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Feedback of

ACT | The App Association
(Transparency Reg. # 72029513877-54)
Rue Belliard 40,
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to the

Irish Competition Authority

regarding its

Consultation on Merger Guidelines

Introduction and statement of interest

ACT | The App Association (hereafter 'App Association') welcomes the opportunity to submit comments to the Irish Competition Authority's consultation on its Merger Guidelines.

The App Association is a policy trade association for the **small business technology developer community**. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately €86 billion and is responsible for over 1.3 million jobs in the European Union (EU).[1]

App Association position on the Irish Competition Authority's updated merger guidance documents

Success for a startup or small business can take a variety of forms and be accomplished through different means, including but not limited to being acquired by a larger company with the resources and knowledge to improve the product and/or streamline market entry or an initial public offering (IPO) all to the benefit of end-consumers. Acquisition is often the best of these options for the business owners and consumers, as IPOs are expensive and fraught with risk and thus reduce likelihood of consumer benefit. App Association members often start their businesses with the understanding that once they have brought their idea to fruition, their business may be acquired, allowing them to move on to develop new businesses. The economy and consumers have benefitted immensely from the freedom to combine the novel products small tech companies create with the resources and technical and commercial knowledge of businesses that later acquire those innovations. A merger that helps deliver better products or services for consumers is often a new small business's desired outcome and is desirable from a competition policy standpoint. Any changes to the merger guidelines likely will significantly have long-term, negative effects on App Association members' ability to innovate and compete, affecting their ability to fully realise success.

In this regard, we urge the Competition and Consumer Protection Commission (hereafter 'CCPC') to ensure that its updated policy recognises that mergers and acquisitions are a natural and desirable outcome for many small and medium-sized entities (SMEs). Any modifications should maintain a deference to thorough economic analysis as a foundation of any merger review or enforcement. Diminishing the role of, or eliminating, economic analysis from the merger guidelines will result in uncertainty and harm App Association members' ability to achieve success through procompetitive mergers. In updating the merger guidelines, it is crucial that the Irish Competition Authority base any changes in settled law and well-demonstrated experiences and effects. The merger guidelines should avoid making policy-level decisions based on edge cases or hypotheticals that do not reflect the reality of our members' business environment.

[1] *See* https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf.

Building on the above, concerning the market definition, we note that market definition is a core element of merger assessment. We strongly believe that a market definition must precede any determination of market power and abuse, considering the foundations of antitrust. Factors to be considered must include substitutivity of demand and supply and potential competition. This market analysis must be data-driven, specific, and based on facts.

Updates should incorporate flexibility that acknowledges the unique aspects of digital markets and the app economy. The App Association strongly believes in the necessity of considering 'multi-sided markets', particularly in the digital economy where platforms connect diverse participants. Today's digital markets are highly complex, involving a variety of players ranging from massive online platforms to one-person software development companies. Digital markets require nuanced market definitions that extend beyond traditional price metrics. For instance, many apps operate in non-price competitive conditions, often offered for free, yet they still create substantial value for consumers. Not only that, but we also believe a case-by-case assessment may be required as not all digital ecosystems fit an aftermarket of 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 creates 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. 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.

Additionally, we encourage a cautious approach to an ex-ante perspective that seeks to predict future market conditions without robust evidence of market distortion. The revised guidelines should avoid overly broad assumptions. SMEs require clear, predictable guidelines to navigate the merger process and make informed business decisions. We strongly encourage the CCPC to maintain a cautious approach, ensuring that any intervention is backed by rigorous economic assessment and that SMEs are not disproportionately impacted by rules that were designed for larger firms.

Finally, we would like to highlight our recent letter, *Global Activists for Change: An Open Letter Regarding Recent International Trends in Competition Regulation*, where our members highlight the need for evidence-based frameworks in merger regulation.

Conclusion

In conclusion, while we support CCPC's commitment to promoting competition, we urge caution in the implementation of these new guidelines. The focus should remain on ensuring that interventions are evidence-based and proportionate to the actual risks posed by a merger. For small businesses, which drive much of the innovation in Europe's digital economy, maintaining flexibility to engage in mergers and acquisitions without unnecessary regulatory burdens is essential. We encourage the CCPC to continue refining its guidance with the goal of fostering, rather than stifling, entrepreneurial activity.

The App Association remains at your disposal to provide further input and would welcome the opportunity to contribute to developing practices and solutions that address competition issues in ways that benefit all market participants, especially innovative SMEs.

Sincerely,

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