’effets unilatéraux d’une fusion horizontale et il n’est même pas nécessaire de délimiter le marché pertinent pour les calculer.

2. L’approche par les effets dans le cadre des abus de position dominante

26. Dans le cadre du contrôle des abus de position dominante, la délimitation des marchés pertinents sert principalement à caractériser la position dominante. Concrètement, l’approche traditionnelle se déroule en deux temps : il convient d’abord d’établir l’existence d’une position dominante, puis d’établir l’existence d’un abus. La première étape reste très formaliste et s’appuie essentiellement sur la part de marché de l’entreprise concernée qu’il n’est possible de calculer qu’après avoir délimité le marché pertinent. La seconde étape repose à l’opposé sur l’analyse économique des effets, deux pratiques de nature similaire étant susceptible de produire des effets contrastés sur la concurrence.

27. Pour l’économiste, cette démarche en deux temps suscite deux questions : d’une part celle de la pertinence de la caractérisation d’une position dominante reposant essentiellement sur les parts de marchés, d’autre part celle de l’utilité de la caractérisation même de la dominance.

28. Sur le premier point, il est utile de repartir de la définition juridique de la position dominante. L’arrêt *Hoffman-Laroche*³⁴ définit la position dominante comme “une situation de puissance économique détenue par une entreprise qui lui donne le pouvoir de faire obstacle au maintien d’une concurrence effective sur le marché en cause en lui fournissant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, de ses clients et, finalement, des consommateurs”. Cette “situation de puissance économique” s’apparenterait à la notion économique de pouvoir de marché détenue par une entreprise, autrement dit à la capacité de l’entreprise en cause à pratiquer un prix supérieur à son coût marginal. Il est évalué par le calcul de l’indice de Lerner³⁵ qui est égal à l’écart entre le prix et le coût marginal rapporté au prix. Cet indice est compris entre 0 et 1 (0 correspond à une situation de concurrence parfaite, 1 correspondrait à un pouvoir de marché infini). Or, le pouvoir de marché d’une entreprise ne se reflète pas forcément dans sa part de marché. Ce n’est en fait le cas que sous des hypothèses très restrictives sur le fonctionnement concurrentiel du marché (par exemple biens homogènes dans un oligopole à la Cournot). Les autorités de concurrence en sont bien conscientes puisqu’elles indiquent généralement qu’au-delà du niveau de la part de marché, la position dominante doit être appréciée à partir d’un ensemble de facteurs tels que les barrières à l’entrée ou l’existence d’une puissance compensatrice du côté des acheteurs. L’analyse de ces critères s’inscrit de façon cohérente dans une appréciation globale du pouvoir de marché de l’entreprise et n’exige aucunement d’avoir défini au préalable le marché pertinent. Finalement, pour établir l’existence d’une position dominante, il n’est pas non plus justifié de définir les frontières du marché pertinent. Il serait en particulier beaucoup plus utile de se concentrer sur l’estimation de l’élasticité de la demande adressée à l’entreprise concernée car celle-ci agrège l’ensemble

32 Par exemple le Gross Upward Pressure Index (GUPPI) proposé par S. Salop et S. Moretti (2009). *Updating the Merger Guidelines: Comments*.

33 Par exemple le *Upward Pressure Index* (UPP) proposé par J. Farrell et C. Shapiro (2010), “Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition”, *The B.E. Journal of Theoretical Economics*, 10(1) (Policies and Perspectives), article 9.

34 Affaire 85/76, arrêt de la Cour du 13 février 1979, *Hoffmann-La Roche & Co. AG* contre Commission des Communautés européennes, § 38.

35 Lerner (1934). “The concept of monopoly and the measurement of monopoly”, *Review of Economic Studies*, n° 1, pp. 157-175.

des pressions concurrentielles auxquelles elle est soumise (de la part de ses concurrents comme de la part de ses clients) et permet donc d'apprécier directement le pouvoir de marché qu'elle détient³⁶.

29. Sur le second point, il est symptomatique d'observer que l'étape permettant de caractériser la position dominante n'a quasiment aucun lien avec l'étape permettant de caractériser l'abus. L'analyse des effets de pratiques et les tests développés pour caractériser celles qui seraient abusives ne nécessitent en rien d'avoir au préalable établi l'existence d'une position dominante. Que ce soit les tests du concurrent aussi efficace, du sacrifice de profits ou d'absence de sens économique, ils peuvent parfaitement être mis en œuvre sans avoir défini le marché pertinent, ni même démontré l'existence d'une position dominante. En fait, ces tests incluent généralement certaines conditions qui sont en quelques sortes redondantes avec la caractérisation de la position dominante. Par exemple, dans le cadre d'une pratique de prédation, la possibilité de récupérer ses pertes une fois les concurrents évincés ou marginalisés signifie bien que l'entreprise a renforcé, à l'issue de la prédation, son pouvoir de marché. De même, dans le cadre d'un refus de vente, le critère sur l'élimination de la concurrence traduit également un renforcement du pouvoir de marché. Le rapport de l'EAGCP³⁷ soulignait d'ailleurs que l'analyse économique des effets des pratiques rendait inutile la démonstration préalable de l'existence d'une position dominante.

Conclusion

30. Si la délimitation des marchés pertinents n'a sans doute pas encore un pied dans la tombe, elle apparaît néanmoins comme le reliquat d'une approche formaliste du droit de la concurrence. Petit à petit, l'analyse économique des effets gagne du terrain et permet d'élaborer de nouveaux tests qui remplaceront avantageusement l'exercice formel et rigide de délimitation des marchés pertinents. ■

36 Kaplow (2011) explique qu'il n'y a aucun sens à vouloir d'abord délimiter le marché pertinent pour ensuite apprécier le pouvoir de marché puisqu'une délimitation rigoureuse du marché pertinent ne peut être menée sans apprécier au préalable le pouvoir de marché. Kaplow (2011). "Market definition and the merger guidelines", *Review of Industrial Organisation*, n°39, pp. 107-125.

37 Rapport de l'EAGCP (2005), *An economic approach to Article 82*.

THE REVISED U.S. HORIZONTAL MERGER GUIDELINES AND MARKET DEFINITION: EARLY RETURNS

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1. More than a year has passed since the United States Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) (collectively, “the Agencies”) issued a revised set of Horizontal Merger Guidelines (“2010 Guidelines”).³⁸ The 2010 Guidelines depart from past merger guidelines by deemphasizing the role of market definition in merger analysis. Specifically, the 2010 Guidelines no longer require the Agencies to begin analyzing a merger by “first defin[ing] the relevant product market.”³⁹ Rather, the 2010 Guidelines state that defining a relevant market is useful “to the extent it illuminates [a] merger’s likely competitive effects” but indicate that the exercise “is not an end in itself.”⁴⁰ The 2010 Guidelines go on to state that the Agencies will “normally” – but not always – define a relevant market in merger challenges.⁴¹

2. In this essay, we briefly discuss: (I) conflicting views on the revised treatment of market definition in the 2010 Guidelines; and (II) whether in practice this new approach to market definition has had any meaningful effect on merger challenges in the United States. We conclude that, at least so far, market definition remains front and center in litigated merger challenges for both the Agencies and courts. Nonetheless, we believe the 2010 Guidelines reflect the Agencies’ attempt to begin moving the law away from requiring plaintiffs to prove a relevant market in all merger cases, and we expect that the Agencies may well rely on the Guidelines to avoid defining a market in a future case that does not lend itself to a traditional, narrow market definition.

I. The role of market definition in the 2010 Guidelines

3. The 2010 Guidelines substantially decrease the role of market definition in merger analysis. Market share is demoted from the first step in the analysis to a tool that may be employed where useful.⁴² In a statement issued concurrently with the 2010 Guidelines, FTC Commissioner J. Thomas Rosch described the new treatment of market definition as a “monumental contribution” that corrects the “misimpression” that defining the relevant market and measuring market shares are “‘gating items,’ without which competitive effects cannot be considered.”⁴³

4. Other agency officials have likewise endorsed this change. According to the former head of the DOJ’s Antitrust Division, Christine Varney, removing market definition as an automatic first step in merger analysis was “necessary to enable the efficient use of government resources.”⁴⁴ Ms. Varney further noted that, while market definition continues to be a prerequisite for challenging a merger based on a coordinated effects theory, under the 2010 Guidelines, in a case based on a unilateral effects theory “there may be no need to settle on a market definition.”⁴⁵ Several former Agency economists agree with this point, and have long argued that market definition is of limited relevance in cases alleging anticompetitive unilateral effects.⁴⁶

* The views expressed herein are those of the authors, not those of Cleary Gottlieb or any of its clients.

38 U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 1 (august 2010) [hereinafter 2010 Guidelines], available at www.justice.gov/atr/public/guidelines/hmg-2010.html#1.

39 U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 1.1 (1992, rev. 1997) [hereinafter 1992 Guidelines], available at <http://www.justice.gov/atr/public/guidelines/hmg.pdf>; see also *id.* at § 1.0 (“[a] merger is unlikely to create or enhance market power . . . unless it significantly increases concentration and results in a concentrated market, properly defined and measured.”).

40 2010 Guidelines, § 4.

41 *Id.* The 2010 Guidelines also generally preserve the “Hypothetical Monopolist test” for defining relevant markets (*i.e.*, whether a hypothetical firm that controlled all the products in a putative market likely would be able to sustain at least a “small but significant and non-transitory increase in price”). See 2010 Guidelines, § 4.1.1. They make explicit, however, that the Agencies will consider the closeness of competition among potential substitutes, in particular where there are differentiated products. *Id.* at § 6.1.

42 See 2010 Guidelines, § 2.1 (The four other general categories of evidence are: (i) actual effects observed in consummated mergers; (ii) direct comparisons based on experience; (iii) head-to-head competition; and (iv) the disruptive role of a merging party). The 2010 Guidelines do continue to use the Herfindahl-Hirschman Index (“HHI”) market-share based thresholds to help determine which transactions are likely to raise concerns, however the guidelines describe this as “one way” to identify transactions that are more or less likely to raise concerns. 2010 Guidelines, § 5.3.

43 J. T. Rosch, Comm’r, Fed. Trade Comm’n, Statement on the Release of the 2010 Horizontal Merger Guidelines (aug. 19, 2010), available at <http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf>. See also 2011 Fed. Trade Comm’n Ann. Rep. 18, available at <http://ftc.gov/os/2011/04/2011ChairmansReport.pdf> (“A significant development in 2010 was the issuance of updated Horizontal Merger Guidelines by the federal antitrust agencies. The 2010 Guidelines advance merger analysis by eliminating the need to define a relevant market and determine industry concentration at the outset”).

44 C. A. Varney, “The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution”, 77 *Antitrust L.J.* 651, 655 (2011).

45 *Id.*

46 See, *e.g.*, J. B. Baker, “Contemporary Empirical Merger Analysis”, 5 *Geo. Mason L. Rev.* 347, 351 (1997); D. L. Rubinfeld, Former Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust Enforcement at DOJ: An Economist’s Perspective (Nov. 17, 1997), available at <http://www.justice.gov/atr/public/speeches/1370.htm>.

5. Other statements by Agency officials, however, have disclaimed any change in course with respect to market definition. Indeed, Commissioner Rosch – who initially described the new treatment of market definition as a “monumental” change – has more recently stated that he does not believe that “agency practice – at least at the FTC – has actually changed much since those Guidelines became effective”⁴⁷. Or, as Commissioner Rosch put it at a meeting of the Antitrust Section of the American Bar Association, “I want to emphasize: I don’t care what the 2010 Guidelines say, you can never do away with market definition”⁴⁸.

6. Similarly, Ms. Varney’s successor at the DOJ, Acting Assistant Attorney General Sharis Pozen, recently testified before the U.S. Congress that the DOJ will “continue to apply traditional merger analysis techniques to our matters, including defining relevant markets”⁴⁹. And Ms. Pozen stated in another forum that “market definition retains the key role it has always played in division investigations and litigations”⁵⁰. And former DOJ chief economist Carl Shapiro has stated that the DOJ “recognizes the necessity of defining a relevant market as part of any merger challenge we bring”⁵¹.

7. Antitrust practitioners have, likewise, offered conflicting predictions about whether the reduced focus on market definition in the 2010 Guidelines will affect the way in which the Agencies litigate merger challenges. Many have suggested that the whole purpose of the 2010 Guidelines was to allow the Agencies to avoid a fight over market definition that might otherwise derail a court challenge to a merger⁵². As the former acting head of the DOJ’s Antitrust Division, Deborah Garza, explained, “the agencies were beginning to lose cases in court due to skepticism about seemingly

overly narrow, even gerrymandered, markets” and this problem was the driving force behind the revisions to the 1992 Guidelines⁵³.

8. Indeed, even before the 2010 Guidelines were issued, the Agencies had been moving in this direction. For example, in the FTC’s administrative complaint to unwind Evanston Northwestern Healthcare Corporation’s acquisition of Highland Park Hospital, the FTC alleged that the acquisition had lessened competition in a defined relevant market, and in the alternative that regardless of the relevant market there were anticompetitive effects from the merger⁵⁴. The administrative law judge hearing the case declined to reach the issue of whether the FTC could ever prove its case without defining a relevant market⁵⁵.

9. Despite these attempts to move away from market definition, other commentators predicted that the Agencies would continue to allege relevant markets in litigated cases “because federal courts expect it, may require it, and failure to do so will harm the agencies’ ability to successfully bring enforcement actions”⁵⁶. These commentators have pointed to cases including the U.S. Supreme Court’s 1957 decision in *United States v. E.I. du Pont de Nemours & Co.*, which predates the earliest U.S. horizontal merger guidelines, in which the Court described “[d]etermination of the relevant market” as “a necessary predicate” to a claim under Section 7 of the Clayton Act, the main U.S. merger control statute⁵⁷. Similarly, in the seminal decision in *Brown Shoe Co. v. United States*, the Supreme Court noted that Section 7 effectively requires a plaintiff to establish a relevant market within which competition will be lessened by prohibiting those transactions that substantially lessen competition “in any line of commerce in any section of the country”⁵⁸. Based on this interpretation of the statutory language equating “line of commerce” and “section of the country” with relevant product and geographic markets, it seems doubtful that the government could ever satisfy its statutory burden in a merger case without first proving a relevant market.

47 J. T. Rosch, Comm’r, Fed. Trade Comm’n, *The Past and Future of Direct Effects Evidence*: Remarks before the ABA Section of Antitrust Law’s 59th Annual Spring Meeting 12 (mar. 30, 2011), available at http://www.ftc.gov/speeches/rosch/110330_aba-directeffects.pdf.

48 J. Wright, *Market Definition and the Merger Guidelines, Again*, Truth on the Market (apr. 4, 2011), <http://truthonthemarket.com/2011/04/04/market-definition-and-the-merger-guidelines-again/> (reporting statements from the 2011 ABA Antitrust Section Spring Meeting).

49 S. A. Pozen, Acting Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Statement before the Subcommittee on Intellectual Property, Competition and the Internet*, Committee on the Judiciary, United States House of Representatives, Oversight Hearing on the Federal Trade Commission’s Bureau of Competition and the U.S. Department of Justice’s Antitrust Division 11-12 (dec. 7, 2011), available at <http://www.justice.gov/atr/public/testimony/278020.pdf>.

50 S. A. Pozen, Acting Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks before the American Bar Association 2011 Antitrust Fall Forum (nov. 17, 2011), available at <http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-111117.html>.

51 C. Shapiro, Former Deputy Assistant Att’y Gen for Econ., Antitrust Div., U.S. Dep’t of Justice, *Update from the Antitrust Division*: Remarks as Prepared for the American Bar Association Section of Antitrust Law Fall Forum 15 (nov. 18, 2010), available at <http://www.justice.gov/atr/public/speeches/264295.pdf>.

52 See, e.g., D. M. Wall & H. F. Kaiser, Latham & Watkins Litig. Dep’t, *What the New Merger Guidelines Mean for Technology Companies*, 1019 Client Alert 1, 3 (2010), available at http://www.lw.com/upload/pubContent/_pdf/pub3492_1.pdf (arguing that showing a substantial lessening of competition in a properly defined relevant market “has been a core point in nearly every case the government has brought and lost”); R. Parker, M. E. Antalics & B. Sayyed, “Shrinking from the ‘Third Rail’: Avoiding Direct Effects Analysis in Lundbeck”, 25 *Antitrust* 14, 15 (2011) (“The effort to marginalize market definition had moved ‘front and center’ when the agencies had difficulty proving their relevant market in two unilateral effects cases: *United States v. SunGard Data Systems* and *United States v. Oracle*.”), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/antitrust_25-2_parker_antalics_sayyed_authcheckdam.pdf.

53 D. A. Garza, “Market Definition, the New Horizontal Merger Guidelines, and the Long March Away from Structural Presumptions”, *The Antitrust Source*, at 4 oct. 2010. See also, e.g., L. Kaplow, *Market Definition and the Merger Guidelines 2* (Harvard, John M. Olin Ctr. for Law, Econ., & Bus. Discussion paper no. 695, May 2011) (noting that the 2010 Guidelines seem to be designed to induce the courts to be more receptive to alternative forms of evidence that might supplant market definition). In fact, to the extent that the Agencies use the 2010 Guidelines as a basis to omit market definition from merger challenges, some commentators have expressed concerns that this might “lead to arbitrariness and discretionary havoc in [U.S.] courts . . . where economics is not as well understood as at U.S. antitrust agencies.” D. Carlton & M. Israel, “Will the New Guidelines Clarify or Obscure Antitrust Policy?”, *The Antitrust Source*, at 1, oct. 2010.

54 See, e.g., Concurring Op. of Comm’n J. T. Rosch, *In the Matter of Evanston Northwestern Healthcare Corp.*, Dkt. no. 9315 at 7-8, available at <http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf>.

55 *Id.* at 8.

56 Josh Wright, *Market Definition and the Merger Guidelines, Again*, Truth on the Market (Apr. 4, 2011), <http://truthonthemarket.com/2011/04/04/market-definition-and-the-merger-guidelines-again/>.

57 353 U.S. 586, 593 (1957).

58 370 U.S. 294, 324 (1962).

10. Nonetheless, in interpreting the law, and the courts may rely on the 2010 Guidelines to the extent they find the guidelines persuasive⁵⁹. And it appears that the Agencies are attempting to use the Guidelines as a first step toward persuading the courts to use a new approach to market definition.

II. Market definition in recent U.S. enforcement actions

11. In practice, there have been very few merger challenges since the 2010 Guidelines went into effect. Based on this extremely limited sample, it appears that the Agencies are continuing to define relevant markets for purposes of litigation⁶⁰. Indeed, recent merger challenges have continued to be won and lost on very traditional measures of market definition. For example, market definition was behind the FTC's recent unsuccessful post-acquisition challenge in *FTC v. Lundbeck, Inc.*, and it was behind the DOJ's recent, successful challenge to H&R Block's proposed acquisition of TaxACT⁶¹.

12. The FTC initiated its post-acquisition challenge to Lundbeck's purchase of NeoProfen prior to the issuance of the 2010 Guidelines. After acquiring NeoProfen, a treatment for patent ductus arteriosus ("PDA"), Lundbeck raised prices by 1300% on a PDA treatment (Indocin) that it already owned⁶². In its complaint, the FTC alleged a market including only NeoProfen and Indocin, the only two then-existing approved treatments for PDA, and the FTC also alleged direct evidence of harmful effects on competition. The FTC's failure to persuade the district court on the issue of market definition, however, turned out to be dispositive. The district court rejected the FTC's challenge because it found that the agency had failed to demonstrate a properly defined relevant market, which the court viewed as a "necessary predicate" to a Section 7 claim⁶³.

13. The court in *Lundbeck* concluded that the two PDA treatments at issue – Indocin and NeoProfen – were not in the same relevant product market because the FTC had failed to produce econometric evidence of cross-price

elasticity⁶⁴. The court rejected the FTC's qualitative evidence that the two products were in the same market, including FDA approvals⁶⁵, published clinical studies showing that the drugs were equally efficacious⁶⁶, and Lundbeck's documents showing that its marketing and pricing strategy for Indocin were dependent on NeoProfen, and that Lundbeck expected to capture a significant portion of the PDA market at the expense of Indocin⁶⁷. The Court of Appeals for the Eight Circuit subsequently affirmed the district court's decision based on a deferential standard of review⁶⁸.

14. Neither the district court nor the court of appeals in *Lundbeck* made reference to the 2010 Guidelines. Rather, both courts focused exclusively on whether the FTC had established a relevant market under existing case law, and did not address the FTC's arguments regarding anticompetitive effects. In contrast to the approach codified in the 2010 Guidelines, under which the Agencies may sometimes "back into" a relevant market if there is direct evidence of anticompetitive effects, *Lundbeck* suggests that market definition remains a threshold question.

15. Market definition was also the central focus of the DOJ's successful challenge to H&R Block's acquisition of TaxACT. In that case, the DOJ persuaded the district court that H&R Block's acquisition of TaxACT would substantially lessen competition in the market for digital do-it-yourself ("DDIY") tax preparation products⁶⁹. Three firms – H&R Block, TaxACT and Intuit (the maker of TurboTax) – accounted for 90% of DDIY sales⁷⁰. According to the DOJ, Intuit was the largest player with approximately 62% of DDIY sales, and a combination of H&R Block and TaxACT would have resulted in a firm with approximately 28% of DDIY tax preparation sales⁷¹. The merging parties disputed the DOJ's proposed market, and asserted that the relevant market included not just DDIY products but all forms of tax preparation, including assisted tax preparation through a professional (e.g., hiring an accountant or going to a retail tax preparation store) and "pen and paper" or "manual" methods⁷².

16. The court rejected the parties' arguments and adopted the DOJ's proposed relevant market. In doing so, the court examined evidence regarding the cross elasticity of demand between various products and applied the hypothetical monopolist test. Among other things, the court considered: (1) the merging parties' and other companies' business documents, (2) testimony of fact witness, and (3) analyses

⁵⁹ See, e.g., *United States v. Kinder*, 64 F.3d 757, 771 & n.22 (2d Cir. 1995) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect, . . . courts commonly cite them as a benchmark of 'legality.'"); *Cal. v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120, 1128–32 (N.D. Cal. 2001) ("Although the Merger Guidelines are not binding, courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues").

⁶⁰ See, e.g., S. A. Pozen, Acting Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks before the American Bar Association 2011 Antitrust Fall Forum (Nov. 17, 2011) ("After the agencies released the Guidelines, some observers predicted that the revisions would lead to an array of problems in merger review. This one-year-plus anniversary provides a good opportunity to see if any of the critics' fears have been realized. These predictions generally were of three types: first, that the revisions to the Guidelines would mean that the agencies no longer would define product markets in some cases and would proceed instead on hazy theories of actual competitive harm."); available at <http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-111117.html>.

⁶¹ Civil Nos. 08-6389, 08-6381 (JNE/JJG), 2010 U.S. Dist. Lexis 95365, at *1 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011).

⁶² *Id.*

⁶³ *Id.* at *60.

⁶⁴ *Id.* at *56-57.

⁶⁵ *Id.* at *57.

⁶⁶ *Id.* at *9.

⁶⁷ *Id.* at *29-30.

⁶⁸ *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1239 (8th Cir. 2011). The Eighth Circuit held that the district court did not commit "clear error" in finding that the FTC failed to prove a relevant product market, and agreed that evidence of cross-price elasticity is essential to establishing a relevant market.

⁶⁹ *United States v. H&R Block, Inc.*, No. 11-948 (BAH), 2011 U.S. Dist. Lexis 130219 (D.D.C. Nov. 10, 2011).

⁷⁰ *Id.* at *5.

⁷¹ *Id.* at *5-6.

⁷² *Id.* at *25-26.

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