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Comments of

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regarding

the proposed Communication from the European  
Commission

on

The revised Notice on the definition of the relevant  
market for the purposes of Union  
competition law

## ACT | The App Association feedback to the European Commission's draft revised Market Definition Notice

### I/ Introduction and statement of interest

ACT | The App Association submits feedback to the European Commission's (EC) Directorate-General for Competition (DG COMP) in response to its draft revised Market Definition Notice. The App Association appreciates DG COMP's efforts to increase guidance, transparency, and legal certainty for enterprises. We believe this initiative is an important step in making Europe fit for the digital age and building a modern, stable, and sustainable competition framework across the European Union. We also appreciate the Commission's efforts to contribute to more harmonised and efficient enforcement by its own competition division and national competition authorities.

The App Association represents small software application developers and connected device companies globally that create mobile apps and enterprise systems. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately €830 billion globally and is responsible for millions of European jobs. Alongside the world's rapid embrace of mobile technology, our members create innovative hardware and software solutions that power the growth of the internet of things (IoT) across all sectors of the economy. Our member companies are small technology and app development companies that operate in increasingly complex markets. Transparency in the enforcement of antitrust and merger rules across the EU is especially important for small and medium-sized enterprises (SMEs) like our members as it allows them to better anticipate potential competition concerns in their activities and facilitates compliance with relevant laws, despite their limited resources.

Given the technological developments and impact of the digital economy we have seen in recent years, the App Association agrees with the Commission that the need for an updated Notice to provide correct, comprehensive, and clear guidance on the market definition is as relevant as ever. An updated Notice that reflects the reality of multi-sided platforms and network effects presents a good opportunity to remedy legal uncertainty for businesses active in the platform economy and to address diverging competition regimes existent across the EU.

We note further that these issues will likely evolve in the future and that the market definition presents an essential intermediate step in the Commission's assessment of merger and antitrust cases to understand the competitive environment in which firms operate. The App Association also welcomes that the Commission's draft revised Notice reflects best practices in market definition as set out in the case law of the EU courts, the Commission's past practice, and the practice of other competition authorities and high-quality academic research.

### II/ The draft revised Market Definition Notice

The App Association strongly believes that the Market Definition Notice remains an essential tool to identify and define the boundaries of competition between undertakings. An in-depth market definition must precede any determination of market power and potential abuses of market power, consistent with the foundations of antitrust. As raised in previous App Association comments on this file, factors like substitutability of demand and supply and potential competition must be part of

a data-driven, specific, and fact-based market analysis. We welcome that the Commission has considered these factors in the context of the digital economy in this draft revision of the Notice.

#### A. Multi-sided markets

The traditional antitrust analysis the 1997 Notice employs does not easily apply to new, multi-sided markets such as those involving online platforms, and we appreciate the Commission's explicit mention of multi-sided markets. Today's digital markets are highly complex, involving a variety of players ranging from massive online platforms to one-person software development companies. For example, traditional antitrust analyses often focus only on one side of the market and, because of their limited impact on one-sided markets, may not consider how network effects apply in two-sided markets. The Commission's new guidance suggests defining a relevant product market for the products a platform offers as a whole, or separate relevant product markets for the product suppliers offer on each side of the platform. Because the impact of direct and indirect network effects (both pro-competitive and anticompetitive) is much more significant in the platform environment, we believe it is appropriate to consider both sides of the market in the definition and analyses of the relevant market here. Considering indirect interactions between the multiple sides of a platform enables the Commission to assess each side of the platform in isolation or allows for a holistic assessment of the products the platform offers, which we believe to be a reasonable approach.

Similarly, we agree with the draft Notice that market definition is possible in three ways, including (i) a system market comprising both the primary and the secondary product; multiple markets, i.e. a market for the primary product and separate markets for secondary products associated with each brand of the primary product; and (iii) as dual markets, namely, the market for the primary product on the one hand and the market for the secondary product on the other hand. The Commission also suggests that offering secondary digital products as a bundle could lead to a market assessment of its own. We welcome the recognition that a case-by-case assessment may be required as not all digital ecosystems fit an aftermarket or bundle market approach, and these assessments should consider network effects, switching costs, and single or multi-homing decisions for the market definition.

The appropriate application of antitrust law to multi-sided digital platforms requires a full understanding of a market and continuing to take legacy or traditional approaches to market definition risks creating improperly narrow market definitions. Non-price elements like intended use, product functionalities, hypothetical substitution, and competitive constraints evidence, as well as costs or other barriers to switching (e.g. interoperability or licensing features) are similarly relevant in multi-sided markets, and we welcome the Commission's acknowledgement and inclusion of these elements. Evaluating customers' switching behaviour in response to a 'small but significant and non-transitory decrease in quality' (SSNDQ test, as opposed to the small but significant and non-transitory increase in price [SSNIP] test) also seems appropriate for market definition in the multi-sided market environment.

#### B. The product market definition

Concerning the product market definition, we agree with the Draft Notice that enterprises are/continue to be subject to three main sources of competitive constraints: demand substitution, supply substitution, and potential competition. Nonetheless, the dynamism of digital markets

challenges the definition of relevant product markets as it blurs the borders between markets by integrating different products and markets, and the Commission should take this into account when defining a market.

### C. Demand-side substitution

Regarding demand substitution, we welcome the draft Notice addressing guidance on non-price competition. Especially in the app economy, free apps are a core aspect of the industry. App developers have several solutions available to generate revenue through software distribution platforms and they are not obliged to choose the model that grants a commission to a software distribution platform. For example, developers may (i) offer apps to consumers for free to simply provide an extension of a good or service already provided to that consumer that is not dependent on the existence of the app (such as a banking app or electronic health record app); or (ii) offer apps for free to facilitate the use of a physical service or good that is effectively dependent on existence of the app (such as a rideshare app). In either of these cases, the developer can generate revenue via paid advertising in their app or by providing a service outside the app (as in the banking app example). The developer does not pay a commission to the platform in either of these scenarios, showing the flexibility developers have to operate and compete in platform environments.

Since most apps are offered free of charge for download,<sup>1</sup> their omission from a market definition has been unreasonable. Even within this large and inextricable segment of the app ecosystem (which are typically the highest-rated apps on major platforms like Apple's App Store<sup>2</sup> or Google Play<sup>3</sup>), numerous categories where free apps are the most popular illustrate the diversity of the app ecosystem as a whole. Accordingly, although consumers may not pay developers directly to download these apps, they generally derive substantial economic value from having them on their phones. Likewise, developers may receive compensation indirectly from clients on behalf of which they offer the apps, advertising revenue, or similar arrangements correlated closely with the apps' success. With their significant impact across sectors, demonstrable value to consumers, and varied methods for deriving revenue, excluding free apps from the market definition has been improper. Therefore, the App Association greatly appreciates the draft Notice's recognition of the fact that simply because a product is being supplied for free does not mean that no relevant market exists for that product. We further welcome that the Commission proposes the consideration of other competitive parameters when defining the relevant market such as innovation and quality, including durability, sustainability, value, and variety of uses the product offers and its availability. Given the fact that the SSNIP test explicitly considers prices, we agree with the Commission's understanding that other types of evidence are just as valid for informing a market definition. Especially in cases of non-price competition, there is no obligation for the Commission to apply the SSNIP test.

In the digital economy, markets have both reconfigured existing and created entirely new channels of competition. There is not only competitive pressure from substitutability of demand and supply and potential competition but also from products that complement each other or make for imperfect substitutes. We see that this is true in the digital economy when we look at past

<sup>1</sup> <https://www.statista.com/statistics/263797/number-of-applications-for-mobile-phones/>.

<sup>2</sup> <https://appfigures.com/top-apps/ios-app-store/united-states/iphone/top-overall>

<sup>3</sup> [https://play.google.com/store/apps/top?hl=en\\_US&gl=US](https://play.google.com/store/apps/top?hl=en_US&gl=US)

examples of mobile phones or tablets increasingly being used instead of desktop computers (or even laptops). Digital markets are therefore highly competitive, and we welcome that the draft revised Notice proposes updates related to the digitalisation of markets and recognises that barriers and costs may result from direct and indirect network effects, the costs of data portability, or the degree of interoperability with other products.

Although we note that evidence of substitution in the recent past and new product launches continue to provide useful insight and can be essential to market definition, we agree with the Commission's plan to also consider forward-looking assessments in dynamic markets. In these forward-looking assessments, the Commission states it may rely on consumers' reactions to hypothetical changes in relative supply conditions. We note again here that focusing this approach too much on prices is not necessarily always practical and operational when considering digital markets where many goods and services are free to consumers. Therefore, we also welcome the Commission's proposal to consider complementary products or imperfect substitutes, as well as switching costs and barriers to alternative suppliers or products. The Commission additionally rightly states that the evidence on hypothetical substitution may be less reliable than that on actual substitution, and we appreciate its commitment to applying a case-by-case assessment in those situations.

#### D. Supply-side substitution

According to the draft revised Notice, supply substitutability may be considered to broaden a market definition where suppliers use the same assets and processes to produce related products that are not substitutes for customers, and where this leads to similar conditions of competition across the range of such related products. It further stipulates the necessary condition 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'. These situations occur when a business produces a wide range of qualities of a product. Online platforms specifically do a variety of things, such as acting as a marketplace, functioning as a messaging or video call operator, monetising data, or running targeted ads, but not necessarily a range of qualities of the same or similar products. The digital economy is characterised by its fast-paced nature, short innovation cycles, and fast growth. An updated market definition Notice should take these factors into account when examining supply-side substitutability.

#### E. Geographic market definition

Considering the geographic market definition, we support the revised Notice's alignment with the Commission's practice in merger and antitrust cases, which has already operated under the assumption that global markets exist. We appreciate the Notice's recognition that 'when customers around the world have access to the same suppliers on similar terms regardless of the customers' location, the relevant geographic market is likely to be global', as this is the case for most app developers who can access a global customer base through software distribution platforms. Digital companies often operate across regions easily and are not necessarily limited in geographic scope by these factors and thus compete in a larger market. The dynamism of digital markets blurs the geographic borders between markets by integrating different products and markets, and many companies are now 'born global'. This means they are involved in the supply and demand of products across different geographic markets, where conditions for competition

may not be sufficiently homogenous and can't be distinguished from neighbouring areas. We encourage the Commission to acknowledge the fact that there are cases in which conditions of competition are not sufficiently homogeneous but cannot be distinguished from neighbouring areas.

### III/ Conclusion

In the face of increasing uncertainty, the App Association believes that the 1997 Notice has added significant value in the assessment of relevant product and geographic markets. Nonetheless, further increasing legal certainty and improving procedures in the application of EU competition law must be a priority for the revision of the Notice. The draft Notice seems to sufficiently accomplish this goal, and the App Association thanks the Commission for the opportunity to provide further recommendations to its proposal.

As the digital economy has driven the rise of new IoT innovations across consumer and enterprise use cases, traditional and legacy market definitions and constructs have become ineffective and potentially damaging to effective competition law enforcement. As discussed above, we believe the Commission's updated market definition should reflect the large and diverse community of small business developers that the App Association represents. The App Association remains available for discussion and commits to working further with the European Commission and all other stakeholders to advance this timely and important initiative. We thank the Commission in advance for its consideration of our comments, and we look forward to engaging further in the future.

Sincerely,



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