

To: European Commission
Directorate-General for Competition
Unit A.1 Antitrust Case Support and Policy

Ref.nr.: HT.5849

Subject: ***Necessity of new competition tooling to improve digital economy***

Dear madam/sir,

Please allow us to shortly introduce ourselves. We represent several national CIO-associations. Communities of Chief Information Officers (CIO's) and other senior leaders that are responsible for digital technologies and digital transformations within private or public organizations. These organizations are all users of digital technologies. We don't represent ICT suppliers and consultants.

In the current reality of very drastic measures adopted to combat the COVID-19 virus, we are seeing the huge potential of digital technologies. These technologies help us sustain organizations that without them, would have to be closed down completely. Suppliers in digital infrastructures, services and devices have become vital to keeping society and the economy going to the largest extent possible, while people are staying at home as much as possible to prevent the further spreading of the virus. And while the current situation proves to all parties that digital technologies are here to stay and will become even more important in the future, this also proves how important it is to address the negative sides of the dominance of a limited group of suppliers, and to prevent abuse of their dominant position. The organizations that we represent, both private and public, are increasingly confronted with undesirable behaviour and sometimes even unfair practices of (large) software vendors and cloud providers. And although the scale differs, companies of all sizes face the same issues.

The purpose of this letter is to address several such issues that will hamper the future digital economic growth in Europe if we continue on the current path. New ways of looking at the competition situation in markets for digital technologies are needed, as they are in some ways different from traditional markets. And new instruments or tools for regulating these markets are necessary where they do not provide for a fair interaction between supply and demand side agents. Below we will illustrate some of the situations our members encounter on the markets for digital technologies, including markets for software, hardware, cloud and other services.

Specific aspects of digital technology markets that make them different from many other markets, either by these aspects on their own, or in combination:

- In many cases, the complexity of contract and license conditions is such that a customer does not have an equal negotiating position vis-à-vis the supplier without hiring external expertise. A supplier only needs to know his own complex contracts, the customer those of many suppliers.
- Unilateral changes to agreements, terms and conditions by suppliers, for example introducing a different method of determining use. This usually leads to higher costs for the user, without added benefits.
- Re-bundling of applications by suppliers, which means that additional licenses must be purchased by the customer in order to continue to use the same applications he/she acquired and used before.
- This means that non-compliance and associated claims often occur and are an opportunity for the supplier to put the customer under pressure to purchase more licenses or other products/services from the same supplier in order to broaden (in range of products and services) and extend (in time) the relationship with / dependency of the customer. This seems to be a consciously pursued business case for the suppliers.
- It is virtually impossible to include any form of product / service liability of the supplier in contracts, while the potential risks for the customer are very large if the digital technology fails or proves unsafe (for instance cybersecurity risks).
- Data from customers and about the customer's use of products and services is appropriated and used by suppliers. Costs for getting your own data out of the cloud are often very high (higher than sending data into the cloud) and the supplier doesn't always cooperate.
- Compliance with legal obligations should be a precondition to being allowed to enter the European market, where in the software market we see that it is often necessary to negotiate this into contracts.
- Due to the economies of scale and network advantages of software, the pressure from some suppliers to adapt software to the specific situation of a customer and the limited interoperability between software from different suppliers for the same application, the choice of a supplier for one application in part of the organization is in most cases a prelude to wider use of products and services of the same application.
- The costs associated with switching to another system or supplier (new licenses, new implementation, training employees, conversion of data / algorithms, starting over with training / learning from AI systems, etc.) are very large and therefore reinforce the dependency on suppliers that have in the past been contracted.
- These switching costs increase the longer a system/product/service is used, as more data/knowledge/value is created that has to be redone with a new system/product/service.
- The major suppliers are that large and have such dominance, that even the large non-IT enterprises or large governmental customers have hardly any negotiating power.

- Almost any new competitor offering interesting alternatives to products and services offered by incumbent large suppliers, is soon bought by one of these incumbents, which further reduces alternatives open to customers. It is almost impossible, due to the very large resources and huge amount of data available to them, to resist these incumbent suppliers.

These aspects lead to the following situations that are from our point of view unwelcome, unfair or even unlawful and need to be addressed.

- Vendor lock-in
 - Once a software vendor or cloud provider has been selected, fair competition is at stake. Switching to another vendor will impact business severely and change cost are extremely high, as indicated above. This results in one sided price increases and terms & conditions changes by vendors. And if our companies or organizations change from one software vendor to another, it is hard for them to get their data back at a reasonable cost.
- Undesirable and possibly unfair behaviour
 - It is very difficult to comply with non-transparent and complex software licensing schemes, which leads to unintended non-compliance, and large claims. These claims are subsequently used to push the user into buying more software than they need, of a type that the vendor is trying to increase its market share in. We see this unwanted behaviour started at the larger software vendors, but more and more suppliers are copying this approach.
- Insufficiency of current competition rules
 - Current competition rules (i.a. articles 101 and 102 of the Treaty on the Functioning of the European Union) apply predominantly to competition between suppliers. They don't very well apply to situations where a supplier has been chosen by a customer and the customer subsequently finds that the supplier is displaying undesirable and possibly unfair behaviour, while the options available to redress this are unavailable.

What's needed is a broader scope and new tooling for authorities to better understand and redress unfair and unwanted behaviour by dominant actors in the digital technology markets.

- The European Commission should not only look at competition between suppliers, but also at supplier behaviour after the choice of supplier / solution has been made and the agreements have been signed. There, the EC should (be able to) act in the

same way against a supplier who abuses his / her power vis-à-vis a customer as it would against a monopolist who abuses his / her power vis-à-vis a competitor.

- In addition, research would be desirable into the extent to which customers actually have an influence on the contract conditions, or whether suppliers can simply push through their conditions. That could be an indication of abuse of power.
- The European Commission should have a much better understanding of the implications for customers when researching and ruling on proposed mergers and acquisitions of/by digital technology suppliers.
- Interoperability between digital technology solutions and flexibility in the movement of data – including meta data - to and from locations/providers/solutions by the owner should be more stringently imposed. If this is not possible by standardization or negotiation and agreement between the data owner and the technology provider(s), it should be made mandatory in regulations.

If you are interested in setting up a meeting to further address these issues, please contact xxx, who'll act as point of contact for all our associations.

Yours sincerely,