

# Clients & Friends Memo

## European Commission's Revised Guidance on Market Definition Will Make It Easier to Allege Mergers Will "Significantly Impede Effective Competition"

February 12, 2024

The European Commission's ("Commission") substantially revised Market Definition Notice ("Revised Notice") will make it significantly easier for it to allege that mergers and other transactions ("mergers") are likely to "significantly impede effective competition."<sup>1</sup>

Merging parties must be prepared for a greater likelihood of a Phase II investigation when notifying a merger to the European Commission's Directorate-General for Competition ("Competition Directorate"), and for a greater focus on the evaluation of the merger's impact on a variety of non-price factors.<sup>2</sup> In response, merging parties should have strong, credible efficiency claims to rebut the Commission's increased emphasis on post-merger non-price anticompetitive effects; previously a nice-to-have, they may now be a must-have.

### Relevance to Mergers Reviewed by the U.S. Antitrust Agencies

The Revised Notice is relevant to firms notifying mergers in the United States. The Federal Trade Commission, with the concurrence of the Antitrust Division of the Department of Justice, (the "antitrust agencies") has [proposed significant changes to the existing merger](#)

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<sup>1</sup> The European Commission's revised [Notice on the Definition of the Relevant Market for the Purpose of Union Competition Law](#) ("Revised Notice") was released on February 8, 2024. It replaces the [1997 Commission Notice](#) on market definition. Market definition identifies the area of competition which may be affected by a merger (or business conduct) (the "relevant market") and supports the identification of (i) products (the "relevant product") that customers consider substitutes in response to a small but significant non-transitory increase in price (or a small but significant non-transitory decrease in quality) and (ii) the identification and evaluation of market participants and their competitive strength. Market definition also identifies the geographic area within which consumers can source the relevant product. The definition of the relevant market is often the most important factor in whether an antitrust complainant, including the government, succeeds in showing that a merger (or business practice) will harm competition. The relevant product and relevant geographic markets in a competition case are often defined more narrowly than firms define the market or industry in which they operate in. Revised Notice at ¶19.

<sup>2</sup> A merger will be prohibited if the Commission finds it will "significantly impede effective competition." Council Regulation (EC) No. 139/2004 on the [Control of Concentration Between Undertakings](#) (Jan. 20, 2004). The Commission may take a remedy, such as divestiture, to address the potential competitive harm of the proposed merger.

[notification form](#); one significant change would require merging parties to provide a narrative description of the relevant market(s) potentially impacted by a transaction.<sup>3</sup>

The recently revised [U.S. Merger Guidelines](#)<sup>4</sup> made important but relatively narrow revisions to the 2010 Horizontal Merger Guidelines discussion of market definition principles. However, the U.S. antitrust agencies considered much more substantial revisions, similar to those incorporated in the Revised Notice, but that, ultimately, were not included in the revised guidelines. The EU Commission's Revised Notice goes substantially further in specifying factors that may be relevant to identifying the relevant market in specific instances. The close working relationship between the U.S. antitrust agencies and European Union's Competition Directorate suggest that many principles in the Revised Notice will be of relevance in notifying and defending a merger before the U.S. antitrust agencies.

### **Expansion of Parameters of Competition Subject to Review and Consideration in Market Definition and in Alleging Competitive Harm**

The most significant revision in the Revised Notice is the Commission's decision to define very broadly the parameters in which competition may occur and thus to significantly increase the type of harm the Commission is likely to allege.

The Commission will define the relevant product market to take account of price, "degree of innovation" and "quality in various aspects" – such as "sustainability, resource efficiency, durability, the value and variety of uses offered by the product, the possibility to integrate the product with other products [*e.g.*, interoperability], the image conveyed [*e.g.*, brand characteristics], the security and privacy protection afforded, as well as availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs" with "the relative importance of these parameters ... chang[ing] over time."<sup>5</sup>

The Commission has previously identified harm to non-price forms of competition. The incorporation of such factors into the Revised Notice suggests significant comfort with incorporating such factors into market definition and greater reliance on such factors in the future. The identification of many parameters of competition as potentially important to consumers (subject to evidentiary support), and as areas where the degree and strength of competition can be measured qualitatively or quantitatively by the Commission, will result in

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<sup>3</sup> Federal Trade Commission, [Notice of Proposed Rulemaking, Premerger Notification Reporting and Waiting Period Requirements](#), 88 FR 42178 (Jun. 29, 2023). The proposed revisions to the Hart-Scott-Rodino merger notification form include, among other proposed additional requirements, that filing parties provide a narrative "competition analysis" that would include a discussion of "current and potential future horizontal overlaps" and "existing or potential vertical" relationships between the filing parties. *Id.* at 42196.

<sup>4</sup> U.S. Department of Justice and Federal Trade Commission, [Merger Guidelines](#) (2023).

<sup>5</sup> Revised Notice at ¶15.

(i) narrow market definitions and (ii) the identification of fewer market participants (a) likely able to constrain or reverse the exercise of unilateral market power from the merger of horizontal competitors, or (b) to prevent the partial or full exclusion of the merged firm's competitors from the relevant market.

While the identification of narrow markets can preclude a finding of head-to-head competition between merging parties, the Commission's identification and acceptance of a very broad set of competitive variables relevant to market definition creates the greater likelihood that the Commission will determine that only a small number of firms participate in the relevant market and are sufficiently competitive on all relevant dimensions of competition to constrain the merged firm, post-merger. The merging parties may find that they are two of only a few competitors in the relevant market, and allegedly uniquely close (or very close) competitors. With the possibility of competition occurring in multiple dimensions of competition, the Commission may find it difficult to allege a merger will strengthen the conditions for post-merger coordination. With so many parameters of competition relevant to consumers (assuming evidentiary support), merging parties may make it easier to successfully argue that detection of deviations from a coordinated or collusive outcome will be much harder to identify, thus decreasing the incentive (and ability) of the merged firm and its competitors to engage in (successful) coordinated or collusive conduct. However, where the market is narrowly defined, market concentration may be sufficiently high to allow the Commission to allege a simple theory of coordination based on the small number of firms.

### **Trends and Market Transitions**

Market definition supports a structural analysis of industry concentration and firm market power. But structural analysis is static: without more, it presumes competition in the future will be like competition in the past. A proper analysis of the competitive effects of mergers is dynamic, and considers, among other things, whether the merger creates or strengthens the incentives or abilities of the merged firm to disrupt the current industry structure or existing competitive interaction between firms operating in the relevant market. This competitive or dynamic effects analysis may support or undermine any presumption of competitive harm associated with market share and industry concentration.

The Revised Notice identifies two factors that it will consider as important components of a forward-looking analysis of market definition and market power: "trends which are likely to continue or foreseeable developments in relation to market shares" and "expected

transitions in the structure of a market ... that affect the general dynamics of supply and demand in a market.”<sup>6</sup>

The Revised Notice is vague on the “trends” relevant to its identification and evaluation of the relevant market and a market power analysis. The leadership of the Competition Directorate and U.S. antitrust agencies have recently indicated their intention to direct their anti-merger authority to stop mergers where there has been a trend towards consolidation or higher market concentration. Competition officials in Europe and the U.S. have expressed the importance of considering trends in vertical integration and non-merger related changes in market concentration as factors relevant to evaluating the future effects of any merger.<sup>7</sup> Such market adjustments are relevant and, potentially, though possibly exogenous to the merger, may be treated as reasons to deny clearance of a merger. This cautionary approach may extend to those market or industry changes driven by efficiency rationales, such as economies of scale or economies of scope.<sup>8</sup> For merging parties, this means that a non-market power rationale for the combination may be viewed as inconsistent with law not because of anticompetitive effects associated with the transaction but because it merely continues or accelerates increases in firm size and industry concentration. The Competition Directorate, much like the U.S. antitrust agencies, is signaling a preference for smaller firms and non-vertically integrated firms.

The Revised Notice’s enhanced discussion and consideration of structural market transitions that “would lead to effective changes in the general dynamics of supply and demand”<sup>9</sup> can operate to the benefit of merging parties. By more clearly requiring consideration of the competition enhancing benefits of, for example, the removal of trade and investment barriers or the removal of broad-based regulatory restrictions, the Revised Notice holds out the possibility of wider geographic markets – worldwide as compared to member-state or regional area markets – for identifying competing suppliers of the relevant product. And, in practice, we have seen this development in the Commission’s acceptance, over time, of worldwide geographic markets in more of their merger decisions. However, the Commission’s recognition of the market-expanding effects of structural shifts are, in

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<sup>6</sup> Revised Notice at ¶¶10, 21.

<sup>7</sup> See the 2023 U.S. Merger Guidelines consideration of trends toward “consolidation,” “concentration” or “vertical integration” in evaluating the “risk a merger may substantially lessen competition or tend to create a monopoly” at Guideline 7.

<sup>8</sup> See the 2023 U.S. Merger Guidelines adoption of an “entrenchment” theory of harm at Guideline 6. This theory of harm was considered abandoned by the U.S. antitrust agencies as recently as 2020. See [Note by the United States, Conglomerate Effects of Mergers](#) (Submission to the OECD, Jun. 4, 2020) (“The ‘entrenchment’ doctrine, in particular, condemned mergers if they strengthened an already dominant firm through greater efficiencies, or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals. This approach is no longer viewed as valid under U.S. law or economic theory.”)

<sup>9</sup> Revised Notice at ¶21.

practice, slow to develop, often because they are initially considered insufficiently certain to counter or reverse projections of merger-related harm. Structural market transitions can also be a factor in limiting competitive alternatives and are often analyzed at the customer-specific level, in a way that leads the reviewing agency to support a market definition that limits, not expands, the number of actual or potential competitors. An example of such a change that would make a finding of anticompetitive effects of a merger more likely is a transition, by customers, from sourcing supply from multiple regional market participants to sourcing supply from only those firms that operate globally.

Consideration of ambiguous “trends” and “expected transitions” in the market definition and market participant analysis is likely to lead to a more precautionary approach to merger clearance and a more limited recognition of potential positive dynamic effects of mergers that are a response to changing market conditions.

### **Market Definition Specific to Particular Industries, Sectors, or Types of Markets**

The Revised Notice helpfully identifies specific situations where market definition analysis goes beyond the demand side factors the Commission always considers, and the supply side factors the Commission sometimes considers, in defining relevant markets. Two are particularly important.

The Revised Notice explicitly recognizes that a merger may affect general innovation, even where such innovation cannot be closely tied to any relative certainty of commercialization of a future product. Where research and development are not closely related to any specific product but “may serve multiple purposes,” the Commission may attempt to assess whether a combination of two firms will result in a loss of “innovation competition” even where a future product associated with that innovation cannot be defined “in the strict sense.”<sup>10</sup> In practice, firms operating in the same industry, even if not producing substitute products, may be considered especially well-placed to turn research and development into products that might, but for the merger, compete with the other party to the merger or with other firms that may participate in a future but presently undefined product market.

The U.S. antitrust agencies adopted so-called innovation markets in a number of cases in the 1990s and into the early 2000s, but largely moved away from this approach and towards the evaluation of lost innovation competition in future product markets that could be identified with reasonable certainty.<sup>11</sup> Although the Commission has defined a market for innovation in the recent past, its incorporation into the Revised Notice suggests an intention

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<sup>10</sup> Revised Notice at ¶92.

<sup>11</sup> See Bilal Sayyed, *Non-Price Effects in Mergers: Examples From Federal Trade Commission Enforcement, 1992-2023*, CPI Antitrust Chronicle (Jan. 2024).

to exploit it more frequently. For example, the Commission may use it to challenge the merger of firms with general (and significant) research and development portfolios or with assets – such as intellectual property portfolios – that are considered uniquely well-positioned to support such research.

The Revised Notice recognizes that market definition with respect to multi-sided platforms may encompass both sides of the platform, recognizing, at least implicitly, that the attractiveness of a platform to one set of users participating on one side of the platform is going to be influenced by the attractiveness of the platform to another set of users operating on the other side of the platform. However, the Commission signals that relevant markets consisting of both (or all) sides of a platform may be limited: “Where there are significant differences in the substitution possibilities on the different sides of the platform” it “may be more appropriate to define separate markets.”<sup>12</sup> In practice, it is common for there to be differences in the substitution possibilities on the different sides of a platform.

More positively, the Commission accepts that even in situations where separate markets are defined for multi-sided platforms, it will take into account “where relevant, the indirect network effects between the user groups on different sides of the platform ... in the competitive assessment” of a merger.<sup>13</sup> Thus, the Commission, in evaluating competitive effects in mergers involving platforms may be open to efficiency arguments related to the potential increase in scope or scale of the platform’s offerings.

Digital ecosystems are a special form of platform markets. The Revised Notice indicates that digital ecosystems may be evaluated as consisting of a bundle of the primary durable product (*e.g.*, the distribution or connecting platform) and a secondary consumable product (the digital content). Under some conditions, so-called walled gardens may be defined as their own relevant market. Where the secondary products are offered as a bundle, a market may be limited to the bundle (without inclusion of the primary product).<sup>14</sup>

Both with respect to platform markets generally, and digital ecosystems specifically, the Commission’s willingness to define markets as consistent with the commercial realities of operations of the platform is unclear, and likely to be a source of contention between merging parties and the Competition Directorate.

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<sup>12</sup> Revised Notice at ¶95.

<sup>13</sup> Revised Notice at ¶96.

<sup>14</sup> Revised Notice at ¶104.

**Conclusion**

The Revised Notice is a significant development for firms contemplating mergers requiring notification to the EU's Competition Directorate. While the Revised Notice largely adopts principles articulated in previous merger cases and does not signal an entirely new direction for the Commission, a consistent and broad application of the principles in the Revised Notice will result in more transactions subjected to significant Phase II investigations, and an increased likelihood that a transaction may be found to "significantly impede effective competition." The greater attention to non-price factors in market definition will carry-over to a competitive effects analysis of a merger; merging parties will need to have strong, credible efficiency claims related to non-price competition to have a reasonable chance of rebutting the Commission's emphasis on harm to non-price competition.

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If you have any questions on the topics raised in this Clients & Friends Memo, please contact the following Cadwalader attorney.

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