



## **MFE-MEDIAFOREUROPE N.V.**

### **RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON THE DRAFT REVISED COMMISSION NOTICE ON THE DEFINITION OF RELEVANT MARKET FOR THE PURPOSES OF UNION COMPETITION LAW**

1. On 8 November 2022, the European Commission (“**Commission**”) invited all interested third parties to comment on the draft revised Commission Notice on the definition of the relevant market for the purposes of Union competition law (“**Notice**”).
2. Market definition is an essential tool for antitrust and merger control. This consultation offers the opportunity to revisit the previous Notice – by now 25 years-old, ensuring greater predictability in the application of competition law as well as to limit the discretion of competition authorities.<sup>1</sup> In addition, the revision of the Notice is timely because the digitisation process poses new challenges for the enforcement of antitrust rules. This is demonstrated by the high level of concentration in the digital markets and the high number of proceedings initiated at European and national level against gatekeepers, coupled with the entry into force of the Digital Markets Act (“**DMA**”),<sup>2</sup> addressing certain digital services (“Core Platform Services” or “**CPS**”).
3. MFE-MEDIAFOREUROPE N.V. (“**MFE**”) welcomes the opportunity to contribute to this consultation, setting out below its views on certain points related to market definition and digital markets.

#### *Markets with zero monetary price products/services*

4. Markets with zero monetary price products/services are increasingly common in digital environments. Offering products/services at zero monetary price is a way for companies active in digital markets to collect data or sell additional services, such as advertising. Moreover, companies active in several interconnected digital markets can easily change the terms of their offers and redesign their pricing strategies along the entire value chain. Such companies may, for instance,

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<sup>1</sup> “In the interests of transparency and with a view to enhancing legal certainty for the undertakings concerned, the Commission published the Market Definition Notice, setting out the criteria which the Commission applies for the purpose of defining the relevant market in each particular case. In that regard, in adopting such rules of conduct and, by publishing them, announcing that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and must not depart from those rules on pain of being penalised, where appropriate, for breach of the fundamental principles of law, such as equal treatment or the protection of legitimate expectations”. Judgment of the General Court of 28 April 2010 in case T-446/05 - *Amann & Söhne and Cousin Filterie v Commission*, §137.

<sup>2</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector.

exploit lock-in effects by changing the free nature of their services or conversely, they may take over markets related to those on which they are active with particularly aggressive pricing policies.

5. Markets with zero monetary price products/services pose a particular challenge for antitrust enforcement because it is not possible to apply the traditional SSNIP test, which is based on a hypothetical price increase.
6. To overcome this issue, the Notice states that *“there is no obligation on the Commission to apply the SSNIP test empirically”*, while underlining that *“other types of evidence are equally valid to inform the market definition [...]”*.<sup>3</sup> Such other evidence includes quality or level of innovation, intended use, distribution channels, regulatory framework, evidence on past or possible future substitution, industry views, barriers to substitution and switching costs.
7. MFE agrees that for markets with zero monetary price products/services, the antitrust analysis should rely on qualitative elements. MFE emphasizes that, to reach a level of predictability comparable to that usually achievable through the SSNIP test, the qualitative evidence should be broad and of univocal interpretation.

#### *Supply side substitution in digital markets*

8. From the **supply side**, the Notice states that it can be appropriate to include certain goods in the relevant market where suppliers use the same assets and processes to produce them under the conditions that *“most, if not all, suppliers are able to switch production between products in the range of related products, while incurring only insignificant additional sunk costs or risks, have the incentive to do so when relative prices or demand conditions change, and can market them effectively in the short term”*.<sup>4</sup> For instance, a finding of supply side substitution is warranted when it is *“possible to switch from the production of one family of grades to another in a short time-frame and using the same equipment with limited additional costs”*.<sup>5</sup>
9. In digital markets, supply substitutions can play a significant role because, once they have achieved the position of gatekeepers, companies can easily upgrade and/or change their offerings, using the technology/data that they have collected. For instance, Android for smartphones can easily be (and it is actually) adapted to other devices, such as connected TVs.

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<sup>3</sup> Notice, §33.

<sup>4</sup> Notice, §35.

<sup>5</sup> Notice, §36.

10. Thus, MFE supports the greater emphasis on that supply-side considerations as a tool to better capture competitive interactions in the digital space. In MFE's views, the Notice should be more explicit in discussing how supply side considerations play out in the digital space.

#### *Multi-sided platforms and digital ecosystems*

11. The presence of multisided platforms and digital ecosystems can strongly affect the competitive dynamics in digital markets. According to the Notice, **multi-sided platforms** *"support interactions between different groups of users, creating a situation where the demand from one group of users has an influence on the demand from the other groups"* (indirect network effects).<sup>6</sup> **Digital ecosystems** are defined as *"consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability"*.<sup>7</sup>
12. Footnote 123 of the Notice recalls paragraph 116 of the General Court judgment in the Google Android case,<sup>8</sup> and then concludes by stating that *"an example of a digital ecosystem would be an ecosystem of products built around a mobile operating system, including hardware, an application store and software applications"*.
13. From the point of view of market definition, the key issue is whether to define digital ecosystem as a single market or to break it down into different components.
14. The Notice suggests applying the same principles as those applicable to after markets and bundles. However, where the criteria for after markets and bundles are not applicable, the Notice states that the Commission may take into account elements such as network effects, switching costs and multi-homing decisions for the purpose of defining the relevant product market(s).
15. MFE welcomes the introduction of the notions of multi-sided platforms and digital ecosystems in the Notice. Gatekeepers thrive on such ecosystems, exploiting the synergies between different products/services to lock-in customers.
16. It is MFE's view that the Notice should set out when digital ecosystems can be seen as a single market because breaking them down into the different components often risks losing track of the

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<sup>6</sup> Notice, §94.

<sup>7</sup> Notice, §103.

<sup>8</sup> *"in a digital 'ecosystem' [...] the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity"*.

market power that is inherent in the multiple reinforcing effects between the services offered. This is, for example, the approach followed by the DMA and its draft Implementing Regulation to prevent gatekeepers from unduly segmenting markets, e.g. just because a given CPS is used across multiple devices.<sup>9</sup> This approach should be followed also when enforcing antitrust law.

17. For this reason, MFE suggests that the Notice should be more explicit on the conditions leading to a unitary definition of ecosystems and multisided platforms to be able to gauge the market power exerted by gatekeepers.

MFE N.V., 13 January 2023

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<sup>9</sup> See, for instance, Section 2 of Annex 1 of the Draft Implementing Regulation that include among the plausible alternative delineations those “that are broader than that which the notifying undertaking considers relevant (for example, where the notifying undertaking considers certain core platform services as distinct on the ground that they are provided across different types of device)”.