Revision of the Commission Notice on the definition of relevant markets:

welcome progress but legal certainty still insufficient, plus a risk of over-regulation.

The Commission has just launched a public consultation and invites all interested parties to submit their comments on the Draft Revised Market Definition Notice by 13 January 2023 (EU Comm., IP/22/6528, 8 Nov. 2022). The revision process started in April 2020 and the draft submitted for consultation is one of the last steps to modernize the 1997 text. This update is welcome given the profound market changes that have occurred since then and the stated objective of adapting the current text to the challenges posed by "the digitization of the economy and new modes of supply of goods and services, as well as the increasingly interconnected and globalized nature of international trade".

The draft does indeed include many elements of analysis that allow for a better understanding of digital competition. It enshrines in particular the notion of asymmetrical competition (pt 15 of the draft), which has already been used by several NCAs (e.g., French Competition Authority, 17 Nov. 2020, LawLex202000003680JBJ): digital strongly competes with certain traditional activities (online commerce vs. physical commerce; online advertising vs. offline advertising in traditional media), even if the reverse is not necessarily true or not to the same degree.

Similarly, the consideration of transition effects in the market structure is very appropriate in view of the digital revolution that has unfolded since the 1997 Notice (pt 16). Price is no longer the only parameter: quality and innovation must also be integrated into the analysis in a context of products with a zero monetary price (point 32 of the draft). Even more innovative is the fact that, whereas the 1997 notice took a very formalistic approach in which the prior delimitation of markets constituted the alpha and omega of the analysis, the draft breaks with this philosophy in part to include external constraints from third parties to the market and favors an effects-based approach for the analysis of so-called "differentiated" product markets. Unfortunately, the draft does not provide sufficient legal certainty for undertakings and contains the risk of over-regulation.

I. Insufficient legal certainty

1. A lack of precision that makes self-evaluation difficult. The Commission recalls its usual practice of studying all possible market definitions when the market definition is left open, which in practice leads to the study of many extremely narrow hypothetical markets. Such an approach has the effect of making the preparation of notification files considerably more cumbersome.

2. A very broad toolbox at the disposal of the Commission, but without sufficient legal certainty as to its use in individual cases for operators. The draft continues to give the Commission a great deal of room for maneuver, but without accompanying its options with sufficiently strict conditions of application to guide companies and guarantee their rights. The draft thus asserts in turn that the outcome of market definition is generally applicable to both merger control and anticompetitive practices (pt. 11), but footnote 20 immediately contradicts this principle by indicating that in some cases it may be different, without explaining which ones. The three possibilities for defining after-sales markets are developed (pts. 100 to 102), but with too much leeway as to the conditions allowing classification in one category or another, which leads to certain after-sales markets still being analyzed by brand, even though multi-branding has now become the norm.

3. An overly privileged consideration of the past, but with no guarantee of certainty for businesses. The draft continues to allow the analysis of current or future markets on the basis of previous decisions (pt. 11), which are often old and obsolete. This approach may lead to the reiteration of market definitions that are disconnected from reality in merger control. Once a certain age of precedents has been reached, which could be defined, it would be more efficient to analyze the relevant markets *de novo*, without prejudice, and to compare the results with precedents in a second phase. Above all, as far as anticompetitive practices are concerned, the position of businesses is highly unfavorable and unbalanced: the Commission is not bound by its precedents (pt 11), while the undertaking that has relied on them has no right to the protection of legitimate expectations (note 21). At the very least, an undertaking having in good faith relied on a precedent should benefit from immunity or a reduction of the fine in the event of an infringement.

II. Risk of over-regulation

4. Current decision-making practice already over-regulates European companies in all areas. In merger control, the current thresholds, which have not been revised for years in France and in Europe, are too low and subject mergers to unnecessary control leading to considerably delays in their implementation as the deadlines are largely exceeded in practice. The thresholds no longer even constitute a watertight safeguard, given the possibility of control below them on the basis of Article 22 of Regulation No 139/2004, as illustrated by the Illumina-Grail case and the attempts to restore merger control for mergers not subject to control through the tool of abuse of dominant positions (see opinion of Advocate General Kokott in Case C-449/21, Towercast of 13 Oct. 2022). The fact that almost all transactions are cleared in phase 1 without commitments should lead to a reconsideration of the scope of control. In general, the market definitions adopted are often excessively narrow and online competition has only been considered very late and partially. European undertakings are disadvantaged by this approach compared to their American and Asian competitors or to investment funds, which are generally not hindered by this over-regulation when they take over European undertakings. It is therefore important to put a stop to the overly narrow vision of markets, but the draft notice continues to allow competition authorities to define markets in a very rigid manner that is often disconnected from economic reality.

5. The draft notice may well lead to the adoption of market definitions that do not correspond to economic reality. Supply-side substitutability is always considered as a very secondary issue (pt 25), without sufficient explanation. The consideration of transition effects (pt 16), which is welcome, is subject to an excessively high standard of evidence that makes this concept difficult to apply in

practice. The superiority of quantitative tests, notably the SSNIP test, over highly subjective qualitative modes of evidence (such as requests for information made to the sector), is still not recognized, which can result in flawed market definitions prevailing. The application of the SSNIP test is even relegated to the last rank of relevant evidence after evidence of hypothetical substitutability or "industry views" (point 59), which are known to be very non-objective and too often biased.

Joseph VOGEL

Avocat à la Cour

jvogel@vogel-vogel.com

VOGEL & VOGEL

T. (+33) 1 53 67 76 20 | F. (+33) 1 53 67 76 25

www.vogel-vogel.com | 30 avenue d'Iéna, 75116 Paris