

# Revision of the Market Definition Notice

**Contribution by Zalando SE to the consultation of the  
European's Commission Notice on the definition of relevant  
market for the purposes of Community competition law -  
January 2023**



# Updating the Market Definition Notice in view of new digital services and changing consumer habits

Contribution by Zalando SE, January 2023

## 1. Updating the Market Definition Notice

The current Market Definition Notice dates from 1997 and, generally speaking, it has withstood the test of time rather well. Nevertheless, the technological, digital and market developments of the last 25 years call for a comprehensive update. Zalando therefore welcomes the opportunity to contribute to the European Commission's consultation on the revision of the Commission's Market Definition Notice.

In our view, the digital sector would benefit from clarification and further guidance from the European Commission regarding three elements: (1) the market definition in relation to marketplaces; (2) the distinction between online and offline in retail markets; and (3) the role that new indicators, such as time spent by end users on platforms, should have in determining market power. Some of these elements are partly reflected in the draft Market Definition Notice published by the European Commission on 8 November 2022.

However, we believe that a few crucial points are missing and could lead to serious misinterpretations, especially given the pivotal role that market definition plays in antitrust and merger cases. In particular, we are concerned that the current draft may suggest an artificial distinction between online and offline markets in the retail sector and we regret the lack of guidance and examples regarding the definition of multi-sided platforms.

**(1) First, regarding the definition of multi-sided platforms:** we think that the introduction of the new Section 4.4 dedicated to multi-sided platforms constitutes a milestone in the formal acknowledgment of the specific characteristics of such digital platforms. Nevertheless, the offered guidance does not yet suffice in order to provide undertakings, national competition authorities and courts with the necessary degree of clarity.

Indeed, Section 4.4 seeks to address the main difficulty arising when defining the relevant market - or markets - for multi-sided platforms, which is namely how many markets need or can be defined in a particular given situation. However, in our opinion, the wording of the draft paragraph 95 is too broad and too generic, as it states that the "*Commission may define a relevant product market for the products offered by a platform as a whole or separate relevant product markets for the products offered on each side of the platform*". This formulation regrettably provides too little legal certainty.

**Additional guidance and examples as to when the Commission may consider one or the other option would be helpful for competition law practitioners.**

**(2) Second, in relation to the distinction between online and offline markets:** We firmly maintain that a distinction between online and offline retail markets appears inadequate in view of the current well-established consumer behaviors, the integrated multi-channel strategies of digital actors and other digital market developments.

From the point of view of retailers, Covid19 resulted in major changes in their sales and distribution strategy, as brick-and-mortar stores faced the harsh situation that they could no longer solely rely on walk-in customers and decided to go online. Small local businesses started using online platforms to sell their products. There are many examples of the merging of online and offline operations and strategies:

- As a first illustration, Zalando's "Connected Retail" business initiative expanded very rapidly from being a modest project prior to the Covid19 pandemic to connecting 7,300 local stores in 13 European countries to Zalando's platform towards the end of 2022. In practice, the "Connected Retail" initiative enables brick-and-mortar stores to sell their products online to Zalando's customers, directly shipping the products from their physical stores. The programme increases visibility for the stores (the address is visible to customers on Zalando) and - most importantly - it generates "virtual footfall" for the stores through sales online.
- Another evidence of multi-channel operations is that, in the beauty sector, online platforms like Zalando are still required to operate physical stores due to applicable regulations or because of the nature of the product (e.g. cosmetics) to sell the same products online. In other instances, new online retailers in fashion, home furniture or home decoration - among other examples - actually decide to open brick-and-mortar stores as "shop windows" for products which they do not stock on premises and exclusively sell online or through pre-order in store. This leads these actors to not distinguish and actually merge their online and offline operations, their business strategies and their commercial policies.
- Last but not least, the very high popularity of "click-and-collect-in-store" options among retailers (also referred to as "click-to-bricks") is precisely designed to drive online shoppers towards a retailer's physical retail space. The hope is that browsing and ordering online can lead to additional purchases in-store. As a result, the line between products that were previously only available offline and products that were (also) available online is becoming increasingly "blurred". In practice, retailers are increasingly following a "phygital" retail strategy.

From the consumer's point of view, the increased amalgamation of the online and offline markets also meets their needs. Customers value flexibility in their shopping experience and still want to access the entire available product range, so a split between offline and online appears incorrect. Numerous examples exist:

- It is well-documented today that consumers often consult online retailers, so as to compare prices, review available options, read reviews, etc. before proceeding to a purchase decision online or through a visit in a brick-and-mortar store to check and test the product "in real life". And vice versa, consumers may visit a specific

brick-and-mortar shop to view the product range offline, before shopping the products online.

- As mentioned above, picking-up in a store a parcel corresponding to an order made online participates to this mixed situation.
- In addition, it is now common practice to scan QR codes in physical stores, directly from product labels or price / information labels, to access the online store of the same vendor, or for consumers and shop assistants to check directly in store the availability of a particular product or size online when it is no longer available in store.

Customers thus no longer meaningfully differentiate between shopping online or offline. Both types of shopping rather exist side by side and complement each other.

In that context, we strongly believe that the current drafting of paragraph 51 is highly misleading. Indeed, the joint reading of paragraph 50 - which states that *“an assessment of whether products are similar along observable characteristics, whether their prices are comparable or whether the products serve the same intended use may be insufficient to determine whether two products are demand substitutes”* - together with paragraph 51 - which suggests considering additional parameters such as the *“differences between distribution channels, including online and offline channels”* - suggests that separate markets exist for online and offline.

On the contrary, we are convinced that a general distinction between online and offline retail is artificial. Today, the e-shops of brands, the platform of online retailers and marketplaces compete with each other, and with brick-and-mortar stores.

**The competitive constraints of online services on traditional services, and vice versa, should be taken into account when defining the relevant market and this should be explicitly mentioned in the Market Definition Notice.**

**(3) Finally, regarding Total Consumer Time:** we strongly believe that, in addition to market shares, the time spent by consumers on online platforms is a relevant indicator when defining markets and identifying market power in the digital era. The phenomenon has been described as “the market for attention” or “Surveillance Capitalism”<sup>1</sup>. A high Total Consumer Time (“TCT”) implies that a provider captures significant attention from its users. In turn, the users’ attention drives a platform’s value for investors, business partners, advertisers, etc. (see discussion paper on TCT by DICE<sup>2</sup>).

The relevance of this criteria was already acknowledged by the German Competition Authority (the Bundeskartellamt) in the 10th Amendment of the German Competition Law

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<sup>1</sup> The expression borrows from the title of Shoshana Zuboff’s book “The Age of Surveillance Capitalism”.

<sup>2</sup> DICE Discussion Paper on TCT, August 2021:

[https://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche\\_Fakultaet/DICE/Discussion\\_Paper/369\\_Goesser\\_Guerrer\\_Haucap\\_et\\_al..pdf](https://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/369_Goesser_Guerrer_Haucap_et_al..pdf)

(“GWB-Digitalisierungsgesetz”) in 2021. In particular, Article 19a of the law<sup>3</sup> gives new powers to the German Competition authority to request behavioral changes from companies with “paramount cross-market significance for competition” and, in this context, Total Consumer Time was introduced as an additional indicator, to be applied on an ad hoc basis.

In light of the above, we also welcome the Commission's efforts to incorporate this parameter in paragraph 107 of the Draft Notice where the Commission refers to “*time spent*” as an example of “*other metrics that can offer complementary or more useful information to determine market shares*”.

**We support the approach to consider “time spent” or “Total Consumer Time” on an ad hoc basis, when relevant.** It is both a forward-looking criteria for the early-detection of market power yet to come and it can be an additional criteria to assess digital services without a monetary price (ie. also referred to as “zero monetary price” or “free against data” digital services).

## 2. About Zalando

Zalando (<https://corporate.zalando.com>) is a European online platform for fashion and lifestyle. Founded in 2008 and headquartered in Berlin, we bring fashion (clothing, footwear, accessories) and beauty products to 50 million active customers<sup>4</sup> in 25 European markets. Our assortment of international brands ranges from world famous brands to local labels. We offer around 1.8 million products, from 6,500 brands to our customers. Zalando counts 17,000 employees.

As Europe’s most fashionable tech company, we work hard to find digital solutions for every aspect of the fashion journey: for our customers, partners and every valuable player in the Zalando story. We develop innovative services for fashion, e-commerce and logistics, through our own machine-learning applications and many other innovations.

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<sup>3</sup> Link to the justification of the 10th German Competition Law reform, see page 113 for the reference to “Total Consumer Time”: <https://dserver.bundestag.de/btd/19/258/1925868.pdf>

<sup>4</sup> Figures in Q3 2022, corresponding to the last 12 months.