



Founded in 2012, the Developers Alliance is a global advocate for software developers and the companies that depend on them.

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## **Developers Alliance's comments on the proposal for an updated Commission Notice on the definition of the relevant market for the purposes of Union competition law**

### **General Remarks**

We recognize the updated Notice as an important guidance tool increasing transparency and predictability of the Commission's assessments under the EU's competition law. It will serve the Commission to pursue this exercise with greater efficiency and further consolidate its expertise, to the benefit of the quality of the competitive assessments.

Our comments are strictly limited to the perspective of digital markets, digital products, and services. In this respect, we take note of the attention given to the specificities of digital markets, notably the multi-sidedness, the ecosystems and the role of adjacent dependent markets, zero-cost and so forth. Market definition is essential for a comprehensive competitive assessment in each case.

We commend the acknowledgment of the value of stakeholders' input, including of trade associations like ours. Their valuable insights on the reality and dynamics of digital markets should always be considered.

### **On the General Principles**

It is very important that market definition should be based on the facts and the evidence of each case (para 11). One should avoid a one-size-fits-all approach based on the analysis of a one-sided market; in the case of multi-sided markets, each side should be contemplated (para 12).

All competitive constraints, from within and from outside the market, should be considered, especially in the context of digital markets where market forces could be quite dynamic (para 14). Different parameters of competition and asymmetric competitive constraints between firms might be relevant, but not necessarily all the time, in the outcome of the market definition. Similarly, the time period is also important to be considered (para 15).

The assessment of “expected transitions in the structure of a market” should be based on clear, solid evidence. We suggest a cautionary approach with regard to evolving digital markets and technology development and uptake. Technology companies are usually investing and developing business strategies based on future bets, while fully aware of the risks, that success is not guaranteed. Establishing the relevant market should focus *ad rem* on the known situation and avoid speculations about the future. At the same time, in certain cases, impending technological changes revealed by obvious evidence and impending regulatory changes represent indeed relevant factors (para 16).

While the concept of ‘relevant market’ should be limited to the jurisdiction and objectives relevant to implementing EU competition law, the assessment cannot ignore the competitive constraints revealed by the understanding of the market and the conditions under which firms operate (para 17).

In situations when market definition would be left open, depending on specific circumstances of certain cases, the competitive assessment should, nevertheless, consider all plausible market definitions, without any concessions to the scope of the analysis and consequently the robustness of the case. Especially in complex cases, a rigorous market analysis would serve as worthwhile guidance for future litigation (para 18).

## **On the Concept of the Relevant Market and General Methodology**

We caution against a rigid approach in appraising the relevant product market. Although, in most cases, the products’ characteristics, prices, and intended use are evident indicators for substitutability, this might not always be the case for digital products and services (para 20). For example, particular situations could be related to the use of the product by consumers, which differs from the intended use. Because of an unforeseen use of a digital product or service (e.g. an app) by consumers in a different way than intended at the time of placing it on the market, it may become a substitute for a product or service that usually would be considered in a completely different market.

Regarding demand substitution (section 2.2.1.1.), the assessment for digital markets requires a more nuanced approach, beyond the narrow consideration of suppliers in a single area. Customers of platforms would often switch between different distribution channels, which may not be apparently substitutable, but represent actual alternatives and therefore substitute offers for those groups of customers.

Aspects related to evidence of past or hypothetical substitution could indeed be quite relevant for the assessment (para 28). For example, certain digital channels co-exist with analogue, traditional ones, and the customers’ conduct indicates that they consider both categories as viable distribution channels and even utilize them at the same time.

The application of the SSNIP test could prove difficult in the case of digital markets and particularly in the case of multi-sided platforms, where one part of the platform might subsidize other part(s).

While acknowledging that the SSNIP test is not pertinent in all cases (para 32) and considering the recent interpretation of the General Court of the application of the SSNDQ test (case T-604/18 Google Android), there is a need to clarify the methodology that the Commission would apply in the case of multi-sided platforms and complex digital ecosystems. Also, it would be of great practical value if the Commission could provide additional clarification on the level of quality decrease, worth informing the market definition, including the assessment of substitutability.

## **On the Process of Defining Markets**

Geographic markets can indeed range from local to a global dimension, depending on the conditions of competition (section 2.2.2.). Regulatory requirements could be an important element in identifying localized markets, as the cost of doing business and regulatory restrictions in certain jurisdictions are creating different conditions for competition between geographical areas (the relevance of regulatory framework, as rightly mentioned in para 51). Conversely, regulatory harmonization, standardization, equivalence and mutual recognition via trade agreements indicate a greater cross-border market integration (para 72).

The exercise of market definition should be consistent and make use of accumulated expertise. Nevertheless, each case should benefit from a specific, proper assessment, especially in complex situations such as those raised by digital markets. This would avoid a superficial approach (section 3.1.).

The delineation between offline and online should be carefully assessed, in particular with regard to digital markets (para 51). As previously mentioned, distribution digital channels co-exist with offline ones and therefore in certain cases could be seen as substitutable.

Hypothetical substitution could be a very useful test indicating customers' attitude towards a possible change and helping to identify those competitive constraints that might not be so obvious (para 54). We note a cautious approach, though the case-by-case assessment and the relevance of evidence would serve their purpose in utilizing this test whenever the need arises.

On the other hand, the draft Notice seems to allow a large margin for speculative appreciation of the evolution of certain markets or the development of certain technology (para 55).

With regard to the evidence on competitive constraints based on industry views (para 56), but also on evidence gathering in general (para 78), we welcome the recognition of the valuable information that can be provided by industry associations. Recourse to such evidence should be taken into account whenever necessary and appropriate, not only as a simple option.

## On the Market Definition in Specific Circumstances

- ***Market definition in the presence of multi-sided platforms***

We applaud the consideration of the specificities of multi-sided platforms for the assessment of relevant markets. A one-size-fits-all approach, an assessment standard based on single-sided markets would not be viable in all cases, in particular for those involving digital markets and online platforms. There needs to be an assessment of each side of a multi sided platform, which will provide a robust understanding of the interplay between different parts of a platform and accordingly the dynamics between different commercial interests. This should be complemented by the analysis of external competitive constraints on each side of the platform and overall, depending on the situation.

Assessment of substitution based on non-price elements, including the SSNDQ test, should rely on solid evidence. We reiterate the necessity to clarify the methodology, for the sake of predictability.

- ***Market definition in the presence of after markets, bundles and digital ecosystems***

Applying the same principles for assessing after-markets and digital ecosystems could draw a superficial approach. The organization and dynamics could be quite different, depending on the circumstances (para 103). Furthermore, a broader perspective might be highly relevant in certain cases, when competitive constraints from other digital ecosystems should not be ignored.

Without disregarding the relevance of network effects, switching costs and (single and/or multi)-homing decisions for the purpose of defining the relevant product market(s), the methodology should avoid the option to narrow the limits of a market as convenient as possible. We recommend instead a rigorous assessment based on different elements, as those aforementioned, but also considering all direct and indirect competitive constraints, as well as all the participants in the ecosystems.