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European Commission draft revised Market Definition Notice HT.5789 – submission from an organisation (Zephyre)

January 2023

Summary

1. Zephyre Ltd (**Zephyre**) welcomes and thanks the Commission for the opportunity to comment on the draft revised Market Definition Notice¹.
2. Zephyre is an antitrust economics advisory firm.
3. The Commission's clarification of the concept – and importance – of market definition for the enforcement of EU competition law Articles 101 and 102 TFEU, the EU Merger Regulation, and the equivalent EEA rules is greatly welcome.
4. Zephyre agrees that the current (1997) Market Definition Notice remains highly relevant and (generally) fit for purpose; but that updates and clarifications are now needed to align it with current practice and new market realities; and that this will provide greater guidance, transparency, and legal certainty, and associated “*more efficient*” public (and private) enforcement.
5. Zephyre especially welcomes the Commission's new guidance on:
 - the principles of market definition;
 - non-price elements;
 - forward-looking application of market definition,
 - market definition in digital markets, especially multi-sided markets and digital eco-systems;
 - innovation-intensive markets;
 - geographic market definition;
 - quantitative techniques; and
 - evidence sources.
6. Of these, Zephyre highlights **multi-sided markets** as one of the most challenging topics in EU (and global) competition policy – in digital markets and beyond – and so potentially the most contentious addition to the revised Market Definition Notice.
7. Zephyre therefore asks the Commission to include *more specific* guidance on multi-sided markets in the new Market Definition Notice – for greater transparency and legal certainty – especially on:
 - I. the definition of multi-sided markets;

¹ Communication from the Commission: Commission Notice on the definition of the relevant market for the purposes of Union competition law, Brussels, XXX [...] (2022) XXX draft.



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- II. the validity of the “*single market*” versus “*multi-markets*” approach to defining multi-sided markets;
 - III. the significance of multi-sided “*homing*” decisions; and
 - IV. the significance of negative (alongside zero) multi-sided pricing.
8. Zephyre’s submission comments on each of these.

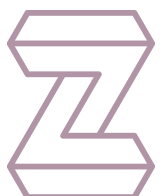
About Zephyre

- 9. Zephyre is an antitrust economics advisory firm focusing in particular on financial services, network, and technology industries, in the UK, EU, and globally. Zephyre supports law firms, litigation funders, businesses, public bodies, and civil society organisations.
- 10. Zephyre is acting/ has acted in multiple complex UK, EU, and US antitrust, merger, and regulatory cases, primarily for consumers and other antitrust complainants.
- 11. Zephyre was founded in 2016 by Mark Falcon. Mark has 25 years’ experience as an expert economist in front of competition authorities, sector regulators, courts, and legislators.
- 12. Zephyre is Affiliated of Coherent Economics, a US-based antitrust economics firm.
- 13. Mark was previously Executive Director of the UK Payment Systems Regulator; Head of Economic Regulation/Chief Economist at Three/CK Hutchison (one the UK/EU’s largest inward investors); and helped found Frontier Economics. Mark has also been a longstanding Specialist Adviser to the UK House of Commons Treasury Committee and an Associate Faculty Member at Imperial College Business School.

I. The revised Market Definition Notice should define “multi-sided markets”

- 14. The Commission’s press release on the revised Market Definition Notice² explains that – the main objective of the revised Notice is to offer more guidance, transparency, and legal certainty for businesses on various key market definition issues. Such issues include market definition in digital and multi-sided markets.
- 15. The draft revised Notice thereby contains a new section: *Market definition in the presence of multi-sided platforms* [4.3], which notes that “*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*” [94].
- 16. Zephyre greatly welcomes this section.

² European Commission - Press release, Competition: Commission seeks feedback on draft revised Market Definition Notice, Brussels, 8 November 2022.



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17. This proposed revised Market Definition Notice definition of multi-sided platforms, and associated multi-sided markets, is nevertheless too non-specific (in Zephyre's view) as it could potentially include *any* market.
18. For example, the Commission's Evaluation support study on the Market Definition Notice (**the Commission Support Study**)³ explains that "*there are many definitions of multi-sided [...] markets [...albeit] Broadly speaking, a two-sided [and, more generally, multi-sided] market is one in which: 1) two [or more] sets of agents interact through an intermediary or platform, and 2) the decisions of each set of agents affect the outcomes of the other set of agents, typically through an externality [also called a 'cross-platform network effect']*" [§3.1, 2nd para.].
19. Typical examples (from the draft revised Notice and Commission Support Study) include:
 - payment card systems – the two groups of "*agents*" being cardholders and merchants (each of which benefit from more of the other);
 - mobile operating systems – the two groups being phone users and app developers;
 - taxi services – the two groups being drivers and riders; or
 - e-commerce websites – the two groups being buyers and sellers⁴.
20. But why then aren't all markets multi-sided? (This is a frequent sceptical question about multi-sided markets from many observers.)
21. In Zephyre's view, the best answer to this question – and most authoritative overall guide to multi-sided markets – is the 2018 Organisation for Economic Cooperation and Development (**OECD**) Competition Committee report: *Rethinking Antitrust Tools for Multi-Sided Platforms (the OECD Report)*⁵. The report comprises agency, academia, and private practice expert economist contributions, already cited extensively in the Commission Support Study.
22. In particular, the OECD Report provides a thorough description of the meaning and significance of multi-sided markets for competition policy enforcement.
23. First, the OECD Report highlights contributors' consensus that multi-sided markets *are* distinct from single-sided markets – and that this distinction matters for competition enforcement, for example:

"[Multi-sided platform markets are] different in nature from traditional markets, and particularly, there are important demand externalities from one side of the platform to the other ('cross-platform network effects') which if ignored could lead to bad [antitrust] decision-making. [...] where these

³ European Commission Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law: Final report, 2021.

⁴ See for example the Commission Support Study, p. 39.

⁵ OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms*, 2018.



externalities are recognised, existing [antitrust] tools can be adjusted to account for them.”⁶

“Two-sided markets are an area of considerable recent economic research in the field of Industrial Organization [economics]. [...] For antitrust authorities it is therefore essential to have a thorough understanding of these platforms to properly enforce antitrust scrutiny.”⁷

24. Second, an important feature of such cross-platform network effects/externalities is that users are unable such internalise such effects directly, namely:

“[The] demands on the two sides of the market are linked by indirect network effects and the firm recognises the existence of (i.e. internalises) these indirect network effects. [...] The buyers of the two products, however, do not internalise these effects, which are therefore often called externalities.”⁸

“Multi-sided markets are characterised by the presence of cross-platform welfare effects that users cannot internalise absent pricing and non-pricing co-ordination by a platform. Those welfare effects can be access externalities (the benefit a user on one side of a platform generates for users on the other side of the platform) or usage externalities (the benefit a user on one side of a platform generates for a user of the other side of the platform when increasing the number of transactions in that platform).”⁹

25. Third, whether a market is multi-sided or single-sided – and the significance of such multi-sidedness – is a matter of degree, rather than a “either/or” question, for example:

“[It] is the magnitude of the cross-platform network externality that determines how big a mistake it is to overlook it and treat the product as one-sided.”¹⁰

“The interesting question is often not whether a market can be defined as two-sided—virtually all markets might be two-sided to some extent—but how important two-sided issues are in determining outcomes of interest.”¹¹

26. Of particular significance in multi-sided markets is the structure of prices between different participants, rather than the overall (total) level of prices set by platform firms:

“Crucially, if [a] cross-platform network externality is present, this implies that the structure of prices that the platform sets will determine volume, not

⁶ Frédéric Jenny, Foreword, in the OECD Report, p. 4.

⁷ Andrea Amelio, Liliane Karlinger and Tommaso Valletti, Exclusionary practices and two-sided platforms, in the OECD Report, p. 132.

⁸ Lapo Filistrucchi, Market definition in multi-sided markets, in the OECD Report, p. 37.

⁹ Enrique Andreu and Jorge Padilla, Quantifying horizontal merger efficiencies in multi-sided markets, in the OECD Report, p. 151.

¹⁰ Chris Pike, Introduction and key findings, in the OECD Report, p. 10.

¹¹ Paul A. Johnson, Suggestions for competition authorities when assessing vertical restraints in multi-sided platforms, in the OECD Report, p. 201.



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just the level at which it sets the price across the different sides of the market.”¹²

“If the price structure is not neutral, then the platform can use prices to internalise externalities. [...] A price structure is neutral if the overall price on the two sides, but not the individual prices charged to each user side matter. If a platform uses subscription fees, membership fees or sign-up fees, the price structure is necessarily non-neutral. If a platform relies exclusively on usage fees, the price structure is said to be neutral if the decisions by users on both sides are only affected by the sum of the two usage fees. [...] Whether or not the price structure is neutral is often unclear a priori and requires a careful analysis.”¹³

27. Zephyre therefore encourages the Commission to adopt the same definition of multi-sided markets at the revised Market Definition Notice as in the OECD Report, in particular, highlighting that:
- multi-sided markets are defined by cross-platform network (access and/or usage) effects/ externalities that users cannot internalise directly;
 - the structure of prices set by multi-sided platforms to their respective user groups is critical to internalising such externalities (and thereby of determining relevant market volumes, e.g. of access to and usage of the platform); and
 - whether a given market is multi-sided or single-sided is a market of degree rather than a binary question.
28. In Zephyre’s view, such clarification would offer greatly welcome additional transparency and legal certainty for businesses, consumers, and other interested parties.

II. The revised Market Definition Notice should reject the “single market” approach to defining multi-sided markets

29. The draft revised Market Definition Notice explains that:

*“In the presence of multi-sided platforms, the Commission may define a relevant product market for the products offered by a platform as a whole, in a way that encompasses all (or multiple) user groups [**the single market approach**], or it may define separate relevant product markets for the products offered on each side of the platform [**the multi-markets approach**]. [...and that...]*

Depending on the facts of the case, it may be more appropriate to define separate [i.e. multi-] markets where there are significant differences in the

¹² Chris Pike, Introduction and key findings, in the OECD Report, p. 10.

¹³ Jens-Uwe Franck and Martin Peitz, Market Definition and Market Power in the Platform Economy, Centre on Regulation in Europe (CERRE), 2019 (Franck and Peitz 2019), p. 47.



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substitution possibilities on the different sides of the platform [...and to] assess if such differences exist, the Commission may take into account factors such as whether the undertakings offering substitutable products for each user group differ, the degree of product differentiation on each side [...and] behavioural factors such as the homing decisions of each user group and the nature of the platform (for instance whether it is a transaction or a matching platform).” [95].

30. In Zephyre’s view, such an optional approach – between defining a *single market* or defining separate *multi-markets* – creates a substantial and unnecessary lack of transparency, and associated significant legal uncertainty.
31. This is because the most significant cases to have addressed market definition in multi-sided markets (globally) show that:
 - defining a relevant product market for the products offered by a platform as a whole – i.e. the *single market* approach – it at considerable risk of an incomplete and/or erroneous analysis, and associated legal risk; whereas
 - defining *separate* relevant product markets for the products offered on each side of the platform – i.e. the *multi-markets* approach – offers far greater transparency, predictability of outcome, and associated legal certainty (and no known disadvantage versus the *single market* approach).
32. In particular, the relevant important multi-sided cases are:
 - *Mastercard* – European Commission (2007)¹⁴ and EU General Court (2012)¹⁵;
 - *Ohio v American Express Co* – US Supreme Court (2018)¹⁶; and
 - *Compare The Market v Competition & Markets Authority (CMA)* – UK Competition Appeal Tribunal (2022)¹⁷.
33. In summary, in *Mastercard*, the Commission and General Court firmly rejected the *single market* approach to market definition (as pleaded by Mastercard).
34. In *Ohio v American Express Co*, the US Supreme Court defined a *single market* for the credit card market – but this judgment was and has been highly contentious (in the US, EU, and UK).
35. In *Compare The Market v CMA*, the UK Competition Appeal Tribunal firmly rejected the CMA’s single market approach (as well also the US Supreme Court’s market definition approach in *Ohio v American Express Co*).
36. Of other cases involving multi-sided markets, very few have addressed the question of the single market or multi-markets approach explicitly.

¹⁴ COMP/34.579 MasterCard, COMP/36.518 EuroCommerce, and COMP/38.580 Commercial Cards (2007).

¹⁵ *Mastercard v European Commission*, Case T-111/08, Judgment of the General Court, 12 May 2012.

¹⁶ US Supreme Court 585 US (2018).

¹⁷ UK Competition Appeal Tribunal (1) *BGL Holdings Ltd*, (2) *BGL Group Ltd*, (3) *BISL Ltd*, (4) *Compare The Market Ltd v Competition Markets Authority* [2022] CAT 36.



37. Accordingly, Zephyre calls on the revised Market Definition Notice to reject the single market approach. This would result in much greater transparency and legal certainty in future (and ongoing) multi-sided markets cases.
38. The remainder of this section comments further on *Mastercard*, *Ohio v American Express Co*, *Compare The Market v CMA*, and other cases and evidence.

Mastercard (Commission/EU General Court) rejected the single market approach

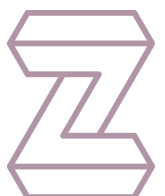
39. The draft Market Definition Notice cites *Mastercard* as an example of where the Commission applied the multi-markets approach – by defining the “issuing” and “acquiring” sides of the payment card systems market as distinct product markets¹⁸.
40. In its decision, the Commission explained that this was because “*there are two groups of consumers in the payment cards industry: cardholders and merchants*” [258] each receiving “*distinct services*” [261]. This market definition followed the Commission’s prior *Visa II* decision.
41. In reaching this finding, the Commission expressly rejected Mastercard’s assertion that there was a relevant *single product market*, saying that “*Two-sided demand does not imply the existence of one single ‘joint product’*” [257] – and that Mastercard’s concept of market definition was “*inconsistent with the Commission’s long standing case practice in defining product markets in industries with two-sided demand [...such as] newspapers and magazines (which offer a simultaneous service to advertisers and readers) and software operating systems (which offer a simultaneous service to users and software application developers)*” [266].
42. The EU General Court later confirmed the Commission’s position, commenting that “*despite [the complementary nature of issuing and acquiring services, and the presence of indirect network effects], services provided to cardholders and those provided to merchants can be distinguished, and, moreover, cardholders and merchants exert separate competitive pressure on issuing and acquiring banks respectively.*”¹⁹

Ohio v American Express Co (US Supreme Court) was highly contentious, as well as incompatible with EU competition law

43. Probably the most prominent case to follow the *single market* approach is *Ohio v American Express Co (US Supreme Court)*.
44. In this case, the Supreme Court rejected the US District Court’s prior finding that “*the credit-card market should be treated as two separate markets—one for merchants*

¹⁸ Draft revised Market Definition Notice, footnote 111.

¹⁹ [176-177].



and one for cardholders”²⁰, finding instead that “the credit-card market is one market, not two”²¹.

45. In reaching this finding, the Supreme Court majority opinion explained that:

*“[American Express] operate[s] what economists call a ‘two-sided platform,’ providing services to two different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a ‘transaction’ platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other.”*²²

46. *Ohio v American Express Co* has nevertheless proven highly contentious (in the US, EU, UK, and elsewhere).
47. In the US, the US Supreme Court (minority) dissenting opinion responded to the ruling that: “The majority’s discussion of market definition is [...] wrong”²³, in particular, “there is no justification for treating [cardholder]-related services and merchant-related services as if they were part of a single market”²⁴.

48. This is of course the same reason that the Commission and General Court rejected the *single market* approach in *Mastercard*.

49. Also in the EU, the Commission’s Evaluation of the Market Definition Notice Staff Working Document (**the Commission Staff Working Document**)²⁵ casts further doubt on the US Supreme Court’s *single market* finding – that “credit-card networks are a special type of two-sided platform known as a ‘transaction’ platform” – as it questions the validity of such a “transaction platform” distinction, namely:

*“[The] academic literature and the [EU National Competition Authority] practice do not appear to endorse the distinction between defining a single market for transaction platforms [also called ‘matching platforms’] and defining separate markets on each side for non-transaction platforms.”*²⁶

50. And in the UK, the Competition Appeal Tribunal’s judgment in *Compare The Market* directly rejects *Ohio v American Express Co*’s market definition finding as contrary to EU (and UK) law, namely:

“Unlike the United States, competition law in [the UK and EU] [...] does not permit the ‘balancing’ of pro- and anti-competitive effects at all.” [120(11)(ii)]

“It follows that the sort of analysis that took place in the US Supreme Court’s decision in Ohio v. American Express Co is inappropriate [in the UK and EU].

²⁰ P. 7.

²¹ P. 8.

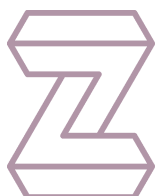
²² P. 1

²³ P. 14.

²⁴ P. 12.

²⁵ European Commission Staff Working Document, Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD(2021) 199 final, p. 54.

²⁶ P. 54.



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[...] By a majority, the Supreme Court held that for the purposes of analysis, there was one market (a ‘credit-card’ market), and not two markets, one for merchants and one for cardholders. [...]

The Supreme Court applied its ‘rule of reason’ approach, but in doing so needed to define the market. The Supreme Court took the ‘it depends’ approach [...], holding that sometimes it was appropriate to consider both sides of the platform as two separate markets, and sometimes appropriate to consider all sides of the platform as a single market. The court concluded that this was a case of a single market. [...]

[The Court] considered that this approach was necessary ‘to accurately assess competition’, and concluded that the anti-competitive effects alleged had not, in this case, been made out. [...] Two points can be noted: first, even in the context of US law, this was a controversial approach, and this was only the majority opinion. There was a powerful dissent. Secondly, and much more importantly, the framework of analysis in the US is [...] very different to that in the UK [and EU], and the US approach (whatever its merits in the context of US law) is simply not suited to the framework for assessing an infringement of [Article 101 TFEU].” [120(11)(iii)]

“Under UK [and EU] law, market definition provides a part of the analytic Framework. If, at the market definition stage, one moves away from the Product that is being acquired/supplied and fails to explore what it is that is being bought and sold, potentially important details will be lost, and the process of analysis becomes obscure rather than pellucid. Uncertainty is the highly undesirable outcome.” [120(11)(iv)]

51. The Commission has also repeatedly affirmed that Art 101 TFEU does not permit a “balancing” of pro- and anti-competitive effects, for example, in its 2018 *Amicus curiae* intervention at the UK Court of Appeal in *Sainsbury’s v Mastercard*²⁷:

“The Commission’s view is that there can be no ‘offsetting’ [of the harm to the consumers who are subject to the restriction]: each relevant group of consumers must receive a net gain; negative effects on one group of consumers cannot be compensated for by positive effects on consumers in a different market.” [42]

“This approach reflects the fundamental aim of the [EU] competition rules to enhance consumer welfare and ensure an efficient allocation of resources. Where a group of consumers suffers an overcharge through collective price-setting, overall consumer welfare is not enhanced where that overcharge provides a corresponding boon to a separate set of consumers, who do not bear the burden of the overcharge. The fair share requirement [of Article 101(3)] is satisfied only where the consumers who are charged the collectively

²⁷ European Commission’s Written Observations on Article 101(3) in *Mastercard v Sainsbury’s*; *Asda v Mastercard*; and *Sainsbury’s v Visa*, Nicholas Khan QC (Legal Service, European Commission) and Ronit Kreisberger (Monckton Chambers), 6 April 2018.



set price also benefit from offsetting efficiencies which at least leave them no worse off.” [43]

52. Hence, *Ohio v American Express Co* provides strong evidence of the approach avoided in the EU.

Compare The Market v CMA (UK Competition Appeal Tribunal) strongly rejects the single market approach

53. The Commission’s and General Court’s market definition finding in *Mastercard* is also the same essential finding as the UK Competition Appeal Tribunal’s in *Compare The Market v CMA*, in which the Competition Appeal Tribunal ruled that the CMA had wrongly defined the relevant product markets as a *single market* rather than as *multi-markets*, namely:

“Given the variety of multi-sided markets, their different network effects and pricing strategies, it is unsurprising that the [CMA’s] Decision [that *Compare The Market*, a home insurance price comparison website, had infringed Article 101 TFEU by imposing ‘Wide Most Favoured Nation Clauses’ on its contractual counterparties] has stressed the different approaches that have been taken by different competition authorities when defining markets. Thus, the CMA has regarded itself as free to choose which approach is ‘appropriate’ in the given case. In terms of predictability of outcome, such an approach does not commend itself, and in our judgement imports into the tool of market definition judgemental factors which are not relevant at the stage of market definition, but which fall to be considered later on in the process for discerning anti-competitive effects [...]. In short, we consider that the approach to market definition in the case of two-sided markets – both as reflected in the [Commission’s Market Definition Notice evaluation] Support Study and in the [CMA’s] Decision – needs to focus on the essential and seek to avoid the confusion that occurs when irrelevant factors are imported.” [120]

“We refer to the Product whose substitutability is being tested or assessed – and which will be subjected to the Hypothetical Monopolist Test or the [small but significant non-transitory increase in price (**SSNIP**) test] – as the **Focal Product** [...]” [120(2)]

“The [CMA] Decision describes price comparison websites as platforms with two supplies provided off them [...]” [120(5)]

“[The] Decision falls into error in eliding these two Products (and the Buyers and Seller acquiring/supplying them). [...] There are two Products in play, and [...] each of them constitutes a Focal Product in relation to which substitutability must be assessed. It follows – if the language of market definition is to be used – that there are two markets to be defined.” [120(6)]

“The point is that there are two quite different Focal Products being supplied (admittedly, by the same Seller [...]) to two quite different sets of Buyers [...].



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[...] The consequence is that, when it comes to the application of the Hypothetical Monopolist Test, the constraints that exist separately, distinctly, and above all differently in relation to each Focal Product are wrongly conflated.” [120(8)]

“Each Focal Product ought to be considered separately [...] because different substitutes may exist in relation to each. We are confident that not to do so is liable to lead to error, precisely because it fails to pay proper regard to the fact that the substitutes for each Product sold by the Seller [...] may very well be different. [...] the purpose of defining a relevant product market is to identify the products or services which are sufficiently close substitutes so as to exercise a competitive constraint on the price of the Product. It is perfectly possible for the competitive constraints to vary according to the Product under consideration: indeed, that will, in our judgement, likely be more often the case than not.” [120(9)]

“The economics literature suggests that two-sided markets can be analysed as either a single market or two separate markets. However, when it comes to market definition, to treat them as a single market runs the risk that the analysis of the degree of substitution will be incomplete, and that a single SSNIP on one side of the market is insufficient to test the competitive constraints on the other.” [146]

“We consider that, as a general precept, the markets in which the different Focal Products provided by Platforms are sold should always be assessed separately. In this way, an outcome neutral assessment of the true position obtains.” [147]

54. Hence, the Competition Appeal Tribunal gives multiple reasons for rejecting the *single market* approach in favour of the *multi-markets* approach (as a general matter of principle in all cases).

Most other multi-sided market cases are ambiguous about the *single market* or *multi-markets* approach

55. The draft revised Market Definition Notice and Commission Staff Working Document say that various cases that have used either the *single* or *multi-markets* approaches.
56. For example, the Staff Working Document says that in case M.4523 – *Travelport/Worldspan*, the Commission defined a single market for global distribution system services encompassing both the travel services providers’ side and the travel agents’²⁸; and the draft Notice explains that case M.8124 – *Microsoft/LinkedIn* defined a single market for online recruiting services, encompassing both job seekers and recruiters²⁹.

²⁸ Footnote 208.

²⁹ Footnote 110.



57. It is not obvious however that *Travelport/Worldspan* applied a single market approach, as the decision defines “*the [relevant] product market*” as being “*the market for electronic travel distribution services through a [global distribution system]*” [10] – but also separately refers to “*the upstream market (the [travel service provider] side of the market)*” and “*the downstream market (the [travel agent] side of the market)*” [11]. *Travelport/Worldspan* does not discuss any choice or reasons for choosing a single market or multi-markets approach (if either approach were applied).
58. Similarly, *Microsoft/LinkedIn* does not discuss any choice or reasons for choosing a single market rather than multi-markets approach.
59. The Commission Staff Working Document says that EU cases involving advertising-funded search engines or social networks defined online advertising services as a relevant market, separate from the markets for services provided to other categories of users, including cases M.5727 – *Microsoft/Yahoo Search Business*, M.6281 – *Microsoft/Skype*, M.7217 – *Facebook/WhatsApp*, M.8124 – *Microsoft/LinkedIn*, AT.39740 – *Google Search (Shopping)*, and AT.40099 – *Google Android*³⁰.
60. Few of these EU cases though made an explicit choice or gave reasons for choosing between a single market or than multi-markets approach to market definition.
61. The draft revised Market Definition Notice in any event says that the Commission “is not bound to apply the definition of a relevant market from its past decisions in future cases” – and that past decisions are only the starting point to analyse and verify “whether the definition of the relevant market from those past decisions may be applied to the case at hand” [11]³¹.

The Commission’s experts Professors Franck and Peitz firmly reject the single market approach

62. The Commission says that competition experts Professors J.-U. Franck and M. Peitz presented to DG COMP as part of the Market Definition Notice evaluation³², focusing in particular on the single market versus multi-markets approach to defining multi-sided markets.
63. In their related recent work, Professors Franck and Peitz firmly advocate the multi-markets approach – rejecting the single market approach – for the similar reasons as in *Mastercard* and *Compare The Market v CMA*, that:

“[The] Commission in recent years has dealt with quite a number of cases that involved two-sided [...] platforms, [...] in none of these cases did the Commission explicitly engage [...] on the question of the conditions under which a multi-markets approach or a single-market approach should be

³⁰ See Commission Staff Working Document, footnote 209.

³¹ And also as confirmed by the General Court and detailed at draft revised Market Definition Notice, footnote 21.

³² https://competition-policy.ec.europa.eu/public-consultations/2020-market-definition-notice_en



applied. Yet the Commission’s practice indicates that it analyses these cases based on a multi-markets-approach throughout.”³³

“[Even] if [a competition] investigation came to the conclusion that the two sides [of a two-sided market] were symmetric (in terms of characteristics and the way the platform sets prices), the single-market approach does not offer any benefits over the multi-markets approach because the economic analysis of the latter could simply consider two identical markets that are characterized by symmetric cross-group network effects.

Competition authorities and courts are [therefore] well advised to uniformly use a multi-markets approach when they define markets in the context of two-sided platforms.

The multi-markets approach is a logical and consistent application of demand-side substitutability to two-sided platforms as it naturally accounts for different substitution possibilities by the user groups on the two sides of a platform. It is based on the economic primitives of the market and not on derived constructs such as an overall demand for an intermediation service, which depends on demand substitutability on each side of the platform as well as on the cross-group network effects linking the two.

While one might think of conditions under which a single-market approach could theoretically be feasible, the necessary conditions are so severe that it would only be applicable under specific circumstances. Moreover, to recognize that a single-market approach might be applicable under certain conditions would create substantial risks that an authority or a court would adopt it erroneously.”³⁴

64. Professors Franck and Peitz make many of the same points in their related 2019 report³⁵.

There are multiple concerns with the single market approach to multi-sided markets

65. As described in the above sections, the Commission’s and General Court’s market definition finding in *Mastercard*, UK Competition Appeal Tribunal’s finding in *Compare The Market* (and comment on *Ohio v American Express Co*), and Professors Franck and Peitz all strongly reject the *single market* approach to defining multi-sided market definition (instead of the *multi-markets* approach).
66. The draft Notice itself says that “it may be more appropriate to define separate [i.e. multi-] markets where there are significant differences in the substitution possibilities

³³ J.-U. Franck and M. Peitz, *Market Definition in the Platform Economy*, Discussion Paper Series – CRC TR 224, 2021 (Franck and Peitz 2021), p. 12.

³⁴ Franck and Peitz 2021, p. 16-17.

³⁵ J.-U. Franck and M. Peitz, *Centre on Regulation in Europe (CERRE) report: Market Definition and Market Power in the Platform Economy*, 2019.



on the different sides of the platform [...and to] assess if such differences exist, the Commission may take into account factors such as whether the undertakings offering substitutable products for each user group differ, the degree of product differentiation on each side [...and] behavioural factors such as the homing decisions of each user group and the nature of the platform (for instance whether it is a transaction or a matching platform).” [95].

67. The fundamental characteristic of a *multi-sided market* though is are there are inevitable differences in the substitution possibilities between the different sides of the platform. (Conversely, absence of such differences in substitution possibilities is the defining characteristic of a *single-sided market*.)
68. This is why Professors Franck and Peitz say that the only situation where the *single market* approach might be suitable is where two sides of the market were “*symmetric in terms of competitive substitutes and the way such platforms set prices*”, namely, where the pricing structure is *neutral* between the two sides of the market. But (as described at Section I above) where pricing structures are neutral between the two sides of the market isn’t a multi-sided market(!) It’s just a single sided-market – where of course the *single market* approach is the correct approach to market definition(!)
69. Hence, the proposed revised Market Definition Approach already implicitly rejects the *single market* approach: but it should make it explicit.
70. It is surprising also that the draft Notice says that the Commission “*may take into account whether*” the platform is “*a transaction or a matching platform*” while the Commission Staff Working Document says that “*the academic literature and the NCA practice do not appear to endorse [such distinctions]*”³⁶. Such a contradiction creates further uncertainty.
71. For all these reasons, the revised Market Definition Notice should reject the *single market* approach to defining multi-sided markets.

III. The revised Market Definition Notice should say more about multi-sided “homing” decisions

72. In considering whether the Commission might define a multi-sided product market as a *single market* or *multi-markets*, the draft Market Definition Notice says that the Commission may take into account “*behavioural factors*” such as “*the homing decisions of each user group*” [95].
73. The draft Notice defines such “*homing decisions*” as “*the decision by users to use one platform for a given product (**single-homing**) or use multiple platforms in parallel for the same product (**multiple-homing**)*”³⁷.

³⁶ P. 54.

³⁷ Footnote 112.



74. The Commission Support Study discusses the implications of homing decisions more extensively³⁸ finding that “*The presence of single- and multi-homing has not in practice been conclusive for defining relevant markets*”³⁹.
75. Zephyre strongly disagrees with this conclusion (as a summary of the economics or case law on homing behaviour in multi-sided markets).
76. On the contrary, the OECD Report, and other very widely cited papers on the economics of multi-sided markets, provides a common account of “*homing*” behaviour for the purpose of market definition, namely:

*“The extent of single-homing and multi-homing by customers on each side of the market is a key competitive aspect of multi-sided platforms.”*⁴⁰

“When an agent chooses to use only one platform, it has become common to say the agent is ‘single-homing’. When an agent uses several platforms, she is said to ‘multi-home’. It makes a significant difference to outcomes whether groups single-home or multi-home.

In broad terms, there are three cases to consider: (i) both groups single-home, (ii) one group single-homes while the other multi-homes, and (iii) both groups multi-home. If interacting with the other side is the primary reason for an agent to join a platform, then we might not expect case (iii) [or case (i)] to be very common.

By contrast, there are several important markets that resemble configuration (ii) termed ‘competitive bottlenecks’. Here, if it wishes to interact with an agent on the single-homing side, the multi-homing side has no choice but to deal with that agent’s chosen platform. Thus, platforms have monopoly power over providing access to their single-homing customers for the multi-homing side. This monopoly power naturally leads to high prices being charged to the multi-homing side [...]. By contrast, platforms do have to compete for the single-homing agents, and high profits generated from the multi-homing side are to a large extent passed on to the single-homing side in the form of low prices (or even zero prices).

This feature—that the single-homing side is treated well and the multi-homing side’s interests are ignored [...—]—is a characteristic of [such platform markets].

It does not make sense to speak of the competitiveness of ‘the market’. There are two markets: the market for single-homing agents which is, to a greater or lesser extent, competitive, and a market for multi-homing agents where each platform holds a local monopoly. The excessive prices faced by the multi-homing side do not necessarily result in excess profits for platforms, since platforms might be forced by competitive pressure to transfer their monopoly

³⁸ See §3.15.

³⁹ Box 5, p. 77.

⁴⁰ Jean-Charles Rochet and Jean Tirole, Platform Competition in Two-Sided Markets, *Journal of the European Economic Association*, 2003.



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revenues to the single-homing agents. Rather, the market failure is a suboptimal balance of prices to the two sides of the market.”⁴¹

“[If] one customer group predominantly practices single-homing while another one practices multi-homing, there might be fierce competition to attract customers from the single-homing group, but little competition for customers from the multi-homing group. [...]”

[One] or more platforms can [therefore] become ‘bottlenecks’ that provide exclusive access to single-homing customers. This means that one platform or even several similar platforms may possess market power vis-à-vis [multi-homing customers]. Where market power is high it might be reasonable to define a market that comprises only one platform (at least on [the multi-homing side of the market]).”⁴²

77. Professors Franck and Peitz’s most recent paper summarises these same points, namely that:

“Where users on one side of competing two-sided platforms single-home, these platform services are substitutes belonging to the same market. If, however, users on the other side multi-home, each platform provides monopoly access to its set of users on the single-homing side. Thus, for given user behaviour on the single-homing side, each platform acts as a monopolist vis-à-vis users on the multi-homing side. This suggests that there is a market for each platform regarding the service provided to the multi-homing side.”⁴³

78. Moreover, the leading applicable Commission decisions also reached the same conclusions, namely:

Travelport/Worldspan: “The two-sided [airline global distribution system] market contains a number of elements which are characteristic of multi-homing /single homing situations [...] As long as [customers on one side of the market] use single-homing, [platform] providers have exclusive access to [such single-homing customers]. Each [platform] provider therefore has a certain degree of monopoly power in relation to [the multi-homing side of the market] that need to reach the [single-homing side] exclusively connected to one [platform]. This monopoly power allows the [platform] provider to charge higher prices to [the multi-homing side].”⁴⁴

Fixed/mobile termination markets: “As established in previous Commission decisions, there is no substitute for [fixed or mobile telephone] call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the operator of the network to which the recipient is connected. Each individual network therefore

⁴¹ Mark Armstrong, Competition in Two-Sided Markets, *RAND Journal of Economics*, 2006.

⁴² Arno Rasek and Sebastian Wismer, Market definition in multi-sided markets, in the OECD Report.

⁴³ Franck and Peitz 2021.

⁴⁴ European Commission, Decision COMP/M.4523 Travelport/Worldspan OJ L 314.



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constitutes a separate market for termination. This applies both to fixed networks and to mobile networks.”⁴⁵

Google Android: “[The] European Commission assumed the existence of a market for app stores for the Android mobile operating system, which is dominated by Google’s app store. This rests upon the assumption that consumers are single-homers as they make a discrete choice to use a device based on Android’s, Apple’s or another firm’s operating system, while app developers tend to be multi-homers.”⁴⁶

79. Accordingly, Zephyre encourages the Commission reflect these conclusions in the revised Market Definition Notice, in particular that:
- any asymmetry of single-homing and multi-homing between alternate sides of a multi-sided market is confirmation of the essential need to define separate (i.e. multi-) markets for each side of the platform; and
 - single-homing on one side of multi-sided market will generally be associated with multi-homing on the other side of the market – and with that – the need to define platform-specific markets on the multi-homing side, and potentially wider product markets on the single-homing side.

IV. The revised Market Definition Notice should also comment on negative (alongside zero) multi-sided pricing

80. In the context of multi-sided markets, the draft revised Market Definition Notice highlights the existence and significance “zero monetary price” markets, namely:
- “Multi-sided platforms often supply a product at a zero monetary price to a user group in order to attract users to products offered on the other sides of the platform and monetise their products on those sides [...and that such zero] monetary prices are an integral part of multi-sided platforms’ business strategy, so the fact that a product is supplied at a zero monetary price does not imply that there is no relevant market for that product” [97] and that “[in] such cases, non-price elements are particularly relevant for the assessment of substitution” [98].*
81. Zephyre strongly agrees – especially that a product is supplied at a zero monetary price this does not imply that no relevant market for that product (and therefore that zero monetary price markets should not be ignored).

⁴⁵ European Commission, Case No COMP/M.5650 – T-Mobile / Orange: Regulation (EC) 139/2004 Merger Procedure, recital 37. The Commission found in particular that the merger parties operated in several relevant markets, including: (i) mobile telecommunication services to end customers; (ii) wholesale access and call origination on public mobile telephone networks; (iii) wholesale market for international roaming and (iv) wholesale call termination on mobile networks.

⁴⁶ Commission Support Study.



82. More generally, multi-sided platforms often set negative prices on one (or more) sides of their platforms.
83. For example, in *Mastercard*, the Commission found that Mastercard’s “*fallback interchange fees*” restricted competition (contrary to Article 101 TFEU). Such interchange fees are fees paid from one side of a payment card market (the *acquiring* side) to the other (the *issuing* side). Interchange fees therefore represent a positive and a negative price, i.e. a *positive* price to the *acquiring* side and a *negative* price to the *issuing* side.
84. Accordingly, zero prices are just a special case of a positive or a negative price.
85. As highlighted at the previous Sections above, the defining feature – and generic antitrust concern – of multi-sided markets is the structure (i.e. balance) of prices between the different sides of the market, rather than the overall level of prices (and monopoly rents), for example (and in particular):

“[The] market failure [in multi-sided markets] is [typically] a suboptimal balance of prices [between] the two sides of the market.”⁴⁷

86. Namely, the price one side is generally too high (for example, the side subject to multi-homing “*monopoly bottlenecks*”) – and the price on the other side is too low.
87. Prices being too low can be a concern of course in single-sided markets, e.g. of predatory or other exclusionary pricing.
88. But in multi-sided markets, excessively-low predatory/exclusionary pricing can be an even greater concern, as:

“[Markets] in which multi-sided platforms operate may provide particularly fertile ground for exclusionary conduct [...with] exclusionary practices [...] more likely in these markets, rather than less likely. [...]

[The] effects of potentially exclusionary conduct, such as [...] predatory prices, should be assessed on a case-by-case basis. In the case of predatory pricing, [...] the incentive for the incumbent to exclude is larger, the stronger the cross-platform network externality.

[This means] greater risks from predation in multi-sided markets due to the opportunities for platforms to predate by sacrificing profit on one-side while in parallel recouping by setting a high price on the other side.

[...] not only can a platform predate by reducing its total price to unsustainable levels, but that it can also do so by changing the balance of prices across the different sides of the market. The implication is that even adjusting [standard antitrust] price-cost tests to focus on net price is insufficient.”⁴⁸

⁴⁷ Mark Armstrong, Competition in Two-Sided Markets, *RAND Journal of Economics*, 2006.

⁴⁸ Chris Pike, Introduction and key findings, in the OECD Report.



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“One of the important features of multi-sided platforms is that indirect network externalities affect the pricing decisions of platforms. It is a well-known result that platforms can price one side below costs. [...] Moreover, [...] a dominant platform may predate through asymmetric pricing between the two sides of the market. [...] price structures due to indirect network externalities can be used in a predatory fashion.”⁴⁹

89. Accordingly, as well as noting that “zero monetary price” markets should not be disregarded, Zephyre encourages the revised Market Definition Notice to note also the existence of “negative monetary price” markets; the likely need to define them as distinct markets; and the potential antitrust concerns associated with such negative price markets.
90. Zephyre thanks the Commission again for this opportunity to comment on the draft revised Notice.

⁴⁹ Andrea Amelio, Liliane Karlinger and Tommaso Valletti, Exclusionary practices and two-sided platforms, in the OECD Report.



Zephyre

Public consultation response submission

E-mail: COMP-REVISION-OF-THE-MARKET-DEFINITION-NOTICE@ec.europa.eu

Cc: COMP-MERGER-REGISTRY@ec.europa.eu

Postal address:

European Commission
Directorate-General for Competition, Unit A2
Merger Registry
1049 Bruxelles / Brussels
Belgique / België
Ref.: HT.5789



Zephyre

Zephyre Ltd
Company Number 9882211
VAT Number 227867177

www.zephyre.co.uk
+44 (0)20 3633 0130
10 Bloomsbury Way, London WC1A 2SL

