

**CONVENIENCE TRANSLATION**

**Bundeskartellamt**

**2nd Decision Division**

**B 2 - 55/21**

Determination of the status as  
addressee of Section 19a(1) GWB  
**-Public version-**

This translation is provided for  
information purposes only  
**(CONVENIENCE TRANSLATION)**.  
It is based on a translation that has  
been made available by Amazon.

**Only the German version of the  
decision is authentic.**

**Decision**

For footnotes please refer to the  
German version.

In the administrative proceeding

1. Amazon.com, Inc.  
410 Terry Avenue North  
Seattle, Washington 98109  
United States of America

- Party 1 -

2. Amazon Deutschland Services GmbH  
Marcel-Breuer-Strasse 12  
80807 Munich

- Party 2 -

Legal counsel of the Parties 1 and 2 to the  
proceeding:

Hengeler Mueller Partnerschaft von  
Rechtsanwälten mbB

Benrather Straße 18 - 20  
40213 Düsseldorf

for determination of paramount significance for competition across markets pursuant to Section 19a(1) of the German Competition Act<sup>1</sup> (Gesetz gegen Wettbewerbsbeschränkungen - GWB), the 2nd Decision Division of the Bundeskartellamt decided as follows on 5 July 2022 :

- I. It is hereby determined that the Party 1, including all its affiliated companies pursuant to Section 36(2) GWB, is of paramount significance for competition across markets within the meaning of Section 19a(1) GWB.
- II. The validity of the decision under I. is hereby limited to five years from the date on which it becomes final.
- III. The fee for this decision shall amount to

**[...] EUR**

**(in words: [...])**

and is payable by the Parties 1 and 2 as joint debtors.

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<sup>1</sup> [Not translated. Please see the German version.]

## Reasons

### A. Facts

#### I. Affected company

##### 1. The Amazon group

- (1) The Party 1, Amazon.com, Inc., (hereinafter **Amazon**) is the parent company of the Amazon Group listed on the US stock exchange NASDAQ, which together with its subsidiaries in the United States of America (hereinafter: USA), Germany and many other countries is primarily active in e-commerce and related activities as well as cloud computing.
- (2) The Amazon Group (hereinafter also **Amazon**) includes the Party 2, an indirect subsidiary in Germany, whose business purpose is in particular to support commercial management of the Party 1 and/or its affiliated group companies, as well as a large number of other companies – according to the Parties' own statements [...] companies which offer services to third parties and generate sales revenue with third parties.<sup>2</sup>
- (3) Amazon was founded in July 1994 by Jeffrey P. Bezos. The online bookstore was opened in July 1995 under the domain www.amazon.com. Two years later, on 15 May 1997, Amazon went public.<sup>3</sup> In the meantime, the majority of Amazon's shares are in free float (approx. 86%), of which, in turn, the majority are owned by so-called institutional investors (approx. 59%). The largest shareholders of Amazon.com, Inc. are Jeffrey P. Bezos<sup>4</sup> (12.7%), Vanguard Group Inc. (6.6%), and Blackrock Inc. (5.6%).<sup>5</sup>
- (4) In the last fiscal year 2021, that coincides with the calendar year, Amazon generated a global revenue of approximately USD 469.8 billion (equivalent to approx. EUR 397.2 billion), with Germany accounting for around USD 37.3 billion (equivalent to approx. EUR 31.6 billion).<sup>6</sup> Amazon's sales have increased continuously in the past, most recently with annual growth rates between just under 20% and well over 30% between 2018 and 2021 at the various geographical levels (values ranging between around 17% and 36%).

[...]

*Figure 1: Amazon's revenue from 2018 to 2021 for Germany, the EEA, and worldwide, see for 2018 to 2020: Amazon's response of 9 July 2021 to the request for information of 18 May 2021, Exhibit 2, spreadsheets 1a, 1b, and 1c; for 2021: Bundeskartellamt's own calculations based on information provided by Amazon in:*

<sup>2</sup> [Not translated. Please see the German version.]

<sup>3</sup> [Not translated. Please see the German version.]

<sup>4</sup> [Not translated. Please see the German version.]

<sup>5</sup> [Not translated. Please see the German version.]

<sup>6</sup> [Not translated. Please see the German version.]

*Amazon.com Inc, Form 10-K for fiscal year 2021, p. 66. Form 10-K did not include any data for the EEA. Conversion to EUR based on the "European Central Bank's reference -EUR/USD exchange rate for "2021 (EUR 1 = USD 1.1827).*

- (5) In a country-by-country analysis of Amazon's sales in 2021, Germany accounted for the second-largest share of sales<sup>7</sup> after Amazon's (by far leading) home market, the USA. This was also the case in previous years.<sup>8</sup> Within the EEA, Germany accounted for [...] of Amazon's EEA-wide sales in 2020.<sup>9</sup>

## 2. Business activities and product portfolio

- (6) Amazon's business activities can essentially be divided into three business areas.
- (7) First, Amazon is – in a broader sense – active in the e-commerce business in a variety of ways, meaning online retail, including the offering of digital content and online-based media services and devices, as well as other services, in particular the offering of marketplace and related services. Most of the offerings originate from the country-specific e-commerce platforms or offer portals (such as amazon.de for Germany). Amazon generates the majority of its revenue in this business area ([...] and thus approx. [...] of its total global revenue in fiscal year 2020<sup>10</sup>).
- (8) Amazon is also active in brick-and-mortar retail. This business area includes in particular the grocery retailer Whole Foods Market, which Amazon acquired in 2017 and which operates almost exclusively in the USA. In Germany, Amazon is not yet active in brick-and-mortar retail.
- (9) The third business area is the independent business unit Amazon Web Services (hereinafter also: AWS). According to its own information, Amazon started this business in 2006<sup>11</sup> and thus opened the offer, which had already been used internally by Amazon, to third parties.<sup>12</sup> Meanwhile, AWS is considered the world's leading provider of cloud computing services such as the provision of computing capacities via cloud.<sup>13</sup> In 2021 AWS generated global revenue of around EUR 52.6 billion<sup>14</sup>, which corresponds to a share of 13.2% of Amazon's total revenue, and thus - according to Amazon's annual report - around 74% of the operating

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<sup>7</sup> [Not translated. Please see the German version.]

<sup>8</sup> [Not translated. Please see the German version.]

<sup>9</sup> [Not translated. Please see the German version.]

<sup>10</sup> [Not translated. Please see the German version.]

<sup>11</sup> [Not translated. Please see the German version.]

<sup>12</sup> [Not translated. Please see the German version.]

<sup>13</sup> [Not translated. Please see the German version.]

<sup>14</sup> [Not translated. Please see the German version.]

income and around 56% of the net income.<sup>15</sup>

- (10) In 2020, the revenue was distributed between the three business lines outlined above as follows:

Revenue in 2020 by business area	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Total	[...]	100 %	[...]	100 %	[...]	100 %
E-commerce	[...]	[...]	[...]	[...]	[...]	[...]
Amazon Web Services <sup>16</sup>	[...]	[...]	[...]	[...]	[...]	[...]
Whole Foods Market	[...]	[...]	[...]	[...]	[...]	[...]
Other <sup>17</sup>	[...]	[...]	[...]	[...]	[...]	[...]

Table 1: Revenue of the individual business activities of Amazon in 2020 in Germany, the EEA as well as worldwide, see Amazon's response dated 9 July 2021 to the request for information of 18 May 2021, para. 32 ff. (explanatory notes) and Exhibit 2, spreadsheets 1a, 1b and 1c (data). [...]

**a) Amazon's e-commerce business and related business activities**

- (11) After Amazon was initially founded as an online bookstore in the USA, Amazon Group now operates a total of 21 country-specific domains with e-commerce platforms worldwide.<sup>18</sup> In the USA, Amazon operates under the domain amazon.com, in Germany under the domain amazon.de. In Europe, in addition to the German platform, there are stores for the United Kingdom (amazon.co.uk), France (amazon.fr), Spain (amazon.es), Italy (amazon.it), the Netherlands (amazon.nl), Turkey (amazon.com.tr), Sweden (amazon.se) and, since 2021, Poland (amazon.pl). The stores for both the UK and Germany were established in 1998 as the first two platforms outside the USA.
- (12) The e-commerce platforms operated by Amazon basically have a hybrid structure meaning that on the one hand Amazon itself sells physical goods and digital content to customers as a retailer (Amazon Retail) and on the other hand operates a marketplace on which Amazon enables (third-party) online retailers ("third-party sellers") to offer their goods to customers (Amazon Marketplace).
- (13) Accordingly, on the one hand Amazon acts as an online retailer vis-à-vis customers<sup>19</sup>, namely as a seller of physical goods and devices as well as digital content (e.g., eBooks,

<sup>15</sup> [Not translated. Please see the German version.]

<sup>16</sup> [Not translated. Please see the German version.]

<sup>17</sup> [Not translated. Please see the German version.]

<sup>18</sup> [Not translated. Please see the German version.]

<sup>19</sup> [Not translated. Please see the German version.]

music, movies and series) via the respective country-specific e-commerce platform. Moreover, Amazon also offers digital content on a subscription basis to customers. On the other hand, Amazon acts as an intermediary for offers from third-party sellers to customers on the respective marketplace. Finally, the e-commerce platform serves customers to a certain extent as a (free) product search engine.

(14) Amazon is also a provider of services to undertakings. These undertakings include, in particular, the third-party sellers on the marketplaces to whom the corresponding intermediary services are offered. Further services that Amazon offers to undertakings - in particular third-party sellers - include logistics services, advertising services or payment services, also on third-party websites.

(15) The portfolio of services in the area of e-commerce includes:

aa) **Amazon Retail, devices and digital content from Amazon**

(16) As a retailer, Amazon offers a wide range of physical goods. These are sold via its own e-commerce platforms. For example, as of 31 December 2020, just under [...] items (ASINs<sup>20</sup>) from **Amazon Retail** were listed on amazon.de.<sup>21</sup> In total, Amazon generated revenue of just under EUR [...] with physical goods (including private brands, but excluding devices and digital content, see below) in Germany in 2020; this corresponds to the [...], regardless of whether this is considered at German, EEA or global level.

Revenue in 2020 in the area: Online Retail	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Amazon Retail (Sale of Amazon-owned goods, incl. own brands, excl. devices and digital content)	[...]	[...]	[...]	[...]	[...]	[...]

Table 2: Revenue in 2020 in the "Online Retail" segment, own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, para. 32 f. and Exhibit 2, spreadsheets 1a, 1b, 1c.

(17) For some goods, Amazon also acts as a supplier (or so-called **private label** manufacturer), for example for products for "everyday needs" (e.g., computer accessories, pet supplies, fitness equipment, kitchen appliances) under the brand Amazon Basics, for baby goods under the brand Mama Bear or for food under the brand Amazon Fresh. According to its own information, Amazon offers "fewer than [...] private brands" on the German

<sup>20</sup> [Not translated. Please see the German version.]

<sup>21</sup> [Not translated. Please see the German version.]

Marketplace with just under [...] items and generated sales of around EUR [...] in 2020.<sup>22</sup>

- (18) Amazon also offers various devices manufactured under its brands in the **home-entertainment** and **smart home** segments. These include the eBook reader Amazon Kindle, the tablet Amazon Fire, the streaming devices of the Fire TV series (as a set-top box or HDMI TV stick), the smart speaker Amazon Echo, and other devices in the home security technology (Blink and Ring) or the smart home segment (Amazon eero). Especially with the Amazon Kindle and the Amazon Echo, Amazon is considered a leader in the respective market segments.<sup>23</sup> In total, Amazon generated sales of just under EUR [...] in Germany and just under EUR [...] worldwide with its devices in 2020.

Revenue in 2020 in the area: <b>Home entertainment devices</b>	<b>Germany</b>		<b>EEA</b>		<b>Worldwide</b>	
	in EUR million or as % of total revenue					
Amazon Devices and Services (Amazon Kindle, Fire Tablet, Fire TV, Amazon Echo)	[...]	[...]	[...]	[...]	[...]	[...]

*Table 3: Revenue in 2020 in the "Home Entertainment Devices" segment, own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, para. 32 f. and Exhibit 2, spreadsheets 1a, 1b, 1c.*

- (19) Amazon also offers **digital (media) content** for download or streaming. This includes eBooks that are read via the Amazon Kindle. Amazon also offers audio content such as audio books, podcasts and music. In addition, Amazon is a provider of various video content (e.g., movies, series, TV programs), especially with its Prime Video service<sup>24</sup>. Amazon is also one of the largest providers of digital content in Germany and worldwide; for example, Prime Video is estimated to have the most monthly active users in Germany.<sup>25</sup> In total, Amazon generated approximately EUR [...] with its digital content in Germany in 2020, [...].

<sup>22</sup> [Not translated. Please see the German version.]

<sup>23</sup> [Not translated. Please see the German version.]

<sup>24</sup> [Not translated. Please see the German version.]

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Revenue in 2020 in the area: Digital (media) content	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Amazon Prime Video (video content)	[...]	[...]	[...]	[...]	[...]	[...]
Kindle Content (eBooks)	[...]	[...]	[...]	[...]	[...]	[...]
Audible (audio books)	[...]	[...]	[...]	[...]	[...]	[...]
Amazon Music (audio content)	[...]	[...]	[...]	[...]	[...]	[...]

Table 4: Revenue in 2020 in the area of "Digital (media) content", own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, para. 32 f. and Exhibit 2, spreadsheets 1a, 1b, 1c.

- (20) Amazon is also active in the field of (universal) voice assistants, with the Amazon Alexa service preinstalled on devices in the Amazon Echo product line. This enables users to access various functions via cloud-based voice control, such as retrieving information, playing music and radio, and in particular controlling connected smart home devices.
- (21) Amazon's other digital offerings include the live streaming platform Twitch, which is known primarily for the live broadcast of video games and is considered leading in this segment,<sup>26</sup> its own Amazon Appstore, and video or computer games, which Amazon offers under the name Amazon Games.

Revenue in 2020 in the area: Other in e-commerce	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Twitch (live streaming platform) <sup>27</sup>	[...]	[...]	[...]	[...]	[...]	[...]
Amazon Appstore (Appstore)	[...]	[...]	[...]	[...]	[...]	[...]
Amazon Games (Video Games)	[...]	[...]	[...]	[...]	[...]	[...]
Other	[...]	[...]	[...]	[...]	[...]	[...]

Table 5: Revenue in 2020 in the area of "Other in e-commerce", own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, para. 32 f. as well as Annex 2, spreadsheets 1a, 1b, 1c. [...]

bb) **Amazon Marketplace**

- (22) Via its marketplace, Amazon (**Amazon Marketplace**) mediates transactions between third-party sellers, who can place and offer their products on the marketplace, on the one hand, and customers, who can search for, compare, and purchase such products on the

<sup>26</sup> [Not translated. Please see the German version.]

<sup>27</sup> [Not translated. Please see the German version.]



marketplace, on the other hand. These transactions are handled in their entirety via Amazon's commerce platform (i.e., placement of the offer, product search and, if applicable, comparison on the part of the buyer, payment services, and, if applicable, returns and return and complaint management).

- (23) For sales via the marketplace and the use of the associated standard marketplace services, such as payment services, complaint management, and the provision of IT tools, third-party sellers pay a flat monthly fee on the one hand and sales commissions on the other. These commissions vary, depending on the product category, mostly between 7% and 15% and [...].<sup>28</sup> In addition, the Amazon Group offers third-party sellers further support services on the marketplace that can be optionally booked. Such services include, in particular, logistics services such as storage of goods, organization of shipping, and return management.
- (24) In total, the operation of the marketplace and the offer of the associated optional marketplace services generated approximately [...] in revenue in Germany in 2020.<sup>29</sup>

Revenue in 2020 in the area: marketplace	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Amazon Marketplace (incl. optional offers such as logistics services, excl. advertising)	[...]	[...]	[...]	[...]	[...]	[...]

Table 6: Revenue in 2020 in the "Marketplace" segment. This figure includes "all revenue generated in connection with Amazon Marketplace" and "includes fees and commissions paid by sellers to Amazon," own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, paras. 32 f., 42 as well as Exhibit 2, spreadsheets 1a, 1b, 1c.

cc) **Amazon's logistics services**

- (25) Based on its own comprehensive logistic infrastructure,<sup>30</sup> Amazon offers various optional shipping services, especially for third-party sellers active on its marketplace.
- (26) Third-party sellers can choose whether they ship their physical goods sold on the marketplace by using the so-called **Amazon Fulfillment Network** (hereinafter "AFN"), which comprises all services provided by Amazon's fulfilment centres, sortation centres and delivery stations<sup>31</sup> including the organization of shipping to customers by Amazon, or organize shipping independently (so-called **Merchant Fulfilled Network**, hereinafter "MFN"). To use the AFN, third-party sellers must register for the Fulfillment by Amazon

<sup>28</sup> [Not translated. Please see the German version.]

<sup>29</sup> [Not translated. Please see the German version.]

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<sup>31</sup> [Not translated. Please see the German version.]

(hereinafter "FBA") program. Sellers participating in the FBA program send the relevant products to an Amazon fulfillment center and Amazon handles the processing of orders, storing, packaging, and shipping of products, as well as customer service requests such as return management or reimbursements. The Multi-Channel Fulfillment Program (hereinafter "MCF") enables FBA sellers to use AFN services also for sales channels outside the Amazon marketplace, such as seller's own online shop or the website of a third-party provider. Amazon charges its third-party sellers for using FBA and MCF. Fees include shipping fees, storage fees, and, if any, return management fees in certain product categories. Amazon does not charge subscription fees or other fees for the mere participation or registration in the program.<sup>32</sup>

- (27) In the MFN, sellers remain responsible for storing, shipping, order fulfilment and customer service. They may, however, participate in the optional shipping programs Buy Shipping through Seller Central (hereinafter "Buy Shipping"), in which Amazon acts as an intermediary for shipping services between third-party sellers and logistics service providers, and/or Seller Fulfilled Prime (hereinafter "SFP").<sup>33</sup> Participation in Buy Shipping or SFP is offered free of charge for third-party sellers. [...]
- (28) Amazon generated at least approx. EUR [...] with fees for logistics services in Germany in 2020. [...].<sup>34</sup> This revenue is included in the marketplace revenue shown in Table 6 and represent approximately [...] of the total revenue generated from the operation of the marketplace in Germany.
- (29) In addition, Amazon now also offers logistics services outside the marketplace with the shipping program Shipping with Amazon (hereinafter: SWA) and with the service Amazon Freight; however, [...] with these services in Germany (here, SWA is not yet available) and the EEA to date:

Revenue in 2020 in the area: Logistics (outside the marketplace)	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Amazon SWA & Amazon Freight <sup>35</sup>	[...]	[...]	[...]	[...]	[...]	[...]

Table 7: Revenue from logistics programs that are independent of Amazon's marketplace business, see Amazon's response of 9 July 2021 to the request for information of 18 May 2021, paras. 32 f., 44 as well as Exhibit 2, spreadsheets 1a, 1b, 1c

<sup>32</sup> [Not translated. Please see the German version.]

<sup>33</sup> [Not translated. Please see the German version.]

<sup>34</sup> [Not translated. Please see the German version.]

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dd) **Amazon Advertising**

- (30) In addition, Amazon is active in the area of online advertising and offers both its own advertising inventory (particularly on the marketplace websites) and the mediation of ad inventory (on its own and third-party inventory).<sup>36</sup>
- (31) The advertising offers particularly target sellers active on the marketplace that can advertise their products listed on the Marketplace via Amazon's ad inventory on the e-commerce platform. Thus, the so-called "Sponsored Ads" offers, which are aimed at all sales partners (i.e., vendors<sup>37</sup> and third-party sellers),<sup>38</sup> generate almost [...] of Amazon Advertising's revenue in Germany (worldwide: [...]).<sup>39</sup> Further ad inventory for the sale of online advertising is available to the Amazon Group through its other points of contact with the customer, such as Amazon's video and audio services. In addition, Amazon offers, among other things, intermediary services via the Amazon DSP platform which provides advertisers with display ads on Amazon's own and third-party ad inventory.
- (32) The importance and revenue of Amazon's online advertising have increased significantly in recent years. In 2020, Amazon generated about [...] in revenue from online advertising in Germany. This corresponds to a [...].

Revenue in 2020 in the area: Online advertising	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Amazon Advertising	[...]	[...]	[...]	[...]	[...]	[...]

Table 8: "Online advertising" revenue, see Amazon's response of 9 July 2021 to the request for information of 18 May 2021, para. 32 f. and Exhibit 2, spreadsheets 1a, 1b, 1c.

ee) **Amazon Pay and Amazon credit cards**

- (33) Another area of Amazon's business in the e-commerce segment relates to payment services. The Amazon Pay service makes it easier for Amazon customers to pay for goods on the internet. Via Amazon Pay, sellers can integrate an interface to Amazon's e-commerce platform on their external websites or online shops. Customers with an Amazon account can then use this interface to make purchases on the external website using the payment methods enabled for this Amazon account. Thus, sellers who use Amazon Pay simplify payment in their online shop for Amazon customers and pay an

<sup>36</sup> [Not translated. Please see the German version.]  
<sup>37</sup> [Not translated. Please see the German version.]  
<sup>38</sup> [Not translated. Please see the German version.]  
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authorization fee and a commission to Amazon in return.

- (34) In addition, Amazon cooperates with banks<sup>40</sup> to offer customers the "Amazon.de Visa Card" and the "Amazon.de Prime Visa Card", which enables them, among other things, to obtain discounts when paying with the Visa Card.<sup>41</sup>[...] <sup>42</sup>

Revenue in 2020 in the area: <b>Payment processing</b>	Germany		EEA		Worldwide	
	in EUR million or as % of total sales					
Amazon Pay	[...]	[...]	[...]	[...]	[...]	[...]
Credit card services	[...]	[...]	[...]	[...]	[...]	[...]

Table 9: Revenue in 2020 in the area of "Payment processing" own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, para. 32 ff. and Exhibit 2, spreadsheets 1a, 1b, 1c.

**b) Amazon's brick-and-mortar retail**

- (35) In addition to its online-based retail business, Amazon owns various brick-and-mortar stores – primarily in the USA, but not in Germany. This includes in particular the US grocery retailer Whole Foods Market, which Amazon acquired in 2017 and whose business is predominantly focused on the USA and to a lesser extent Canada and the UK.<sup>43</sup> However, Amazon is also active in brick-and-mortar retail (primarily in the U.S.) with other businesses such as Amazon Books (a book store), Amazon Go and Amazon Fresh (grocery stores).<sup>44</sup> In the UK in particular, Amazon is looking to significantly expand its presence in grocery retail.<sup>45</sup> Amazon has not ruled out to enter into brick-and-mortar retail in Germany in public statements.<sup>46</sup>

**c) Amazon Web Services (cloud computing)**

- (36) In addition, Amazon offers a wide range of cloud-based IT services through its Amazon Web Services (AWS) business unit. This third business area (cloud computing), which is primarily aimed at business customers, operates as a separate business unit and is also described separately, for example, in Amazon's annual reports as one of three business

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<sup>40</sup> [...]  
<sup>41</sup> [Not translated. Please see the German version.]  
<sup>42</sup> [Not translated. Please see the German version.]  
<sup>43</sup> [Not translated. Please see the German version.]  
<sup>44</sup> [Not translated. Please see the German version.]  
<sup>45</sup> [Not translated. Please see the German version.]  
<sup>46</sup> [Not translated. Please see the German version.]

branches (alongside "North America" and "International").<sup>47</sup>

- (37) According to its own information, Amazon started its external business in this business area in 2006.<sup>48</sup> The background to this was that, as part of its e-commerce activities, Amazon had built up considerable expertise in the operation of IT infrastructure and data centres on a relevant scale and now wanted to use this expertise to offer IT services, mainly cloud computing services, to business customers.<sup>49</sup>
- (38) Amazon is now regarded as the world leader in cloud computing.<sup>50</sup> Among other things, Amazon offers its business customers internet-based computing capacities (i.e., for example, processors, RAM, storage and network capacities), block storage services, database systems and object storage services that run "via cloud", i.e., on Amazon's servers, and can be accessed remotely. AWS also offers many other services, including hybrid solutions with servers on premise; furthermore, AWS operates for example a marketplace for software solutions.
- (39) As mentioned above, AWS is also significant to Amazon, because this business unit generates the majority of group profits (approximately 56% of Amazon's net income in 2021, see fn. 15), even though the (online) retail business is larger in terms of revenue and AWS as a whole only accounts for approximately 13% of Amazon Group's total revenue in 2021.

## II. Course of the proceedings

- (40) The Bundeskartellamt initiated a proceeding to determine that Amazon is of paramount significance for competition across markets within the meaning of Section 19a(1) GWB on 18 May 2021 and informed Amazon by letter of the same date. The Bundeskartellamt then sent Amazon a request for information dated 18 May 2021.
- (41) By request for information dated 10 September 2021, the Bundeskartellamt conducted investigations of different online marketplaces and questioned delivery service providers by requests for information of 28 and 29 September 2021. Additional requests for information dated 21, 22, and 23 September 2021, and 1 October 2021, were sent to Amazon regarding several business areas and activities. Furthermore, the Bundeskartellamt conducted investigations among sellers on Amazon's German marketplace with requests for information dated 19 and 29 October 2021, by means of an online survey. In a letter dated 19 November 2021, Amazon provided additional general information on the present

<sup>47</sup> [Not translated. Please see the German version.]

<sup>48</sup> [Not translated. Please see the German version.]

<sup>49</sup> [Not translated. Please see the German version.]

<sup>50</sup> [Not translated. Please see the German version.]

proceeding. Furthermore, Amazon provided additional information in response to further questions from the Bundeskartellamt by emails dated 1 and 15 September, 24 November, 1 and 7 December 2021, and by letter dated 26 November 2021. In addition, the Bundeskartellamt has held several discussions with companies that received requests for information and with Amazon.

(42) [...] <sup>51</sup> [...] <sup>52</sup> [...] <sup>53</sup>

(43) [...]

(44) By letter dated May 13, 2022, Amazon commented in detail on the statement of objections.

## **B. Legal Analysis**

(45) The Party 1 which is active to a significant extent on markets within the meaning of Section 18 (3a) GWB, including all undertakings affiliated with it pursuant to Section 36(2) GWB (together: Amazon), is of paramount significance for competition across markets within the meaning of Section 19a(1) GWB.

### **I. Principles**

(46) Section 19a GWB was introduced together with other provisions on abuse control with the so-called "GWB Digitization Act" (10th GWB Amendment).<sup>54</sup> It essentially intends to cover special positions of power and the possible anti-competitive effects and threats to competition resulting therefrom in the area of "digital ecosystems", including so-called "gatekeeper functions" of individual undertakings.<sup>55</sup>

(47) Large digital corporations offering a broad variety of products and services may hold a position of economic power across markets that is difficult to contest and opens up margins to manoeuvre for the respective undertaking to further consolidate, expand or otherwise use this position to its own advantage without sufficient competitive control. Such positions of power and their expansion are favoured by the dynamics of the digital economy and internet industry, which leads to accelerated and increased concentration, especially in markets referred to in Section 18(3a) GWB, and gives rise to conglomerate or vertically integrated corporate structures<sup>56</sup>, in which cross-market systems of products and services that are often

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<sup>51</sup> [...]

<sup>52</sup> [...]

<sup>53</sup> [...]

<sup>54</sup> [Not translated. Please see the German version.]

<sup>55</sup> [Not translated. Please see the German version.]

<sup>56</sup> [Not translated. Please see the German version.]

scalable and linked in various ways - for example, by bundling the generated data - can be operated and expanded.

- (48) By linking this to a significance "across markets", the provision also takes into account the fact that the trend toward the formation of ecosystems and the interconnections of markets can blur market boundaries in the digital economy<sup>57</sup> and that markets are constantly becoming broader through expansion strategies.<sup>58</sup> Competition from alternative providers can often take place - at least at the outset - only on the edges of an ecosystem, since competitors offer, for example, individual services that cover only a subsection of the portfolio of services or that can themselves be offered only as part of the ecosystem - on its technical platform, for example. Ecosystem operators regularly have good opportunities to fend off competition from other providers (e.g., in the form of innovation competition in sub-segments) as well as the expansion of competitors' activities. Insofar as expansion into a new service and into new markets is concerned, this is also easy for such undertakings, e.g., because within their ecosystem they can organize the markets, their entry requirements and thus the competitive opportunities themselves and/or high switching costs for users exist because of the breadth and characteristics of the ecosystem. In addition, large digital corporations regularly have a particularly significant amount of resources that can be deployed in a variety of different areas, such as a large user base, access to data and data sources, know-how, technology, their own computing capacities or financial resources.
- (49) Whether an undertaking in the digital economy is in a position of paramount significance for competition across markets in this sense is determined by an overall assessment of all relevant circumstances in the individual case.<sup>59</sup> Section 19a(1) GWB lists several factors that can contribute to an undertaking's competitive potential for the purpose of determining its paramount significance for competition across markets. According to the explanatory memorandum of the revised GWB, these factors are neither cumulative nor exhaustive; nor is any weighting intended by the order in which they are mentioned.<sup>60</sup> The interpretation of the individual factors determining the addressee of the provision need to take into account the objective of Section 19a GWB, which is to cover the competitive leeway resulting from a significance across markets. A schematic adoption of the interpretation of identical market-related factors for the existence of a dominant position, for example from Section 18(3), (3a) or (3b) GWB, is therefore prohibited. However, the principles developed

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<sup>57</sup> [Not translated. Please see the German version.]

<sup>58</sup> [Not translated. Please see the German version.]

<sup>59</sup> [Not translated. Please see the German version.]

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for market-related powerful positions can be applied mutatis mutandis for the purposes of Section 19a GWB.

## II. Activity to a significant extent on markets within the meaning of Section 18(3a) GWB

- (50) Pursuant to Section 19a(1) sentence 1 GWB, a finding of overriding importance for competition across markets can only be made for an undertaking that operates to a significant extent on markets within the meaning of Section 18(3a) GWB. This is the case with regard to Amazon.
- (51) The characteristic of operating on markets within the meaning of Section 18(3a) GWB to a significant extent is a mandatory component for the application of Section 19a GWB to a specific undertaking. It is intended to ensure that only undertakings with a focus on digital business models are subject to the standard.<sup>61</sup> With the 9th GWB amendment and the provisions introduced in Section 18(2a) and (3a) GWB, the legislator identified in particular multi-sided markets and networks as a key element of the internet and data-based business models which are characterized by the discernible concentration tendencies in certain business areas, which go hand in hand with the increasing digitization of markets.<sup>62</sup> In addition, the criterion relates to advantages of powerful positions across markets through the concentration and self-reinforcing dynamics of multi-sided markets and networks mentioned above, which bear the risk of further consolidation (and concentration) and an expansion of market power to further business areas and markets.<sup>63</sup>
- (52) In this context, it is irrelevant whether the paramount significance for competition across markets is attributable precisely to such products or whether it has also been made possible as a result of other activities. In particular, the provision also covers undertakings that are active to a significant extent on markets within the meaning of Section 18(3a) GWB, but whose paramount significance for competition across markets also derives to a significant extent from other activities on digital markets.<sup>64</sup> In this respect, the legislator has found the threat posed by such business models to be sufficient as a starting point for examining whether an undertaking is an addressee of Section 19a(1) GWB.
- (53) The section does not cover undertakings for which the activity on a multi-sided market or network either plays only a completely minor role for the undertaking itself - compared to

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<sup>61</sup> [Not translated. Please see the German version.]

<sup>62</sup> [Not translated. Please see the German version.]

<sup>63</sup> [Not translated. Please see the German version.]

<sup>64</sup> [Not translated. Please see the German version.]



its other activities - or which play only a minor role on the relevant markets compared to their competitors.<sup>65</sup> Accordingly, the significant scope of activity does not require, in particular, an exclusive or predominant activity on markets within the meaning of Section 18(3a) GWB. In accordance with the purpose of the criterion, which is to cover an essential element of the threat resulting from the significance across markets of an undertaking in the digital economy, it is also irrelevant whether dominant positions or even monopolies exist in relation to such markets under Section 18(3a) GWB. In the case of Amazon, however, this holds true, for example, with regard to a central activity in Germany, the online marketplace (for more details, see B.III.1).

- (54) In the present case, it must first be established that Amazon is active on markets within the meaning of Sec. 18(3a) GWB (see 1.) and that these activities amount to a significant extent (see 2.).

**1. Activity on markets within the meaning of Section 18 (3a) GWB**

- (55) Amazon is active on markets within the meaning of Section 18(3a) GWB. This relates in particular to its activities as an operator of e-commerce platforms on country-specific domains such as amazon.de. On these platforms, Amazon not only sells physical goods and digital content to end customers itself as a retailer (Amazon's online shop), but also operates an online marketplace (Amazon marketplace) on which Amazon enables other online retailers (third-party sellers) to offer their goods to end customers.
- (56) As Section 19a(1) sentence 1 GWB refers to activities on markets within the meaning of Section 18(3a) GWB, the undertaking in question is required to operate on so-called multi-sided markets and/or in networks. In each case, these are business models with certain characteristics; in addition, the corresponding service offerings must be provided on markets within the meaning of the GWB (in particular also pursuant to Section 18(2a) GWB).
- (57) In the case of so-called multi-sided markets pursuant to Section 18(3a) GWB, at least two distinguishable user groups meet;<sup>66</sup> the term platform is often used synonymously.<sup>67</sup> The (platform) undertaking in question acts as an intermediary for the various user groups or acts between them and connects the various market sides with each other so that the users belonging to the various user groups can interact directly with each other.<sup>68</sup> An essential

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<sup>65</sup> [Not translated. Please see the German version.]

<sup>66</sup> [Not translated. Please see the German version.]

<sup>67</sup> [Not translated. Please see the German version.]

<sup>68</sup> [Not translated. Please see the German version.]

characteristic of multi-sided markets is the existence of indirect network effects.<sup>69</sup> They are present when the benefit of a platform for at least one user group depends on the presence and size of the other user group.<sup>70</sup> (Online) platforms in particular regularly represent such multi-sided markets, such as e-commerce platforms.<sup>71</sup>

- (58) In the case of networks, on the other hand, an undertaking acts as an intermediary between users of the same user group and enables interactions between them; direct network effects must result therefrom.<sup>72</sup> Such direct network effects exist when the growth or decline in the number of users has a direct positive or negative impact on the usefulness of the product or its service to individual users.<sup>73</sup>
- (59) In the present case, Amazon is in any case active on multi-sided markets, i.e. operates business models of the type of a multi-sided market (a platform). This applies in particular to the e-commerce platforms operated by Amazon on country-specific domains. This includes the platforms under the domains "amazon.com" (for the USA), "amazon.de" (for Germany) as well as further platforms in Europe (e.g. "amazon.co.uk" (United Kingdom), "amazon.fr" (France) and "amazon.it" (Italy)) and, in addition, especially in Asia (such as "amazon.co.jp" for Japan).
- (60) With the online marketplaces operated on its e-commerce platforms, Amazon acts in each case as an intermediary between the user group of sellers (not affiliated with Amazon) as supplier (and potential retailer) of goods - the so-called third-party sellers - on the one hand and the end customers on the demand-side (as potential buyers) of the goods offered by the third-party sellers on the other. Amazon thus mediates between these different user groups and enables direct interaction between the groups up to the transaction, i.e. the sale/purchase of the offered goods directly on the marketplace.<sup>74</sup> Amazon's own sales activities on the e-commerce platform, on the other hand, are commercial activities, i.e. Amazon in its function as a retailer represents in this respect a vertically integrated part of the seller user group.<sup>75</sup> From the perspective of the end customer user group, the e-commerce platform presents itself as a single sales platform.
- (61) There are also indirect network effects in the form of positive indirect network effects. This is because the benefit of an online marketplace for third-party sellers active on it increases

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<sup>69</sup> [Not translated. Please see the German version.]

<sup>70</sup> [Not translated. Please see the German version.]

<sup>71</sup> [Not translated. Please see the German version.]

<sup>72</sup> [Not translated. Please see the German version.]

<sup>73</sup> [Not translated. Please see the German version.]

<sup>74</sup> [Not translated. Please see the German version.]

<sup>75</sup> [Not translated. Please see the German version.]

with a growing number of users on the end customer side and thus potential buyers on the e-commerce platform, as this also increases the sales opportunities. Conversely, with an increasing number of third-party sellers, the number of merchandise offers and thus the range of offers can increase, which goes hand in hand with greater benefits, especially for users on the end customer side, who attach importance to the associated product and price comparison options. In addition, the likelihood that the individual needs of a single end customer can be (better) met via the platform increases as well. Since Amazon, as an online retailer, also contributes with its offers to the breadth of offerings available to end customers on the e-commerce platform (in addition to the offers from third-party sellers of the Amazon marketplace), this also leads to positive indirect network effects.<sup>76</sup>

- (62) Accordingly, an e-commerce platform with such an online marketplace is a multi-sided market and, more precisely, a matching platform in the form of a transaction platform. A platform is considered to be a matching platform if it enables mediation between members of two or more user groups which is tailored to individual preferences and which is sought by all user groups; as a result of the mediation enabled by a matching platform, direct interaction can take place between the mediated users.<sup>77</sup> If the downstream interaction between the users mediated by the platform, which takes place directly between them, is a transaction in the economic sense, it is referred to as a transaction platform (as a subset of matching platforms).<sup>78</sup>
- (63) There is also no doubt that the offer of online marketplaces as transaction platforms is market-related, since at least with regard to one side of the marketplace, namely the side addressing third-party sellers, the offered services are paid through sales commissions and other fees.
- (64) Furthermore, Amazon assumes the role as an intermediary between different user groups in the sense of a multi-sided market pursuant to Section 18(3a) GWB in another aspect concerning the operation of the online marketplaces. For example, Amazon mediates shipping orders between the third-party seller user group on the Amazon marketplace and the user group consisting of delivery service providers (so-called Buy Shipping):<sup>79</sup> In the context of Buy Shipping, third-party sellers can assign a delivery service provider registered with Amazon to ship products sold via the online marketplace to the end customer and obtain

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<sup>76</sup> [Not translated. Please see the German version.]

<sup>77</sup> [Not translated. Please see the German version.]

<sup>78</sup> [Not translated. Please see the German version.]

<sup>79</sup> [Not translated. Please see the German version.]

the corresponding shipping label from Amazon.

- (65) Furthermore, Amazon – with regard to its advertising services – assumes the role of a so-called audience providing platform (or advertising platform). An audience providing platform is a platform that enables one user group to attract the attention of another user group.<sup>80</sup> In the present case, Amazon offers advertising customers various types of advertising inventory, in particular on the country-specific websites (including sub-pages) and thus the attention of the users of the respective e-commerce platform or overarching the offer portal, so that Amazon is also active as an advertising platform in this respect.

## 2. Significant extent of activity on markets within the meaning of Section 18(3a) GWB

- (66) Amazon is also active to a significant extent on markets within the meaning of Section 18(3a) GWB.
- (67) The criterion of significance intends to ensure that only undertakings with a focus on digital business models are subject to Section 19a GWB. In contrast, undertakings for which the activity as a platform or network either plays only a completely minor role - compared to its other activities - or which play only a minor role on the relevant markets compared to their competitors are not to be covered.<sup>81</sup> Accordingly, a significant extent of activity on markets within the meaning of Section 18(3a) GWB can be assumed if, on the one hand, the business activity on markets pursuant to Section 18(3a) GWB is not only of completely subordinate importance within the undertaking (compared to its other business activities) - for example, forms a certain centre of activity - and, on the other hand, the undertaking with this business activity does not only play a subordinate role on the relevant markets - for example, measured in terms of market position - (compared to its competitors).
- (68) As stated above under 1., Amazon, as operator of a number of e-commerce platforms with corresponding online marketplaces in various countries, including the USA (amazon.com) and Germany (amazon.de), is active on - multi-sided - markets within the meaning of Section 18(3a) GWB. This activity is also significant in scope within the meaning of Section 19a(1) sentence 1 GWB, both with regard to the undertaking (Amazon) itself (see below a)) and with regard to the competitive environment (see below b)).
- (69) Against this background, it does not need to be conclusively examined whether its activity

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<sup>80</sup> [Not translated. Please see the German version.]

<sup>81</sup> [Not translated. Please see the German version.]

as an intermediary in relation to the commissioning of shipping services (Buy Shipping) and/or the operation of the advertising platform (Amazon Advertising already accounts for [...] of Amazon's revenue in 2020 and already around [...] <sup>82</sup> in 2021) have a significant scope within the meaning of Section 19a(1) sentence 1 GWB in themselves. However, they contribute in any case to the fact that overall it can be assumed that Amazon is active to a significant extent on markets within the meaning of Section 19a(1) sentence 1 GWB.

**a) Significant extent in relation to total activity**

- (70) The fact that the activity in question is of significance within the undertaking - also in comparison to the other business activities - already follows from a consideration of the share of revenue generated with the actual platform activity (the operation of the online marketplaces) alone.
- (71) According to the 2021 Annual Report <sup>83</sup>, revenue generated with third-party sellers operating on the online marketplaces ("Third-party sellers services") represent the second-highest revenue item of Amazon's total global revenue of USD 469.8 billion in financial year 2021 (corresponding to calendar year 2021). At USD 103.4 billion seller services represent a revenue share of 22%. These are largely attributable to Amazon's intermediation activities on online marketplaces. The only larger revenue item concerns Amazon's activities as an online retailer ("Online Stores") with a worldwide revenue of USD 222.1 billion (47%); the third-largest item is the revenue attributable to AWS (USD 62.2 billion/13%).
- (72) In the financial year 2020, the revenue generated from the operation of the online marketplaces also represented the second highest revenue item according to the revenue numbers submitted by Amazon in the present proceeding and broken down in more detail <sup>84</sup> (shown here as "Marketplace"). Larger than the marketplace revenue is the revenue generated with Amazon's online retail activities ("Retail") with the revenue attributable to AWS or Advertising following, each irrespective of whether the worldwide, EEA-wide or domestic revenues are considered:

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<sup>82</sup> [Not translated. Please see the German version.]

<sup>83</sup> [Not translated. Please see the German version.]

<sup>84</sup> [...]

Revenue in 2020 by business area	Germany		EEA		Worldwide	
	in EUR million or as % of total revenue					
Retail	[...]	[...]	[...]	[...]	[...]	[...]
Marketplace	[...]	[...]	[...]	[...]	[...]	[...]
AWS	[...]	[...]	[...]	[...]	[...]	[...]
Advertising	[...]	[...]	[...]	[...]	[...]	[...]
Other business areas <sup>85</sup>	[...]	[...]	[...]	[...]	[...]	[...]
<b>Total</b>	[...]	<b>100 %</b>	[...]	<b>100 %</b>	[...]	<b>100 %</b>

Table 10: 2020 revenue by individual business unit, own presentation based on Amazon's response of 9 July 2021 to the request for information of 18 May 2021, Exhibit 2, spreadsheets 1a, 1b, 1c.

(73) According to this data, the share of the marketplace business in total revenue was also consistently around [10-20] % or more in each of 2018 and 2019, and again regardless of whether global, EEA-wide, or domestic revenue is considered (Figure 2 shows exemplary shares based on German as well as total global revenue).

[...]

Figure 2: Revenue distribution between "Marketplace" and Amazon's other designated business segments for 2018 to 2020 in Germany as well as worldwide, own representation based on Amazon's response dated 9 July 2021 to the request for information of 18 May 2021, Exhibit 2, Spreadsheets 1a, 1b, 1c.

(74) The fact that the operation of the e-commerce platforms with the corresponding online marketplaces has a significant scope for the undertaking and does not only play a (completely) subordinate role also results from the fact that the platform activity (i.e. the operation of the online marketplaces) is closely related to other essential business activities of Amazon. In particular, the online marketplaces as well as the online retail business<sup>86</sup>, with which Amazon generates [...] of its revenue, jointly use the respective country-specific e-commerce platform, with which the same group of end customers is reached in each case due to the uniform domain. Accordingly, the undertaking's own online retail business - even if it is not itself to be regarded as a platform activity - also contributes to the end customers using the e-commerce platform and can thus strengthen possible indirect network effects for the third-party sellers operating on the online marketplace.<sup>87</sup>

(75) Many other Amazon offerings (such as digital content like Prime Video or Amazon Music) are also sold under the same domains as the online marketplaces. The marketplace is also

<sup>85</sup> [Not translated. Please see the German version.]

<sup>86</sup> [Not translated. Please see the German version.]

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the starting point for other offers - such as the offer of advertising opportunities through Amazon Advertising.

- (76) After all, it is clear that the operation of the e-commerce platforms with the online marketplaces - an activity on (multi-sided) markets pursuant to Section 18 (3a) GWB - is of significant scope for the undertaking and (also in terms of extent) is not only of minor importance.

**b) Significant extent in relation to the activity of other providers**

- (77) But also from an external perspective, Amazon, as the operator of the e-commerce platform with the online marketplaces, is active to a significant extent on (multi-sided) markets pursuant to Section 18(3a) GWB, i.e. as a platform. This is because Amazon often holds a strong or leading market position on the underlying markets.
- (78) It is sufficient for the undertaking in question, in this case Amazon, to play more than a minor role on the relevant markets compared to its competitors.<sup>88</sup> However, this does not require a market position that reaches the threshold of market dominance. Such an interpretation would not be compatible with either the wording or the statutory system. Although any existing dominant positions are to be taken into account as one of the criteria under Section 19a(1) sentence 2 GWB (see No. 1) when examining the existence of an paramount significance for competition across markets, they are not required for the existence of paramount significance for competition across markets, either according to the wording or according to the intention of the legislator.<sup>89</sup> If existing market dominance is already not required under Section 19a(1) sentence 2 GWB, this cannot be read into Section 19a(1) sentence 1 GWB either – beyond the wording – especially since the criterion of Section 19a(1) sentence 2 no. 1 GWB would otherwise largely lose its meaning.
- (79) However, if one considers the actual platform activity, the operation of the online marketplaces, it must be stated for the German market that Amazon does indeed hold a dominant position concerning its German online marketplace (see in detail B.III.1.a)) and is therefore not merely active to a subordinate extent compared to other competing online marketplace operators. In addition, the significance of Amazon's activities on markets pursuant to Sec. 18(3a) GWB also follows from the importance of the Amazon e-commerce platform for German online retailing in general. In 2020, for example, the share of the

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<sup>88</sup> [Not translated. Please see the German version.]

<sup>89</sup> [Not translated. Please see the German version.]

German Amazon e-commerce platform in the total trade volume in German online retail was estimated by HDE Online-Monitor at [50-60%]. Of these [50-60%], around [30-40%] were attributable to the Amazon marketplace, around [20-30%] to Amazon's own retail sales, and around [0-5%] to other purchase transactions. This means that in 2020, around one in two euros spent by end customers on online purchases in Germany was spent on Amazon.<sup>90</sup>

- (80) Similarly, other geographic markets are to be assessed with regard to which other competition authorities have either identified a dominant position of Amazon in the marketplace business or see corresponding indications for this:
- (81) As far as the U.S. marketplace (amazon.com) is concerned, the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary of the U.S. House of Representatives also assumes a dominant market position of Amazon as a marketplace in its report "Investigation of Competition in Digital Markets" from 2020.<sup>91</sup>
- (82) Amazon also has strong market positions with regard to the online marketplaces operated in Italy and France. In a recent decision, the Italian competition authority also assumes a dominant position on the part of Amazon.<sup>92</sup> For the French market, the European Commission is investigating this and, in its statement of objections, preliminarily assumes that Amazon holds a "... dominant position on the market for marketplace services in Germany and France, the largest markets for Amazon in the EU...".<sup>93</sup>
- (83) After all, Amazon is active to a considerable extent on multilateral markets within the meaning of Section 18(3a) GWB and thus fulfils the requirement of Section 19a(1) sentence 1 GWB. Accordingly, it is also irrelevant, contrary to Amazon's view<sup>94</sup>, that Amazon's business activities, in addition to the digital platform activities, also include physical actions such as the shipment of goods to a certain extent; Section 19a(1) sentence 1 GWB cannot be taken to mean that physical activities (of a certain extent) exclude the application of Section 19a(1) GWB per se. Nor did the legislator indicate - let alone did this find expression in the wording of the law - that only companies with certain digital business models (such as offering free services in order to collect and monetize data) should be subject to Section 19a(1) GWB.<sup>95</sup> Section 19a(1) sentence 1 GWB only generally refers to significant activity

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<sup>90</sup> [Not translated. Please see the German version.]

<sup>91</sup> [Not translated. Please see the German version.]

<sup>92</sup> [Not translated. Please see the German version.]

<sup>93</sup> [Not translated. Please see the German version.]

<sup>94</sup> [Not translated. Please see the German version.]

<sup>95</sup> [Not translated. Please see the German version.]



on markets within the meaning of Section 18(3a) GWB, which was shown here for Amazon.

### III. Paramount significance for competition across markets

- (84) Amazon has paramount significance for competition across markets because, when all the relevant circumstances in the individual case are considered together, it has a cross-market position of economic power which gives the undertaking a cross-market margin to manoeuvre which is not sufficiently controlled by competition.
- (85) Whether paramount significance for competition across markets of an undertaking exists in an individual case and can be established must be decided on the basis of an overall assessment - guided by the purpose of the law - of all circumstances relevant in the individual case.<sup>96</sup> In particular, the criteria set out in Section 19a(1) sentence 2 GWB must be taken into account; they can be used to reflect the competitive potential of the undertaking.<sup>97</sup> Section 19a(1) sentence 2 GWB does not, however, contain an exhaustive list of the criteria to be taken into account in an overall assessment, nor do the criteria that are mentioned have to be fulfilled cumulatively or each need to be met to a certain extent or in a certain quality. Also, a weighting of the criteria among each other cannot be inferred from the list or the selected order. Within the framework of an overall view of the findings on the individual criteria examined, it must finally be examined whether overall - taking into account all circumstances relevant in the individual case<sup>98</sup> - a paramount significance for competition across markets of the undertaking in question, in this case Amazon, must be assumed.
- (86) In the present case, after consideration of the criteria to be taken into account pursuant to Section 19a(1) sentence 2 nos. 1 to 5 GWB (see 1. to 5. above) and an overall assessment of all the circumstances (see 6. above), it follows that Amazon has such a paramount significance for competition across markets within the meaning of Section 19a(1) GWB.

#### 1. Market dominance on one or several markets (Section 19a(1) sentence 2 no. 1 GWB) and other positions of (market) power

- (87) The dominant position of the online Marketplace (hereinafter also "German Amazon marketplace" or "marketplace under amazon.de") operated by Amazon Europe Core S.à.r.l. in technical terms and Amazon Services Europe S.à.r.l. in operational terms under [www.amazon.de](http://www.amazon.de) (hereinafter also "domain amazon.de") on the German market for the provision of online marketplace services for professional sellers (Section 19a(1) sentence 2

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<sup>96</sup> [Not translated. Please see the German version.]

<sup>97</sup> [Not translated. Please see the German version.]

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no. 1 GWB) contributes to Amazon's paramount significance for competition across markets.

(88) However, in accordance with the meaning and purpose of the norm, the fulfilment of the criterion of market dominance pursuant to Section 19a(1) sentence 2 no. 1 GWB is not a mandatory prerequisite for the determination of the norm addressee pursuant to Section 19a(1) GWB.<sup>99</sup> The government's explanatory memorandum makes it clear that the criteria of Section 19a(1) sentence 2 GWB do not have to be present cumulatively and that the order in which they are mentioned does not specify any weighting.<sup>100</sup> However, if the characteristic of market dominance is fulfilled, this circumstance may carry considerable weight. This applies in particular if the undertaking concerned holds a dominant position on a market within the meaning of Section 18(3a) GWB which may form an important basis of its ecosystem. The dominance on such a market, which is central to the activities of the undertaking concerned, demonstrates its competitive potency and the abstract threat to competition emanating from it, precisely in view of the special protective purpose of Sec. 19a GWB. Both in the government's explanatory memorandum and in the Economic Committee's recommendation for a resolution, the legislative materials for the act make strong reference to the special risk situation - in particular, for example, the dangers of "tipping" - which can arise in platform and network markets as a result of the consolidation of market positions.<sup>101</sup>

(89) Irrespective of the fact that the characteristic of Section 19a(1) sentence 2 no. 1 GWB is already fulfilled here by Amazon's dominant position in the segment for online marketplace services, however, the objective of capturing the cross-market significance also already requires the consideration of strong positions of (market) power of the undertaking concerned. This corresponds to a broad understanding of Section 19a(1) sentence 2 no. 1 GWB. In any case, such positions of (market) power are to be taken into account in the required overall assessment of all relevant factors for determining a paramount significance for competition across markets, especially since Section 19a(1) sentence 2 GWB does not provide an exhaustive list of the relevant criteria. The explanatory memorandum to the Act makes it clear in several places that the threshold for intervention under Section 19a GWB can lie below market dominance. In view of the purpose of Section 19a of the GWB, which is to capture the cross-market significance, and the strong positions of (market) power that are sufficient for an overall assessment, there is no need for an exact market definition and

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<sup>99</sup> [Not translated. Please see the German version.]

<sup>100</sup> [Not translated. Please see the German version.]

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no determination of a dominant position in the individual case. Such positions of (market) power - which are to be located in the grey area of the classic concept of market dominance - are also to be assessed within the framework of Section 19a(1) sentence 2 no. 1 GWB or, in any case, within the framework of Section 19a(1) sentence 2 GWB as a whole.

(90) Even if the German Amazon marketplace did not have a dominant position, Amazon still has a very strong position of (market) power in the marketplace business in Germany, which, according to a correspondingly broadly interpreted characteristic of Section 19a(1) sentence 2 No. 1 GWB, but in any case within the framework of the required overall view in combination with the other characteristics pursuant to Section 19a(1) sentence 2 GWB, additionally supports Amazon's paramount significance for competition across markets. In addition, there are indications that the Amazon marketplaces in other countries - in particular the USA, Great Britain, France and Italy - also hold strong, in some cases even very strong positions of (market) power.

**a) Market dominance on the market for the provision of online marketplace services to professional sellers**

(91) Amazon has a dominant position on the German market for the provision of online marketplace services for professional sellers within the meaning of Section 18(1) in conjunction with (3a) and (3) GWB.

**aa) Affected market**

(92) Amazon's business activities with "Amazon Marketplace" concern the national market for the provision of online marketplace services for commercial sellers.

(93) At [www.amazon.de](http://www.amazon.de) and with the mobile Amazon app (hereinafter together: amazon.de), Amazon operates an e-commerce platform on which the undertaking both sells products to end customers as a retailer in its own business ("Amazon Retail", see above. para. 16 ff. hereinafter also referred to as "German Amazon Shop" or "Amazon Shop") and acts as an intermediary between third-party sellers and end customers ("Amazon Marketplace", see above. para. (87) ff.; hereinafter also "German Amazon marketplace" or "Amazon marketplace"). Since the offer of products by Amazon as a retailer as well as the mediation of products by third-party sellers takes place via uniform product detail pages, the platform at [www.amazon.de](http://www.amazon.de) has a hybrid structure comprising both elements and presents itself to end customers as a uniform sales platform (hereinafter also "(German) Amazon e-commerce platform").

- (94) In the context of market definition and in view of its multilateral nature within the meaning of Section 18(3a) GWB (see recital (62) f. above) (see (1)), the Amazon marketplace is to be assigned as a separate market for the provision of online marketplace services for professional sellers, at least with regard to the market side of third-party sellers. The market must also be defined on a national geographic basis (see (2)).

**(1) Product market definition**

- (95) The relevant product market is the market for the provision of online marketplace services to professional sellers, namely as one side of the multi-sided market for intermediation services via online marketplaces.
- (96) According to the Bundeskartellamt's decision-making practice, the product market is defined in accordance with the modified demand market concept.<sup>102</sup> According to this concept, such products or services form a single product market which are so close to each other in terms of their characteristics, their economic purpose and their price level that a reasonable customer would regard them as suitable for meeting a particular need and as substitutable.<sup>103</sup> In addition, the product range concept and the supplier's switching flexibility must be taken into account when defining the product market. According to this, the relevant product market can be defined more broadly and according to (groups of) products or services which cover a typified need or for whose production or provision a comparable know-how as well as similar equipment can be used.<sup>104</sup> Deviating preferences of individuals or small purchaser groups must be disregarded as marginal inaccuracies in the product market definition, as must overlaps at the fringes of product ranges.
- (97) The online marketplace services relevant here are functionally intermediary products of platform undertakings that broker transactions for shippable products between end customers and professional sellers without themselves being involved in the transaction (in this regard (a)). The hybrid structure of the integrated trading platform operated by Amazon does not eliminate the independence of the intermediary product vis-à-vis the third-party sellers (on this point (b)). From the perspective of third-party sellers, the market must be limited to online marketplace services (see (c)).

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<sup>102</sup> [Not translated. Please see the German version.]

<sup>103</sup> [Not translated. Please see the German version.]

<sup>104</sup> [Not translated. Please see the German version.]

**(a) Functioning of online marketplaces**

- (98) Operators of online marketplaces for the trade of (shippable) products offer an intermediary product which, on the one hand, enables sellers, in return for a commission, to offer and sell their goods to end customers (hereinafter also "consumers") under the uniform internet presence of the online marketplace, and, on the other hand, enable end customers to search for products on the marketplace, compare them with regard to their quality and price, and then purchase them from the seller without additional payment. The characteristic feature here is that the purchase is concluded directly on the online marketplace and the marketplace operator is not involved (as a contractual party) in the purchase transaction between the seller and the end customer.
- (99) The products offered on the online marketplaces relevant here by third-party sellers are consumer goods which, after the order has been placed, can be shipped (physical goods) or transmitted (digital content) to the end customer directly on the marketplace either by the seller or by the marketplace operator ("shippable consumer goods"). Thus, no physical meeting of seller and buyer is required outside the platform to complete the purchase transaction. Since the product ranges brokered by online marketplaces depend, among other things, on which sellers operate there in each case, they vary to some extent in terms of their scope and focus. As a rule, however, online marketplaces broker a broad product range covering many product categories, if only because of the large number of sellers. End customers thus have the opportunity to purchase products from various product categories, namely at single internet address and using a single customer account (so-called one-stop shopping). In principle, this is also an intermediary service (free of charge in this case) vis-à-vis the end customer, which initially merely facilitates the direct transaction with the seller against payment.
- (100) The online marketplaces thus do not acquire ownership of the third-party sellers' products, nor do they directly set the selling price for the products or enter into a purchase agreement with the end customer themselves. This also applies to Amazon's role in the Amazon Marketplace. For example, the terms of use for sellers are available on amazon.de under the link "Our Terms and Conditions", in which it is stated under Section 12 regarding Amazon's role: *"Amazon allows sellers to list and sell their products on the website. This is evident on the respective product detail page. Even though Amazon enables transactions on Amazon Marketplace, Amazon is neither the buyer nor the seller of these seller's items. Amazon offers buyers and sellers the opportunity to conduct negotiations and conclude transactions. Thus, the contract that comes into being when these seller's items are sold is concluded*

*exclusively between the buyer and the seller. Amazon is not a party to the contract and therefore assumes no responsibility for that contract. Amazon is also not the seller's representative. The seller is responsible for the sale of the products, any complaint on the part of the buyer and all other matters arising from the contract between buyer and seller. ... "*<sup>105</sup>

- (101) The intermediary product of an online marketplace also typically includes additional service offerings for sellers and for end customers, which in turn are regularly provided for merchants against payment and for end customers free of charge.
- (102) With regard to the range of services offered to sellers, the survey of online marketplace operators in the present proceeding and the information provided by Amazon<sup>106</sup> in its "Seller Central" seller portal<sup>107</sup> show that most online marketplaces in Germany also offer sellers operating on them IT tools for product presentation, payment processing options and complaints management as standard. In addition, some online marketplaces also offer returns processing - some as standard and some as an option. Individual online marketplaces - including Amazon - offer comprehensive logistics services as an option, i.e., storage, packaging and shipping. In addition, the majority of online marketplaces also offer services in the area of online advertising - in some cases as standard, but predominantly as an option.<sup>108</sup>
- (103) For end customers, most online marketplaces in Germany offer options for immediate payment of the goods at the time of purchase.<sup>109</sup> They also usually offer opportunities to compare products and prices and provide their users with customer ratings for information about products. End customers can also find out about sellers and their reliability from reviews by other customers. In addition, some online marketplaces also make it easier for end customers to select products by displaying products offered by several sellers on uniform product pages and pre-selecting the product recommended to the customer.<sup>110</sup> Finally, most online marketplaces enable electronic communication between end customers and third-party sellers via the platform for handling customer complaints in connection with a purchase and also often offer arbitration or mediation services themselves.

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<sup>105</sup> [Not translated. Please see the German version.]

<sup>106</sup> [Not translated. Please see the German version.]

<sup>107</sup> [Not translated. Please see the German version.]

<sup>108</sup> [Not translated. Please see the German version.]

<sup>109</sup> [Not translated. Please see the German version.]

<sup>110</sup> [Not translated. Please see the German version.]

**(b) Market relationship vis-à-vis professional sellers in the case of a hybrid structure**

- (104) A hybrid structure, as in the case of the integrated trading platform operated by Amazon, does not eliminate the market relationship vis-à-vis third-party sellers and their status as an online marketplace service.
- (105) This is because an online marketplace such as Amazon Marketplace forms a multi-sided market, since the service offering is directed on the one hand at sellers who want to offer and sell their products and on the other hand at end customers who want to search for and buy products. The online marketplace brings these two user groups together by providing access to potential buyers of their products for the seller user group and access to product offers for the end customer user group. In this way, purchase transactions can be concluded directly on the online marketplace. Online marketplaces therefore offer the two sides involved - seller and buyer - the technical opportunity to find each other and, if necessary, enable them to complete the purchase transaction directly. An essential feature of multi-sided markets is indirect network effects, which are present when the benefit of a platform for at least one user group depends on the presence and size of the other user group.<sup>111</sup> This is also the case with the Amazon marketplace (see para. (61)).
- (106) The hybrid structure of a platform such as Amazon's, under whose respective country-specific domain both the marketplace business - i.e. the sale of products by third-party sellers to end customers - and Amazon's own retail activity - i.e. the sale of products by Amazon to end customers - are presented in a uniformly integrated form, does not change the integrated marketplace's character as an intermediary product. Even if Amazon exclusively operated online shops on its websites at the beginning, in which only Amazon was active as a retailer, and only later also allowed third-party sellers to sell via these websites, the definition of a (retail) market only comes into consideration with regard to Amazon's own retail activity, contrary to the view held by Amazon<sup>112</sup>. This applies in particular to the market side of the third-party sellers, to whom only the marketplace product is offered. Therefore, it is also irrelevant for the market definition if Amazon now refers to the e-commerce platform as a whole as the "Amazon Store" and thus does not want to make a distinction between the Amazon Retail business and the Amazon Marketplace.<sup>113</sup> The integrated offer of the Amazon Marketplace and the Amazon Retail products could rather at most have an effect vis-à-vis the end customers on their view of the substitutability of the products, since it can often only become apparent to the end customer late in the purchase process whether he

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<sup>111</sup> [Not translated. Please see the German version.]

<sup>112</sup> [Not translated. Please see the German version.]

<sup>113</sup> [Not translated. Please see the German version.]

contracts directly with Amazon as a proprietary retailer or uses the intermediary service of Amazon and buys the product from a third-party seller. However, the marketplace service to the sellers remains functionally unchanged.

- (107) Finally, in the view of the Bundeskartellamt, in the case of multi-sided markets, a uniform market definition which does not differentiate between the various user groups is also - possible in principle. This applies, for example, if the intermediary product as such only comes into existence when the addressed user groups use the product to a sufficient extent.<sup>114</sup> However, a uniform market definition - encompassing several market sides - must also - follow the principles of the demand market concept in these cases and can therefore only be assumed if the views of the user groups regarding the functional substitutability of the intermediary service do not differ significantly from each other and they thus have a largely uniform demand.<sup>115</sup> The integration of Amazon's retail business and the Amazon marketplace on a uniform platform could speak in favour of a divergent view of substitutability on the part of the end customers. Ultimately, however, the question can be left open, since the competitive analysis of the market side of the sellers also takes into account the competitive repercussions from the end customer side and a separate examination of the end customer side is not necessary in the present case.

**(c) Relevant product market for the marketplace sellers**

- (108) The service that marketplace operators offer to the user group of marketplace sellers thus essentially consists of brokering sales transactions with a large number of end customers (who are interested in buying). In addition, the offering includes further services - some provided as standard, others as an option – which lead to simplification of online sales of their products via the marketplace for sellers.
- (109) On the demand side, this range of services offered by marketplace operators is aimed primarily at professional sellers and not at private sellers. Thus - with the exception of eBay - sales on all major online marketplaces or hybrid e-commerce platforms take place via uniform product pages which provide for a standardized product description and are thus designed for new or as-new products. Such products are generally sold by professional sellers in larger quantities, while private sellers predominantly offer used products and these only sporadically, i.e. with low availability. Accordingly, quite a few larger online

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<sup>114</sup> [Not translated. Please see the German version.]

<sup>115</sup> [Not translated. Please see the German version.]



marketplaces or hybrid retail platforms (Kaufland, Otto, Zalando and Galeria Karstadt Kaufhof) as well as some smaller online marketplaces (Lenando, Yatego, Sugartrends) do not even allow private sellers as third-party sellers.<sup>116</sup> Amazon and eBay as large providers do allow sales by private sellers on their online marketplaces operated at [www.amazon.de](http://www.amazon.de) and [www.ebay.de](http://www.ebay.de), respectively. However, the turnover generated by private sellers on the respective marketplaces is not significant in relation to the turnover generated by professional third-party sellers there, with a share of less than 20%. The activity of private sellers on online marketplaces can therefore not be regarded as formative. Private sellers are more likely to be active on other platforms such as classified ad portals, among other things because of more favourable cost structures. Online marketplaces that focus exclusively or predominantly on private sellers - such as classified ad portals - are therefore not taken into account in the definition of the relevant market.

- (110) On the supply side, marketplace services are provided both by operators of so-called open online marketplaces and by operators of so-called closed online marketplaces. Whereas on open online marketplaces the end customer is generally also shown several offers for products offered by several sellers and thus "competition for the product" takes place directly on the platform, i.e. recognizable to the end customer, on a closed marketplace the end customer is regularly shown only one product offer even for products offered by more than one seller. Here, therefore, there is no "competition for the product" directly on the platform, but the decision as to which product offer is shown is made by the marketplace operator as part of an upstream ranking and selection process. In addition, sellers on closed online marketplaces are not - as on open online marketplaces - generally admitted to marketplace sales with all the products they offer. Rather, a selection process is carried out by the marketplace operator beforehand, in which in particular it is determined which brands and products are to be offered on the marketplace. As a result, the operators of closed online marketplaces provide the same marketplace services to the sellers they admit for the selected products as the operators of open online marketplaces, so that their service offerings can be attributed to a uniform market.
- (111) The breadth of the product range offered on online marketplaces varies considerably.<sup>117</sup> While some online marketplaces are very specialized and limit their offering to one product category or to a few and closely related product categories ("vertical" marketplaces), other online marketplaces - such as that of Amazon - have a very broad product range covering many or even almost all product categories ("horizontal" marketplaces). However, a precise

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<sup>116</sup> [Not translated. Please see the German version.]

<sup>117</sup> [Not translated. Please see the German version.]

classification as a "vertical" or "horizontal" marketplace is often not possible. This is because it is usually not possible to make a clear distinction between product categories. In addition, online marketplaces usually have core categories in which they offer many products, while other complementary categories offer only a limited range of products. As a result of these differences, not all online marketplaces are equally suitable for all sellers to sell their products. On the other hand, with regard to the "shippable consumer goods" relevant here, it must be taken into account that online marketplaces with a limited product range to date may also be willing and able to include additional product categories at short notice and with economically justifiable effort, provided there is corresponding demand, particularly from sellers. Ultimately, however, the question of whether separate markets could be defined for such "vertical" marketplaces - and if so, for which ones - can be left open in the present case. Even if "vertical" marketplaces are also included in favour of Amazon and taken into account in the competitive assessment (see para. (186)), the assessment of Amazon's market position does not change as a result.

- (112) On this basis, the importance of multi-channel distribution - i.e. the use of different forms of distribution - in the retail sector on both the Seller and end-customer sides for the definition of the platform market in question here is discussed below (see (aa)) and the relevant product market is then defined on the basis of functional substitutability from the demand perspective (see (bb)) and supplier switching flexibility (see (cc)).

**(aa) Distribution forms and multi-channel distribution in retail**

- (113) Retailers basically have various forms of distribution at their disposal through which they can reach end customers and sell their products. In addition to traditional distribution via one or more brick-and-mortar stores, retailers can also market their products online. Common online forms of distribution include sales via their own online shop and the activity as a third-party seller on one or more online marketplaces. Many retailers use online and offline sales options as part of so-called multi-channel distribution and also various online sales formats in parallel. For example, the proportion of brick-and-mortar retailers in Germany who also sell online - via their own online shop and/or via online marketplaces - has risen from 34% in 2014 to 45% in 2020.<sup>118</sup> Accordingly, the share of total sales in German online retail accounted for by these retailers has risen steadily from 30.7% in 2014 to 33.3% in 2020.<sup>119</sup>

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<sup>118</sup> [Not translated. Please see the German version.]

<sup>119</sup> [Not translated. Please see the German version.]

- (114) In this way, retailers are taking account of developments in the German retail sector, where the share of online retailing has been steadily increasing for years - albeit to varying degrees in the various product categories<sup>120</sup>. According to the HDE Online Monitor 2021, this share has risen from 10.1% in 2018 to 12.6% in 2020, in each case in relation to the sales volume in the German retail sector as a whole (net). If food is excluded, it increased from 14.8% in 2018 to 18.4% in 2020.<sup>121</sup> Within online retail, in turn, the importance of online marketplaces and, in particular, the German Amazon marketplace is increasing. For example, the share of online marketplaces in total sales generated in online retail in Germany has risen from 26% in 2014 to 38% in 2019.<sup>122</sup> In 2020, sales via online marketplaces already account for 49%<sup>123</sup> and in 2021 even 51%<sup>124</sup> of total sales in German online retail. The fact that more and more retailers are selling online exclusively via online marketplaces is also reflected in the fact that among brick-and-mortar retailers who also sell online, the proportion of retailers who have their own online shop has fallen from 69% in 2014 to 62% in 2020.<sup>125</sup>
- (115) This development is linked to changes in the shopping behaviour of consumers, who are increasingly shopping online<sup>126</sup> and spending more and more money online.<sup>127</sup> Many end customers also make use of information and shopping opportunities across sales channels, i.e. they inspect goods in a retail store and buy online, or they find out about a product on the internet and then buy it local in a brick-and-mortar outlet. In addition, they are increasingly making use of retailer offerings that combine elements of online and offline shopping in what is known as click-and-collect, in which goods can be ordered online and tried out and purchased in the retail store.<sup>128</sup> If a retailer uses several sales formats in parallel, it therefore increases its chances of reaching as many end customers as possible with different shopping habits with its product range.
- (116) However, the fact that end customers have access to online and offline shopping options as they become increasingly interlinked and that retailers use the existing forms of distribution in principle in parallel ultimately says nothing about their functional substitutability with one another. On the contrary, complementary<sup>129</sup> use is also possible on both sides in the sense that the use of several or even all purchasing or sales forms is required to meet the

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<sup>120</sup> [Not translated. Please see the German version.]  
<sup>121</sup> [Not translated. Please see the German version.]  
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<sup>125</sup> [Not translated. Please see the German version.]  
<sup>126</sup> [Not translated. Please see the German version.]  
<sup>127</sup> [Not translated. Please see the German version.]  
<sup>128</sup> [Not translated. Please see the German version.]  
<sup>129</sup> [Not translated. Please see the German version.]

respective needs of end customers and retailers. From the point of view of the retailers - as will be shown below - the specific services of online marketplaces are not substitutable with other services and forms of distribution.

**(bb) No functional substitutability with other forms of distribution from the demand-side perspective**

- (117) On this basis, the market is to be limited to online marketplace services for professional sellers. Other services or entire forms of distribution are not to be included in the relevant market due to the lack of substitutable services.
- (118) In this context, contrary to the view taken by Amazon<sup>130</sup>, it cannot be generally assumed that end customers, due to their individual search and purchasing behaviour, are also willing to purchase in another retail channel if a product is not available on an online marketplace or possibly in general, and that retailers could therefore also reach customers via other channels. In particular, this cannot lead to a general inclusion of all sales channels as such in a market to be objectively delimited. Rather, a market can only include *products* from suppliers that can be examined for their functional substitutability in terms of characteristics, intended use and price. Thus, the only decisive factor for market definition can be which services sellers purchase on the market in order to be able to realize the forms of distribution.
- (119) This is of particular importance for the question of whether the general possibility of operating one's own brick-and-mortar store or one's own online shop is to be included in the market. This is because the starting point is not the use of a service offered on the market, but rather the waiver of this and the internal realization of access to the end customer. The possibility of self-fulfilment, however, is a possible threat potential of the demand side against the providers of trade intermediation services and can therefore only be taken into account under antitrust law within the framework of buyer power with the corresponding requirements. However, this cannot be considered here from the outset - irrespective of the exact market definition - already in view of the high fragmentation of the demand side of online marketplace services.
- (120) However, insofar as sellers request services on the market for the establishment and operation of their own online shop, incorporation is possible insofar as these are substitutable with online marketplace services. The services of product and price comparison services frequently cited by Amazon or the use of social media platforms are therefore considered in principle, but must be examined for their functional substitutability, which is, however,

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<sup>130</sup> [Not translated. Please see the German version.]

already doubtful in the present case from their purpose as advance services for the operation of their own online store.<sup>131</sup>

- (121) However, irrespective of the fact that distribution via a separate sales environment does not constitute a market service as such, it is not comparable from the outset, even with a view to the specific performance of an online marketplace.
- (122) The special feature of sales via online marketplaces is that in this case the seller chooses - either as an overall concept for its sales or as an additional sales channel - to carry out its own sales (at least in part) embedded in a sales environment designed by third parties. In this way, the marketplace operator opens up to him the possibility that a large number of end customers can be referred to his product offering and thus satisfies a specific need of the seller for *reach*. As a result of the decision by sellers, which is characteristic of sales via online marketplaces, to forego sales in their own sales environment for at least part of their product range and instead to make use of a sales environment designed by third parties and the customer access thereby mediated, this form of sales is clearly different from self-distribution via one's own sales environment, i.e. in a brick-and-mortar store or in one's own online shop. The fact that ultimately both forms of distribution serve to reach customers and sell goods to them is not sufficient for consideration within the same market.
- (123) However, even if one were to assume a comparable purpose, the characteristics of sales via online marketplaces are so specific due to the bundle of services offered by the operators in this respect that, from the perspective of the sellers as demanders, sales via a brick-and-mortar store (see i., para. (124) ff. below) and sales via their own online store (see ii., para. (127) ff.) do not, as a rule, represent practically significant possibilities for replacing the use of online marketplaces. Even taking into account other (supplementary) services in the area of online sales promotion, such as the use of product or price comparison services (see iii. below, margin no. (137) ff.) or in the area of sales links to social media platforms (see iv. below, margin no. (143) ff.), nothing else emerges. It is true that the respective services are demanded by third parties on the market. However, they do not offer a sales opportunity directly on the platform, but require the operation of their own sales outlet – usually their own online shop – so that functional substitutability must also be denied. Furthermore, they differ in terms of their mode of operation and fee model.

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<sup>131</sup> [Not translated. Please see the German version.]

**i. No substitutability with brick-and-mortar distribution**

- (124) Sellers can reach customers with their product offering by opening a brick-and-mortar store. For a seller who sells or wants to sell on an online marketplace, however, offline sales are not an alternative to marketplace sales. This is because it is essential for sellers who sell their products online, and in particular via online marketplaces, to be able to reach customers beyond the catchment area of a brick-and-mortar store.<sup>132</sup> Via the internet, they can offer and sell their products at least nationwide and thus basically reach a very large number of customers. Brick-and-mortar stores, on the other hand, are regularly visited by customers only within a limited geographic radius. For example, the Bundeskartellamt has defined catchment areas of 20 to 30 km for department stores with a wide range of non-food products.<sup>133</sup> This catchment area could only be extended in "offline" terms if the seller set up a network of branches with several stores. Even then, however, the customer base that can be reached would be located in the vicinity of the stores and would therefore be significantly smaller than in the case of nationwide online sales.
- (125) In addition, setting up and operating one or even several brick-and-mortar stores involves different and in some cases higher investment and operating costs than sales via online marketplaces. For example, the operation of a brick-and-mortar store incurs costs in particular for renting the store space, setting up the store, and staffing, without the seller knowing for sure whether these costs will be recouped through successful business operations. In the case of marketplace sales, on the other hand, it is essentially the sales commissions and the costs of shipping the goods to the respective end customer that have to be factored in, although these only arise in relation to transactions and are therefore easier to plan. In addition, there are other costs to a certain extent, as well as financial risks from possible returns, but these are also in proportion to the transactions carried out. Due to these differences in the cost structure and the resulting entrepreneurial risks, it can be assumed that brick-and-mortar sales and sales via online marketplaces represent different business models from the sellers' point of view.
- (126) In view of this, it can be assumed that sellers who already have brick-and-mortar sales will generally take up or use sales via online marketplaces as a supplement in order to increase their customer reach and also reach customers outside the catchment area of their retail store. For sellers who are originally active on online marketplaces, on the other hand, (additional)

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<sup>132</sup> [Not translated. Please see the German version.]

<sup>133</sup> [Not translated. Please see the German version.]

sales via brick-and-mortar stores will not be very important for reaching customers<sup>134</sup> and in particular will not be an alternative to marketplace sales.<sup>135</sup>

**ii. No or very limited substitutability with sales via own online shop**

- (127) Similarly, for sellers, the online marketplace services offered to them by marketplace operators cannot be substituted by sales via their own online shop, or at best only to a very limited extent. A major advantage of sales via online marketplaces for sellers is the use of the high reach that these platforms regularly have. Sellers who become active on an online marketplace have immediate access to a large customer base right from the start due to the high user numbers. By contrast, when selling via their own online shop, they first have to gradually build up their own customer base and invest in advertising measures to do so. On online marketplaces, a seller can therefore at least make its product offerings accessible to a large number of potential end customers, even if not all of them will buy from it. They are present where (many) end customers are (also) looking for their goods. With their product range in their own online shop, many sellers are therefore not even found by these end customers. Even if they do succeed to a certain extent, the reach of online shops is regularly significantly lower than that of online marketplaces. This is because measures to increase reach are used not only by sellers for their online stores, but also by operators of online marketplaces or hybrid retail platforms (also) for their marketplaces.<sup>136</sup> This clear difference in reach is also shown by a comparison of traffic, i.e., the total number of visitors (visits) generated by online shops on the one hand and online marketplaces on the other.
- (128) Such a comparison can be based on estimates from SimilarWeb<sup>137</sup>, [...] <sup>138</sup> This data relates to the monthly visitor numbers for the "Top 50 Shopping Sites" in Germany in December 2020, but only visits made via the website are recorded, not visits made via app access.<sup>139</sup> It cannot be assumed that including visits via apps would result in a significantly different assessment of the different reach of online marketplaces and online shops. In this respect, it should be borne in mind that the apps of online marketplaces are downloaded by users significantly more frequently than the apps of online shops.<sup>140</sup> One possible reason for this is that users are more inclined to download the app of an online marketplace with a mostly broad product range than the app of an online store with a product range limited to one or a

<sup>134</sup> [Not translated. Please see the German version.]

<sup>135</sup> [Not translated. Please see the German version.]

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<sup>139</sup> [Not translated. Please see the German version.]

<sup>140</sup> [Not translated. Please see the German version.]

few product categories, so as not to overload their end device with apps from different providers

- (129) Even taking into account an uncertainty due to the exclusion of visits via app accesses, an examination of the data from SimilarWeb shows on the one hand that the two large online marketplaces of Amazon and eBay, but also the online marketplace otto.de, achieve significantly higher visitor numbers via their German websites than the online shops. This even applies in relation to the visitor numbers of the largest online shops such as mediamarkt.de or lidl.de. On the other hand, it is striking that even the online marketplace real.de (today: kaufland.de), which was only launched in 2017 starting from an existing online shop <sup>141</sup>, already had visitor numbers at the end of 2020 that are comparable to those of the largest online shops mentioned there, such as mediamarkt.de or lidl.de. In addition, even "smaller" online marketplaces such as etsy.com or de.aliexpress.com can still be found among the 15 largest shopping websites in terms of sales and trade volume. A pro-rata calculation of visitor numbers compared to those of amazon.de<sup>142</sup> results in the following shares for the other 15 largest shopping websites:

Total number of website visits to the fifteen largest online shopping websites in Germany, December 2020 (in % of website visits to Amazon.de)	
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]

<sup>141</sup> [Not translated. Please see the German version.]

<sup>142</sup> [Not translated. Please see the German version.]



[...]	[...]
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*Table 11: [...]*

- (130) What is significant for the high reach of online marketplaces is that, with their broad range of goods, which regularly encompasses several product categories, and the options for comparing products and prices, including the provision of reviews of the products, they attract those customers who have not yet made up their minds about the product to be purchased and would like to make a choice. Seller-owned online shops cannot offer such a variety of products and the resulting selection options for end customers, if only because of the associated inventory and storage costs. Rather, their product range is predominantly - limited to products from one or a few product categories, similar to brick-and-mortar retail.
- (131) Sellers who operate on online marketplaces also benefit significantly from their marketing power beyond the use of their high reach. This applies above all to the increased trust that end customers place in online marketplaces. Trust is a key factor in online shopping, where sellers and buyers do not meet in person.<sup>143</sup> Online marketplaces offer end customers a shopping environment that is perceived as secure, among other things because the personal details for the selected payment method in the user account only have to be stored once with the online marketplace and not with many different online retailers. In addition, end customers can obtain information about the reliability of a seller from the seller ratings regularly provided on online marketplaces by other customers. Finally, online marketplaces also build up particular customer trust by establishing uniform and often stricter rules for handling customer complaints for the third-party sellers who operate with them and also offer their own mediation and arbitration services. Accordingly, according to a report in the trade press, 67% of customers trust a purchase made on an online marketplace they know, even if they do not know the marketplace Seller selling them the product.<sup>144</sup>
- (132) In addition, there is a high level of customer loyalty in online marketplaces for other reasons as well. Purchasing via online marketplaces is particularly attractive to end customers for various reasons. In addition to the usually broad product range and the larger product selection associated with it, consumers in this respect cite above all more favourable prices, more advantageous delivery conditions and an overall better shopping experience.<sup>145</sup> In particular, they can purchase products from various product categories "at a central point", i.e. via a single customer account, as part of so-called one-stop shopping. Moreover, if the online marketplace also offers logistics services, they receive just one package even when

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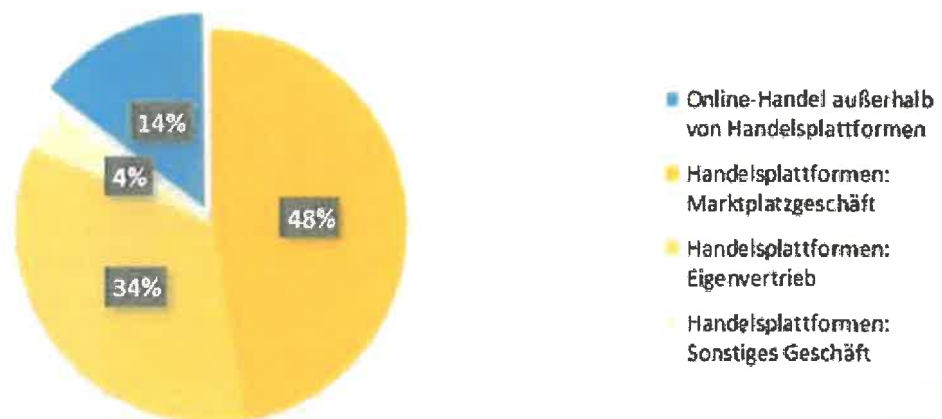
<sup>143</sup> [Not translated. Please see the German version.]

<sup>144</sup> [Not translated. Please see the German version.]

<sup>145</sup> [Not translated. Please see the German version.]

buying several products from different sellers - wherever possible. Overall, many consumers therefore now consider online marketplaces to be the most convenient shopping option and prefer this form of shopping to purchasing from a (pure) online shop.<sup>146</sup> This trend toward shopping on online marketplaces could even intensify in the future.<sup>147</sup> Sellers can therefore only reach these consumers if they are also present on online marketplaces. This is also demonstrated by the fact that - based on an estimate of EUR 72.8 billion<sup>148</sup> - around 86% of the total volume of online retail in Germany in 2020 will have been transacted via the 15 retail platforms or online marketplaces surveyed as part of the investigation (see Figure 3). Only around 14% of this sales volume was generated outside these platforms. Even taking into account certain uncertainties and a potential underestimation of the total volume of online retail, it can be stated that online retail platforms account for the overwhelming majority of online retail in Germany and therefore represent a fundamental sales channel for online retailers.

**Anteil der Handelsplattformen/ihrer Marktplätze am gesamten Umsatz im Onlinehandel 2020**



*Figure 3: Share of the surveyed retail platforms and their online marketplaces in total online retail sales in 2020, own calculation and presentation based on Evaluation Note Marketplaces of 25 January 2022, p. 25 ff. and HDE Online-Monitor 2021, p. 5.*

- (133) Other advantages of the services offered by online marketplace operators for sellers are the quick and easy entry into online sales and the simple processing of sales activities via the marketplace. Online marketplaces offer sellers a ready-made and immediately usable sales environment into which they can easily enter their products or product offerings via the IT tools provided. Payment processing and the handling of customer complaints are also

<sup>146</sup> [Not translated. Please see the German version.]

<sup>147</sup> [Not translated. Please see the German version.]

<sup>148</sup> [Not translated. Please see the German version.]

regularly carried out directly via the marketplace<sup>149</sup> and therefore do not have to be organized by the Seller himself. Instead, they can concentrate entirely on procuring goods and - unless the online marketplace also offers logistics services (as an option) - on storing and shipping the products. In addition, in the case of marketplace sales, the fees - apart from any listing fee - are generally incurred on a transaction basis and are therefore calculable for the Seller. This is not only advantageous in general for starting online sales, but also in particular for new products or products of still unknown brands, as the seller can test without risk whether and how these products can be marketed.

- (134) In contrast, the implementation of an own online shop can be more complex and lengthy, especially because of the necessary IT solutions for the purchasing and payment process. Furthermore, the seller must conclude its own agreements with payment service providers and, if necessary, with a hosting service provider, and arrange advertising measures to publicize the online shop. For further sales activities, they must - in addition to goods procurement and logistics - also take care of website maintenance and customer service. Setting up and operating their own online shop can therefore involve considerable effort and higher upfront financing costs for the seller, without them knowing whether the online shop will be so successful that these costs will be recouped. However, there are now IT infrastructure providers that offer sellers simplified and more affordable solutions for setting up an online shop. These include Shopify, which offers ready-made store systems that sellers can adapt to their individual sales concepts and link to payment, shipping and advertising solutions.<sup>150</sup> Even within the framework of such solutions, however, the seller - unless it already has a high profile due to sales via other sales channels - must first invest significantly in advertising in order to generate sufficient reach for its online shop and build up the necessary trust among its customers.
- (135) Due to these differences in the design of sales activities and the respective cost structure, sales via an online marketplace and sales via a seller's own online shop are different business models from the point of view of sellers. On the one hand, marketplace sales lead to a considerable simplification of online sales, plannable costs and a correspondingly lower entrepreneurial risk. On the other hand, the seller cannot build up its own customer relationships and accordingly has difficulty raising its own profile as a seller. In contrast, sales via an own online shop is usually more complex, more expensive and therefore associated with a higher entrepreneurial risk. However, the seller remains completely autonomous in commercial terms. This is because they continue to shape their customer

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<sup>149</sup> [Not translated. Please see the German version.]

<sup>150</sup> [Not translated. Please see the German version.]

relationships and their advertising themselves and are therefore more likely to build up their own customer base and become better known as a seller.

- (136) A key criterion for whether sellers sell via online marketplaces or their own online shop, or whether they use both forms of distribution in a complementary manner, is therefore whether and to what extent they are prepared to give up part of their entrepreneurial autonomy - namely the direct customer relationship - in the interests of simple and, in terms of costs, calculable Internet distribution with a high reach. Thus, distribution via online marketplaces will be particularly suitable for brick-and-mortar sellers without an online shop and for smaller or unknown sellers who cannot invest significantly in setting up an online shop or - if they do have an online shop - in advertising measures to increase its reach.<sup>151</sup> Distribution via their own online shop, on the other hand, is more likely to be considered for larger sellers who are already known to many end customers through other distribution channels and can invest more in online sales promotion measures.<sup>152</sup> Only for such sellers could the services of online marketplace operators be replaced by sales via their own online shop - possibly supplemented by online sales promotion measures to maintain customer reach. Other sellers will use their own online shop as a complement to marketplace sales at best.

**iii. No substitutability with other forms of distribution even in the case of supplementary measures of online sales promotion**

- (137) Even the (supplementary) use of online sales promotion measures does not make marketplace sales substitutable with other forms of sales, in particular sales via an undertaking's own online shop. Frequently used measures of online sales promotion are the use of product and price comparison engines, paid search engine advertising, advertising on social media platforms and search engine optimization. Through these measures, a seller can promote its product offerings to a large customer base and thus increase its awareness and the reach of its point of sale - in particular its own online shop, to which end customers can be directly redirected. The decisive difference to the use of online marketplaces, however, is that there is no direct purchasing option on the platform of the product and price comparison engine or the advertising service, but the purchase takes place in a sales outlet of the seller. The operation of an own point of sale, namely an own online shop, is therefore a prerequisite for these measures. For this reason alone, there is no functional substitutability between online sales promotion measures and online marketplace services from the seller's perspective.

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<sup>151</sup> [Not translated. Please see the German version.]

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- (138) The fact that online marketplace services cannot be replaced, or can only be replaced to a limited extent, by sales via a seller's own online shop from the seller's point of view cannot be changed by the use of supplementary online sales promotion measures combined with the operation of an online shop, with which a (certain) increase in reach could possibly be achieved. This is because the services offered as part of the aforementioned online sales promotion measures differ significantly from online marketplace services in terms of their mode of operation and in terms of the fee model. In detail:
- (139) **Product and price comparison engines** such as Google Shopping or Idealo are specialized search engines that allow consumers to search for products and compare them in terms of their product features and prices on the basis of various offers that sellers have posted in their online shops or on online marketplaces. To do this, they provide them with a list of results for the product search, which contains a summary overview of the relevant product offerings. Via the link provided, the consumer can go directly to the online shop or online marketplace where the purchase of the product can be made. However, the seller does not post the product offers directly on the platform, but rather provides the service provider with dynamic access to structured data about the products offered in its online shop in the form of so-called feeds, which also includes dynamically adjusted information about prices, product descriptions and available stock.<sup>153</sup> The product and price comparison engines are usually remunerated on the basis of a cost-per-click model. In contrast to the provision of marketplace services, for which the seller regularly pays sales fees only when a purchase transaction is concluded, fees are due for each click by the consumer on a product offer by the seller when using product and price comparison engines, regardless of whether the seller also successfully sells the product to the consumer.<sup>154</sup> The costs can therefore be significantly higher, so that product and price comparison engines are typically not used by smaller sellers, but primarily by larger sellers.<sup>155</sup>
- (140) In the case of **paid search engine advertising** (*keyword advertising*), such as Google Ads or Bing Ads, paid advertisements from website operators are played and displayed above the search results list on search engines depending on the entry of certain keywords in a user's search query.<sup>156</sup> If the end customer clicks on one of these ads, they are taken directly to the advertiser's website. The fees for paid search engine advertising are also calculated on a cost-per-click basis. The ads are placed by means of an auction process in which the advertiser

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<sup>153</sup> [Not translated. Please see the German version.]

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bids for certain keywords in order to display an ad on the search results page. Whether the ad is displayed depends, among other things, on the amount of the bid.<sup>157</sup> Consequently, the more bids are placed on a keyword, the more the cost-per-click fees increase and thus the total advertising costs of the undertaking that wins the bid. Particularly in the case of common keywords in search queries, considerable costs can therefore be incurred for an ad placement on a larger scale. In addition, keyword advertising means a high level of support for advertisers due to the ongoing need for optimization, which is incurred regardless of whether a transaction is successfully made with the forwarded visitor.<sup>158</sup>

- (141) **Social media advertising** is the content paid for advertising purposes within social media. They can be placed as text, images, or videos via specific functionalities of social media - in the so-called newsfeed, where the content and the information shared are listed according to relevance and chronologically, and as part of the "Stories" or "Status" or comparable functionalities - and receive immediate social resonance due to the social interaction of the users with each other and with the advertising or the brand. Again, the pricing method differs from the fee model applicable on online marketplaces. This is because the ads are allocated via auction systems, and the prices are predominantly calculated as a cost-per-thousand (CPT) or cost-per-mille (CPM) contact price, but also as a cost-per-click.
- (142) **Search engine optimization (SEO)** is intended to improve the ranking of a website in the search result lists of search engines such as Google or Bing, among others. It comprises so-called on-page measures, which concern the improvement of content, technology and structure of a website according to search engine criteria, and so-called off-page measures, which concern the increase of relevance outside of the own website - namely link building. With SEO, positive effects for the sales success of an online shop can usually not be achieved directly, but - if at all - only after a considerable period of time. The cost and time associated with SEO varies on the one hand according to which products and brands a seller offers in his online shop, and on the other hand, according to whether the seller carries out the SEO itself despite high time expenditure or whether he transfers it to a service provider and possibly accepts high costs.<sup>159</sup>

iv. **No substitutability with other distribution channels in the case of supplementary sales links to social media platforms**

- (143) For some time now, sellers have had the option of setting up so-called stores on social media

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<sup>157</sup> [Not translated. Please see the German version.]

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platforms, through which they can reach platform users with their product offers and thus a large number of potential customers. Namely, Meta Platforms Inc. (hereinafter "Meta") has been increasingly offering corresponding services for professional sellers via its social networks Facebook and Instagram with "Shops" since 2020.<sup>160</sup>

- (144) The use of stores via Facebook<sup>161</sup>, which has been possible in Germany since May 2020, requires that the seller maintains a business page (Business Page) on Facebook as administrator and creates a so-called store for it, i.e. a list of products or product collections. Users visiting the seller's Facebook business page can click on a "View Shop" button to view products, add items to their shopping cart and purchase them directly on a Facebook checkout page. Where a Shop tab is available, they can also search for products and vendors through it.<sup>162</sup> Sellers can use WhatsApp and Facebook Messenger to communicate with customers. Payment, where available, can be made via Facebook Pay or Shop Pay from Shopify.<sup>163</sup> Setting up a store is free of charge for businesses. Unlike in the U.S., where this option has been available since spring 2019, Meta does not currently offer an integrated check-out in Germany, which could be used to complete a purchase directly on the platform.<sup>164</sup> Instead, the user is redirected to the external online shop of the respective seller. However, the online shop can be displayed in the Facebook app via an in-app browser so that users do not have to leave the app during the entire purchase process.<sup>165</sup>
- (145) Access to stores via Instagram was launched in Germany at the end of 2020<sup>166</sup>, but essentially uses the same design, layout and technology. In the Facebook Commerce Manager settings, the Facebook and Instagram business pages can be linked and the store activated in the Instagram business profile.<sup>167</sup> After that, users can enter the store via the "Show Shop" button (also) on Instagram. In addition, it is possible to promote the products directly to Instagram users via posts, Stories, on the app's Discover tab, and on a special "Shop" tab. Instagram Direct Messenger can also be used for communication here.<sup>168</sup> Setting up access to stores via Instagram is also free for sellers. Check-out is not yet possible on Instagram in Germany, but the user is directed to the seller's external online shop via an in-

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<sup>160</sup> [Not translated. Please see the German version.]  
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<sup>168</sup> [Not translated. Please see the German version.]

app browser for payment.<sup>169</sup>

- (146) As part of the overall offering in the shopping area, Instagram continues to include, among other things, the Instagram shopping function already introduced in Germany in March 2018, which enables sellers to link products in their organic content to their external online shop via a marker with a shopping bag symbol and a price tag (so-called shoppable posts).<sup>170</sup> When users tap on these posts, they can find out more about the products and - if they want to buy them - are redirected to the seller's online shop via an in-app browser.<sup>171</sup>
- (147) The purchasing options currently available in Germany via social media therefore do not allow a purchase to be concluded directly on the platform, but require the seller to have an external online shop in which the purchase is concluded. It is therefore - at least for the time being - a sales connection to social media platforms and not a sale via social media platforms. Just like the use of product and price comparison sites or paid advertising, the use of stores on Facebook or Instagram thus represents sales promotion measures aimed at increasing sales via the undertaking's own online shop, according to the current status. In this respect, the services offered by Meta therefore (still) differ significantly from the services offered by online marketplace operators. Functional substitutability is therefore ruled out from the - perspective of the sellers for this reason alone.
- (148) Even if there was an integrated check-out function enabling payment directly on the respective social media platform, this is at least currently a service for setting up one's own online shop on another platform and not a marketplace service. This is because it must be taken into account that, unlike online marketplaces, social media platforms as currently designed offer users - if at all - fewer very general search functions via which (all) products from the various stores are comprehensively linked. Rather, the comparison and selection options of the user who directly visits a store via Facebook or Instagram are limited to the products contained in the respective product catalogue. Other sellers offering comparable products do not have the opportunity here to direct a user whose buying interest has been aroused to their store and to their product offerings. In addition, although the user may in principle have had a function available on both Facebook<sup>172</sup> and Instagram<sup>173</sup> since the end of 2020 in the form of the so-called Shop Tab, this function enables a product search that goes beyond the products contained in the product catalogue of an individual store.<sup>174</sup> The

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<sup>169</sup> [Not translated. Please see the German version.]

<sup>170</sup> [Not translated. Please see the German version.]

<sup>171</sup> [Not translated. Please see the German version.]

<sup>172</sup> [Not translated. Please see the German version.]

<sup>173</sup> [Not translated. Please see the German version.]

<sup>174</sup> [Not translated. Please see the German version.]



store tab, which includes a field for entering search terms, can be accessed via the shopping icon or the Discover tab, for example. In response to a search query, however, users are shown product recommendations specifically tailored to them, based on the respective accounts they follow and additionally based on the general target group of the undertaking in question.<sup>175</sup> In contrast to online marketplaces, therefore, this is not a comprehensive search function that basically shows all available products in the search results list that match the search criteria, but rather a search option that is individually concretized on the basis of user behaviour.

- (149) These different search functions reflect the divergent shopping behaviour of customers on online marketplaces on the one hand and users of social media platforms on the other. Customers on online marketplaces are usually interested in buying from the outset and have a more or less concrete idea of the product they are looking for. Using the general search function in conjunction with more extensive filter options, they can obtain an overview of all the products available on the online marketplace that match their search criteria and compare them in terms of their features and prices. An end customer who is interested in these marketplace-specific search and comparison options expects and finds the broadest possible product selection on online marketplaces. On social media platforms, at least for the time being, users are more likely to become aware of products or brands (spontaneously) and be inspired to make an (impulse) purchase through the seller's social media content or through social interaction with other users on the platform. When searching for products in a shopping function, they also expect such product offers that correspond to their "virtual identity", which they have created by creating a personal profile and by creating a friends list, and that correspond to their exchange with other users on the platform. The design of the shopping options on social media platforms is intended to channel the user's consideration and decision-making process with regard to products that have attracted his attention on the basis of the undertaking's profile or interaction with other users, or that could be of interest to him because of his other user behaviour, in such a way that it leads to a purchase.
- (150) Against this backdrop, it is initially important for sellers who want to sell via social media platforms to draw the attention of users to their product offerings through advertising on social media platforms that is as targeted as possible. Social media platforms offer various specific opportunities for this, particularly via the activity of influencers, but also, for example, on Meta via forms of advertising such as Facebook or Instagram Ads, and can

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<sup>175</sup> [Not translated. Please see the German version.]

ensure precise definition and addressing of the target groups relevant on the platform due to the data they accumulated on the social interaction of their users. Sellers must therefore operate social media advertising in order to reach "their" customers on the platform. In addition, it is important for sellers who want to sell via social media platforms (following the introduction of an integrated check-out function) to maintain the attention that has been generated among users with regard to their product offerings, to provide communicative support for their decision-making process, and to respond to inquiries about the product quickly and as individually as possible. In this respect, it is significant that sellers selling via stores on Facebook or Instagram have the opportunity to communicate directly with users via the platform's own communication services WhatsApp, Facebook Messenger and Instagram Direct Messenger. In contrast to sales via online marketplaces, where communication with end customers is usually handled by the marketplace operator and sellers essentially focus on procuring goods and, if necessary, shipping them, when selling via Facebook or Instagram they also have to devote considerable resources to customer communication, especially communicative support for the purchasing process. This distinguishes the currently existing options for linking sales to social media - despite the store tab even when accessing stores via Facebook and Instagram - from sales via online marketplaces even after the introduction of an integrated check-out function.

- (151) Even if this cannot be conclusively decided in the present case, in the opinion of the Bundeskartellamt, there are therefore indications that even after the introduction of an integrated check-out function on the Facebook and Instagram platforms, the sales formats there will, at least for the time being, be at best a limited substitution option for online marketplace services from the perspective of the sellers and will tend to be used by them in a complementary manner. This is because sales via social media platforms do reach a large user group, at least in the form in which they have been offered to date. However, it is a specific "shopping community" to which a certain range of products is displayed - namely product offers tailored to the "virtual identity" of the respective users. By contrast, sales via online marketplaces - taking into account the product range offered in each case - can in principle reach all potential end customers with regard to (almost) all shopping needs. However, the competitive pressure that could emanate from social media platforms as potential competitors, in particular due to the high user numbers and the resulting reach on the market side of the end customers for online marketplaces, is taken into account in the assessment of Amazon's market position.

**(cc) No supply-side substitutability**

(152) Even taking into account the criterion of supply-side substitutability, no broader product market emerges. In particular, contrary to the view of Amazon<sup>176</sup>, no uniform product market can be assumed that encompasses all forms of retail sales as ways of reaching customers and that also includes services provided by product and price comparison engines. From the perspective of the operators of product and price comparison engines or the operators of online shops, a switch to offering online marketplace services is only possible to a limited extent and not within a reasonable time.

**i. Operation of an online shop**

(153) Supply-side substitutability from the operation of an online shop towards an online marketplace can be considered in principle. For example, otto.de, Zalando and Galeria Karstadt Kaufhof have evolved from online shops to closed online marketplaces and, in some cases, (further) to open online marketplaces (otto.de, kaufland.de<sup>177</sup>). In each case, these were large online shops that were already very well known and had a broad customer base, so their marketplace offering for third-party sellers can help increase their reach. In addition, such a conversion requires time, especially for setting up the IT structure and onboarding the sellers, as well as not inconsiderable financial and human resources. Such a conversion is therefore not possible within a reasonable period of time, so that this conversion option does not exert sufficient competitive pressure on the operators of online marketplaces.

(154) From the point of view of supply-side substitutability, a broader product market that also includes online shops therefore cannot be justified. Corresponding conversion options are not available or are only available to a very limited extent.

**ii. Operation of a product and price comparison engine**

(155) As already explained above (see para. (139)), the services provided by marketplace operators and those provided by operators of product and price comparison engines differ considerably in terms of their functionalities. While online marketplace operators enable the placement of product offers by sellers directly on their platform, sellers using a product and price comparison engine must continuously transmit so-called feeds with updated information on their product offers to the platform so that the operator can include the offers in the search

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<sup>176</sup> [Not translated. Please see the German version.]

<sup>177</sup> [Not translated. Please see the German version.]

results list for corresponding search queries and forward the user to the sellers' online shops.<sup>178</sup> On the part of the providers of product and price comparison engines, this requires not only the establishment and maintenance of a specific data infrastructure but also, in particular, appropriately structured contractual relationships with the online sellers transmitting the data, which the operators of online marketplaces do not have. Whether, in view of these different functionalities and the resulting need for conversion, a (complete) conversion from the operation of a product and price comparison engine to the operation of an online marketplace can be considered also seems questionable.

- (156) However, the product and price comparison engine Idealo introduced a direct purchase function for sellers on its [www.idealo.de](http://www.idealo.de) platform in 2015. When sellers list their product offers for direct purchase, they are automatically sorted into the price comparison offer page.<sup>179</sup> A seller's direct purchase offer on the Idealo platform is therefore not only in direct competition with other direct purchase offers, but also with all products listed for product and price comparison.<sup>180</sup> The "To buy" button indicates that the offer is a direct purchase offer. Consumers can buy the products marked in this way directly on the platform of the product and price comparison engine without having to leave it.<sup>181</sup> However, the direct purchase function is only offered to sellers as an optional additional contractual service for a very small proportion of the product offers that can be posted in total for a product and price comparison.<sup>182</sup> This very limited offer only for certain sellers and products thus does not fundamentally change the service offering and the design as a product and comparison service.<sup>183</sup>
- (157) Also Alphabet Inc. (hereinafter: "Google") has additionally offered the function "Buy on Google" (originally "Google Shopping Actions") within the scope of the product and price comparison engine "Google Shopping" since 2018, which enables sellers to sell products directly via the platform. Whereas consumers can only compare offers on the platform via the product and price comparison engine and are then redirected to the seller's external online shop to purchase a product, with "Buy on Google" the entire online purchase, from product search to payment, takes place via a so-called check-out function on the platform. Product orders placed via "Buy on Google" are also covered by a special Google guarantee. The product offers that can be purchased via "Buy on Google" are also displayed to the consumer

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<sup>178</sup> [Not translated. Please see the German version.]

<sup>179</sup> [Not translated. Please see the German version.]

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<sup>182</sup> [Not translated. Please see the German version.]

<sup>183</sup> [Not translated. Please see the German version.]

together with the product offers that are only posted for product and price comparison, so that sellers using "Buy on Google" are subject to stronger competition in this respect than would be the case on an online marketplace. However, according to industry reports, neither the introduction of Buy on Google (as a paid offering for sellers) nor the subsequent provision of this feature free of charge has led to Google being perceived by sellers or users as a genuine online marketplace.<sup>184</sup> Moreover, Buy on Google was initially only offered in the U.S. and France anyway, and the offer in France has already been discontinued as of 7 December 2021.<sup>185</sup> Here, too, it can be seen that the conversion of a product and price comparison engine to a supplementary offering of online marketplace services is only possible to a limited extent.

**(dd) Result**

- (158) Consequently, the market for the provision of online marketplace services for professional sellers is to be taken as the relevant product market. In this respect, both open and closed online marketplaces are covered which offer consumer goods which - after the sales contract has been concluded directly via the platform – can be shipped (physical goods) or transmitted (digital content) by the seller or the marketplace operator to the end customer. Whether "vertical" marketplaces, which only offer products from one product category, or only "horizontal" marketplaces, which offer products from several product categories, belong to the relevant product market can, however, be left open. Even if a broader market is assumed in favour of Amazon, which includes both "vertical" and "horizontal" marketplaces, the assessment of Amazon's market position does not change.
- (159) In view of the lack of functional substitutability, even a hypothetical monopolist test (or SSNIP test: small but significant non-transitory increase in price) - as, however, carried out and submitted by Amazon<sup>186</sup> - is fundamentally not capable of justifying a contrary result - i.e. a broader market.<sup>187</sup> Notwithstanding this, the informative value of an SSNIP test is limited in the present case. This is because it is difficult for this test to capture the feedback effects resulting from network effects in the case of multi-sided markets. In contrast to the "classic" application of an SSNIP test, in which consumers can decide directly about shifting their demand to other channels, (hypothetically queried) shifts in sales by online sellers are only of limited significance in this respect, as they presuppose a corresponding willingness to switch on the part of end customers. However, these customers are likely to remain in the

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<sup>184</sup> [Not translated. Please see the German version.]

<sup>185</sup> [Not translated. Please see the German version.]

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marketplace as long as the product selection and price level do not change significantly. This is because the end customers' loyalty is typically to the marketplace and not to the third-party seller potentially changing the sales channel precisely to the extent that the advantage of using the marketplace for end customers is that they are referred to offers from previously unknown sellers. In addition, particularly on larger online marketplaces, high-turnover items are often offered by several sellers and possibly the marketplace operator's own online retail business at comparable prices and delivery conditions. The product selection available to end customers therefore does not generally deteriorate if a single seller changes its product range or shifts to other sales channels.<sup>188</sup>

## **(2) Geographic market definition**

- (160) The geographic market definition pursues the same purpose as the determination of the relevant product market and, in accordance with the demand market concept, is also to be carried out according to the criterion of the exchange possibilities from the point of view of the relevant market counterparty. The relevant geographic market thus comprises the area in which the relevant products or services are regularly offered and in demand, in which the competitive conditions are sufficiently homogeneous and which differs from neighbouring areas in that the competitive conditions are appreciably different. Due to the separate consideration of the respective sides of the market, and in this case specifically the side of the market of the sellers, the possibilities of the sellers to avoid the market are decisive here. Suitable points of reference for determining the relevant geographic market in this case are the economic focus of the online marketplace, the presence in the area and the consumer habits, which also determine the demand of the sellers vis-à-vis the marketplace operators.
- (161) Accordingly, the relevant product market for the provision of online marketplace services for professional sellers is to be defined nationally in geographic terms. Even if operators of online marketplaces can also enable and facilitate cross-border sales between sellers and end customers with their range of services, the focus of their service provision is predominantly on the mediation of transactions (including the provision of related services) in the country in which the respective marketplace is operated. Since consumers primarily shop at online marketplaces that are operated in their own country - in this case Germany<sup>189</sup> - the range of services offered by online marketplaces is targeted accordingly to these consumers. This has an impact on demand from sellers, who can therefore reach German end customers with their

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<sup>188</sup> [Not translated. Please see the German version.]

<sup>189</sup> [Not translated. Please see the German version.]

product range primarily via German online marketplaces.

- (162) This is supported by the fact that, in addition to Amazon, nine of the 15 online marketplaces surveyed in Germany operate their marketplaces under a domain with the German country code ".de".<sup>190</sup> These also include the five "big" online marketplaces<sup>191</sup>, which in 2020 account for around 98% of the total trade volume generated with sellers and around 96% of the trade volume generated with third-party sellers in the online marketplaces surveyed.<sup>192</sup> As one of these five online marketplaces, Amazon offers additional language versions in English, Dutch, Polish, Turkish and Czech for its marketplace operated under amazon.de, but these are only intended to make it more convenient for end customers to use the online marketplace by allowing them to select their "preferred language".<sup>193</sup>
- (163) With the exception of Amazon, all other "major" online marketplaces also operate an online marketplace under the Austrian country code ".at" and eBay and Zalando also operate another online marketplace under the Swiss country code ".ch". These companies thus address end customers located in Austria and in some cases also in Switzerland via a separate online marketplace, each of which is operated under a country-specific domain. If (German-speaking) end customers from these other German-speaking countries wish to make purchases via an Amazon marketplace, on the other hand, the German language version of the offer is available to them at amazon.de. This offer is nevertheless originally aimed at end customers in Germany. This follows in particular from the fact that the prices quoted include German sales tax<sup>194</sup> and the delivery options and delivery times available for shipping in Germany are displayed. Although the latter can be adjusted for certain countries if a different country is selected in the top navigation bar using the function "Hello - Select delivery address". However, product prices are still calculated taking into account German VAT and thus vary depending on the country selected for delivery. For end customers in Austria and even more for end customers in Switzerland, the product range under amazon.de is therefore - as shown below - significantly different.
- (164) End customers in Austria can access the product range of the Amazon marketplace operated under amazon.de under the country-specific domain amazon.at. In this regard, however, the section "Help and Customer Service" under "Information for our customers in Austria" states: *"On the portal site Amazon.at you will find the same product range as on Amazon.de,*

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<sup>190</sup> [Not translated. Please see the German version.]

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*with some exceptions as indicated in the delivery restrictions. In addition, we provide information on certain topics, promotions and offers. Amazon.at is not an independent website. It is a version of the Amazon.de website localized for Austria.*<sup>195</sup> It is therefore - with regard to the availability of products as well as the sales tax used as a basis for calculating prices - an offer adapted for Austria. In order to be able to see such "pages specific to Austria", end customers in Austria are advised by Amazon in these instructions to activate cookies in their browser. With regard to the display of prices with the sales tax applicable in Austria, it is explained that end customers in Austria must register for this during the order process and provide a delivery address in Austria. Otherwise, the prices shown always include the German sales tax. Finally, it is also pointed out that not all products offered can be delivered to Austria, but that there may be restrictions in this respect.<sup>196</sup>

- (165) End customers in Switzerland can also make purchases via the online marketplace operated under amazon.de. However, they too are first shown the delivery options and delivery speeds applicable for delivery within Germany and the prices calculated on the basis of German sales tax. In addition, import fees are incurred for deliveries to Switzerland due to the applicable customs regulations. These are also not initially shown for the respective products under amazon.de. In addition, since 1 January 2019, foreign online sellers in Switzerland have been subject to the obligation to pay import sales tax even for small shipments if they generate more than 100,000 francs in sales per year. Every foreign seller must therefore make appropriate arrangements to comply with this obligation if they want to sell their goods to customers in Switzerland.<sup>197</sup> However, the majority of third-party sellers have not done so, with the result that many of the products offered on amazon.de are not available to end customers in Switzerland.
- (166) However, in October 2020, Amazon initiated an expansion of its product offering in Switzerland by now offering third-party sellers the FBA program in Switzerland as well. Since Amazon takes care of customs clearance as well as import sales tax, they can more easily sell to end customers in Switzerland.<sup>198</sup> Regardless of how many FBA sellers take advantage of this option for simplified sales to Switzerland, however, it can be assumed that the offer available to end customers in Switzerland via the online marketplace at amazon.de will continue to differ significantly from that available to end customers in Germany. Just as

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for end customers in Austria, therefore, only a "localized version" of the marketplace operated under amazon.de is provided for end customers in Switzerland.

- (167) The focus of the online marketplaces operated under a German domain on end customers located in Germany is also reflected in the fact that the share of active user accounts<sup>199</sup> of customers located abroad (hereinafter also referred to as "foreign user accounts") existing in the fourth quarter of 2020 at these marketplaces - with the exception of Amazon's marketplace - is below 10%.<sup>200</sup> With regard to the higher share of foreign user accounts of [...] % on the marketplace operated under amazon.de, however, it must be considered, taking into account the assessment above, that these will primarily be user accounts of end customers in Austria, but also in Switzerland, to whom only a "localized version" and not the original marketplace offer is available. Notwithstanding this, however, even this higher proportion of the Amazon marketplace is not sufficient to establish that the range of services offered by online marketplaces operating in Germany is also geared towards mediating transactions with end customers located outside Germany. In view of the fact that [...] % of the user accounts were created by end customers in Germany, it must rather be assumed with regard to the online marketplace operated under amazon.de that it is also focused on mediating transactions with customers from this territory.
- (168) Of the online marketplaces that operate in Germany under a domain that is not country-specific - namely a domain ending in ".com" - some of them reported a very high proportion of foreign user accounts of over 90%.<sup>201</sup> For these online marketplaces, which operate their marketplaces in different languages but under a single domain, it is hardly possible, if at all, to calculate the proportion of foreign user accounts in relation to the language version used in each case. The data is therefore not meaningful for the question relevant here. Ultimately, online marketplaces that operate under a uniform, non-country-specific domain and merely provide customers in the individual countries with different language versions of their marketplace presence are not significant in terms of market conditions, given their low share of the total trade volume generated by sales through third-party sellers of less than 5%.<sup>202</sup>
- (169) The focus of the mediation activities of online marketplaces on Germany is further evidenced by the determination of the shipping areas for or by the sellers. The shipping areas of online marketplaces operating under the country code ".de" are generally national, i.e., goods purchased via these platforms are predominantly shipped within Germany. Thus, for four of

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the marketplace operators surveyed by the Bundeskartellamt, it was stated that customers not resident in Germany could not purchase products via the marketplace operated under the German country code. Two other marketplace operators stated that customers located abroad could purchase from the marketplace with the country code ".de", but that the goods were only or predominantly shipped within Germany.<sup>203</sup> Consequently, the trade volume of these online marketplaces in 2020 was generated entirely by purchase transactions conducted within Germany.<sup>204</sup>

- (170) On the other online marketplaces that provided information in this regard as part of the survey, the share of the trade volume generated with cross-border sales<sup>205</sup> was also 8% on average in 2020. Amazon reported the highest share at [...] % for the online marketplace operated under amazon.de.<sup>206</sup> Here, too, however, the focus of activity is on mediating transactions in Germany. Moreover, it also follows from the "Amazon Services Europe Business Solutions Agreement" (hereinafter: "BSA"), which third-party sellers conclude prior to commencing their sales activities on an Amazon marketplace, that Germany is generally the relevant sales territory for the online marketplace operated under amazon.de. According to the definitions of the BSA, the term "German Amazon Website" means the website whose homepage is displayed under the URL www.amazon.de, and the fee term "Country of the Amazon Website" for this German Amazon Website means Germany.<sup>207</sup>
- (171) Even though third-party sellers registered on an Amazon European marketplace website have for some time now automatically had a European seller account with which they can also sell on all other Amazon European marketplace websites under the same terms and conditions, they must still observe "the seller rules for the countries" in which they sell, as well as "the tax and legal requirements of the respective country", according to Amazon's notices in this regard in Seller Central.<sup>208</sup> Sellers can or must therefore deactivate countries to which they cannot or do not wish to sell in their account settings. With the product range they have posted on the respective country-specific marketplace websites, sellers consequently continue to address primarily the end customers in the areas corresponding to the country code to which the goods are also shipped in the event of a purchase.
- (172) Against this backdrop of the largely homogeneous geographic orientation of the intermediation activities of online marketplaces with regard to end customers of a specific

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country, it can be assumed that this is also demand-defining from the perspective of the sellers on the demand side in geographic terms and that this demand related to German end customers is not substitutable with the mediation activities of online marketplaces with regard to end customers of another country. Accordingly, it is not relevant for the geographic market definition whether the sellers that are active on an online marketplace operating under a domain with a specific country code are located in the country in question or in another country. Rather, it is solely a matter of the fact that they demand the intermediary activities of German marketplaces in order to be able to reach end customers in Germany with their product range. From a geographic point of view, the market must therefore be defined on a national basis.

### **(3) Result of the market definition**

(173) For the further examination, the relevant market is therefore to be taken as the German market for the provision of online marketplace services for professional sellers.

#### **bb) Dominant position of Amazon**

(174) Amazon is dominant on the national market for the provision of online marketplace services for professional sellers pursuant to section 18(1) GWB. The dominant position results from the overall consideration of the criteria contributing to market power pursuant to Sec. 18(3), (3a) and (3b) GWB, which are neither exhaustive nor do they all have to be present cumulatively.<sup>209</sup> According to these factors, Amazon has margin to manoeuvre in this market which is not sufficiently controlled by competition and which enables the undertaking to behave independently of its competitors and the other side of the market.

(175) Even taking into account the entire competitive environment surveyed (see (1) above), the German Amazon marketplace is by far the largest online marketplace in Germany, with a market share of over [60-70 %] or over [70-80 %], depending on how it is calculated (Sec. 18(3) no. 1 GWB, see (2)). Amazon's strong market position is attributable to indirect network effects (Sec. 18(3a) no. 1 GWB) and related economies of scale (Sec. 18(3a) no. 3 GWB, see (3)), to the high level of customer loyalty on the retail side, which is further strengthened by the Prime customer program, and thus to insufficient multi-homing (Sec. 18(3a) no. 2 GWB, see (4)), to access to competition-relevant data (Sec. 18(3) No. 3, (3a) no. 4 GWB, see (5)) and to insufficient innovation-driven competitive pressure (Sec. 18(3a) No. 5 GWB, see (6)), as well as to other market power factors (in this regard (7) to (10)).

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**(1) Competitive environment**

(176) In addition to the German Amazon marketplace, there are other online marketplaces in Germany which, according to the results of the investigations in the course of which 15 operators of German online marketplaces (including Amazon) were interviewed,<sup>210</sup> differ in part, however, with regard to their business model (see (a)), their product range and the type of product presentation (see (b)) as well as their range of services for sellers (see (c)). In detail, these are as follows:

**(a) Business models**

(177) First, there are differences with regard to the design of the platforms. Some operators are also active as sellers themselves under the (country-specific) domain under which they operate the marketplace and sell products directly to end customers. They thus operate a hybrid retail platform comprising both the online marketplace and their own online shop. In addition to Amazon, this includes a further seven of the online marketplaces surveyed (including Otto, Zalando, Kaufland,<sup>211</sup> Galeria Karstadt Kaufhof,<sup>212</sup> AliExpress, Fairmondo and Sugartrends).<sup>213</sup> In contrast, the platforms of other operators are designed as pure online marketplaces, i.e. the operator itself does not operate as a Seller on the platform. This applies to seven of the online marketplaces surveyed (eBay<sup>214</sup>, Idealo, Etsy, Depop, Hood, Lenando, Yatego).<sup>215</sup> Idealo does not operate as a seller itself, but takes a special role with regard to the design of its platform. This is because the domain, under which marketplace services are also provided to a small extent, is primarily used to offer a product and price comparison service and the option of purchasing directly on the platform is only offered as an additional service for interested sellers.<sup>216</sup>

(178) In addition, online marketplaces are designed to be partly "open" and partly "closed".<sup>217</sup> On so-called open marketplaces, sellers can register and, in principle, offer all their products for sale, provided they meet rather general admission criteria. For products offered by several sellers, the end customer is generally presented with several offers from which they can choose. The "competition between sellers for the product" therefore takes place directly on the online marketplace in a way that is recognizable to the end customer. On a so-called

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closed marketplace, on the other hand, the end customer is generally only shown one product offer, even for products offered by several sellers. The decision as to which product is shown is made by the operator of the online marketplace and takes place as part of an upstream ranking and selection process. The process for approving sellers is therefore more complex, as the marketplace operator must decide which products and which seller are approved for which products. According to the findings, besides Amazon, nine of the online marketplaces surveyed have an open model (Idealo, eBay, Kaufland, Etsy, Depop, Fairmondo, Hood, Lenando and Yatego). Five operators stated that they practice a closed model (Otto, Zalando, Galeria Karstadt Kaufhof, ASOS and Sugartrends)<sup>218</sup> With regard to Otto, however, it should be taken into account that the previously closed marketplace has been successively transformed into an open marketplace for around two years and that for part of the product range there is already "competition among sellers for the product" directly on the online marketplace.<sup>219</sup>

**(b) Product ranges and product presentation**

- (179) Only online marketplaces or hybrid retail platforms that - like the Amazon marketplace - offer products from several product categories were surveyed as part of the investigations.<sup>220</sup> Nevertheless, there are differences in terms of the breadth and focus of their product ranges. Some online marketplaces and also the Amazon marketplace offer almost all or at least all major product categories in the consumer goods sector. These include Otto, eBay and Galeria Karstadt Kaufhof (hereinafter also referred to as "Galeria"). In contrast, other online marketplaces have a specific focus or only offer certain product categories. For example, Zalando essentially offers products from the fashion sector - in particular shoes and clothing.<sup>221</sup> The range on the Etsy marketplace is primarily focused on handmade products, vintage and artists' supplies.<sup>222</sup>
- (180) The type of product presentation also differs. Apart from Amazon, six other of the online marketplaces surveyed present the products on offer on uniform product pages which, in addition to the necessary product information, contain all seller offers in the case of an open marketplace model and the offer identified by the operator as part of the ranking and selection process in the case of a closed marketplace model. In the other online marketplaces,

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on the other hand, sellers can create individual product pages for their own product offering and sell via these.<sup>223</sup>

**(c) Service offerings for sellers**

- (181) The other services offered to sellers in addition to the intermediation services of online marketplaces also differ in some cases. By default, most of the online marketplaces surveyed - like Amazon - offer IT tools for product presentation, payment processing options and complaints management, and some also offer returns processing. Individual online marketplaces - including Amazon - optionally offer comprehensive logistics services, i.e. storage, packaging and shipping. Advertising services are also offered by the majority of online marketplaces - but mostly as an option.<sup>224</sup>

**(2) Market structure and market shares (Sec. 18(3) no. 1 GWB)**

- (182) Amazon's high market share is the first indication that it holds a dominant position on the national market for the provision of online marketplace services. Irrespective of whether the calculation of the market share is based on the fees collected by the operators of online marketplaces (fees and commissions) or on the sales volume generated by third-party sellers via the online marketplace, the result is - depending on the method of calculation - a market share of over [60-70 %] or over [70-80 %]. The threshold for the presumption of market dominance under Sec. 18(4) of the GWB is therefore clearly exceeded. In addition, the market share gaps to the following competitors are considerable. Many competitors have market shares of less than 5%.
- (183) In platform markets, high market shares do not necessarily imply market power. However, they do represent a suitable starting point for the competitive assessment of market conditions. The significance of market share is not only derived from its absolute size, but also from the distance to competitors and the distribution of market shares, as well as from the development of market shares over time.<sup>225</sup> In the case of platform markets, high market shares or a substantial market share lead can be an expression of a tipping process or indicate a competitive advantage of the marketplace that cannot be recovered.
- (184) The market share of a marketplace can be calculated on the basis of various key parameters, each of which highlights different aspects of the marketplace's market power. Compared to other platforms and their respective services, it is possible in the case of online marketplaces

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to allocate the revenue from transactions to the specific marketplace services. First of all, therefore, the revenue generated from the provision of services, i.e. the respective fees (charges and commissions), can be taken into account. In addition, the value-based share of the transaction or trade volume realized overall via online marketplaces provides a good estimate of the importance of an online marketplace in relation to its competitors. User-based indicators such as the number of visitors, users on the end customer side and third-party sellers active on the marketplaces are less suitable for calculating market shares. This is because the number of users alone does not allow conclusions to be drawn about the intensity of the respective marketplace usage, i.e. the actual buying behaviour of end customers or selling behaviour of third-party sellers. In principle, end customers and third-party sellers could also use several online marketplaces at the same time, but with different intensities. Nevertheless, these figures are also important indicators of the market position of an online marketplace. Above all, the number of monthly active users and active user accounts show how intensively it is used by end customers and demonstrate its reach.

- (185) On this basis, Amazon's market shares are calculated below under (aa) on the basis of revenue from the provision of online marketplace services (fees, i.e., charges and commissions) and under (bb) on the basis of the trade volume generated by third-party sellers on the online marketplace - i.e., revenue from purchase transactions. Both calculation methods result in a very high market share of Amazon of over [60-70 %] and over [70-80 %], respectively. In addition, (cc) consider user-based metrics to assess Amazon's market position. These key figures also speak very clearly in favour of a dominant market position for Amazon.
- (186) The market volume used to calculate the market shares both on the basis of the revenue for the provision of services and on the basis of the trade volumes transacted by third-party sellers was in each case the sum of the revenue or the sum of the trade volumes of the online marketplaces surveyed as part of the investigations. These figures underestimate the actual market volume in each case - as Amazon also claims<sup>226</sup> - because no full survey was conducted. However, the online marketplaces excluded from the survey are predominantly small online marketplaces that can be assumed to generate only very minor sales compared to Amazon, but also compared to eBay, Otto or Zalando. Furthermore, the survey did not include larger online shops such as Mediamarkt<sup>227</sup>, which have only recently allowed sales by third-party sellers on their internet presence. In this respect, the development at Otto and at Galeria, two very large and well-known online shops which have started to set up a

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<sup>226</sup> [Not translated. Please see the German version.]

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marketplace, shows that the conversion takes considerable time and that initially rather low sales are achieved.

- (187) As explained above (see para. (132)), the total trade volumes, i.e. the sum of the sales generated by all purchase transactions, of the 15 retail platforms or online marketplaces surveyed in the course of the investigations accounted for around 86% of total German online retail sales in 2020, measured against the total sales of online retail in Germany estimated by the HDE. Only 14% was thus generated outside the surveyed retail platforms. A considerable proportion of this is again not attributable to retail platforms, but primarily to large online shops (as such not belonging to the relevant market) such as Saturn and Lidl, which generate significant online sales.<sup>228</sup> On this basis, it can be assumed that other online marketplaces - which were not surveyed in the course of the investigation - generate only low e-commerce revenue and that the operators generate correspondingly low revenue from the provision of marketplace services. Taking into account the sales and trade volumes of all online marketplaces operating in Germany or a safety margin on the market volume determined would only minimally shift Amazon's market share.<sup>229</sup>

**(a) Revenue from the provision of online marketplace services**

- (188) If revenue from the provision of online marketplace services is used as the basis for calculating market shares, and if **only the fees paid for the intermediary service by third-party sellers** (basic fee and/or sales commissions) are taken into account in this respect, Amazon's market share was over [70-80 %] in both 2019 and 2020. eBay follows as the next competitor with a market share of [10-20] % in both years. The market shares of the other online marketplaces surveyed in the course of the investigations are - in some cases significantly - below 5 %.<sup>230</sup>
- (189) The exclusive consideration of the fees paid for the intermediary service is supported by the fact that these have to be paid by the sellers in order to be able to offer and sell products on an online marketplace. Marketplace services include sales services which sellers have to use in order to sell their goods on the marketplace. Depending on the fee model of the online marketplace, sellers pay in this respect either alternatively or cumulatively basic fees for opening or maintaining a seller account, which are charged on a one-off or recurring monthly basis, as well as sales commissions, which are incurred for each transaction and are

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<sup>228</sup> [Not translated. Please see the German version.]

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calculated as a percentage of the end customer price of the respective product.<sup>231</sup> These fees are thus collected by each of the online marketplaces surveyed, making it a comparable metric.

- (190) If, on the other hand, the revenue-based calculation takes into account all **fees for all online marketplace services for third-party sellers** that the operators of the online marketplaces provide in connection with marketplace operation, Amazon will have a market share of over [70-80 %] in both 2019 and 2020. Here, too, eBay follows at a great distance with a market share of [10-20]% in each case, while the other online marketplaces have market shares of well below 5%.<sup>232</sup>
- (191) When including all marketplace services provided for third-party sellers, however, it must be taken into account that the offerings of the online marketplaces in terms of further - standard or optional - services for third-party sellers are in some cases very different. Logistics services in particular are only offered by a few online marketplaces and only as an option.<sup>233</sup> Amazon in particular offers one of the broadest ranges of services for sellers, which also includes a range of logistics services. In detail, the revenues generated by Amazon in 2020 with third-party sellers were generated to around [...] % with fees for the intermediation of transactions (basic fees and sales commissions), to around [...] % with fees for advertising and to around [...] % with fees for logistics services.
- (192) In view of this, the respective revenue of the online marketplaces are only comparable to a limited extent if all online marketplace services provided to third-party sellers are taken into account. However, a similar picture emerges if the **fees for all online marketplace services provided to third-party sellers, with the exception of logistics services, are included** for the revenue-based calculation of market shares for 2020. According to this, Amazon had a market share of over [70-80 %] in 2020. eBay follows at a great distance with a market share of [10-20]%, while the other online marketplaces have market shares of less than 5%.<sup>234</sup>

Online marketplace	Market shares in 2020, based on charges for...		
	Online marketplace services	Online marketplace services without logistics	Intermediation services
Amazon	> [70-80%]	> [70-80%]	> [70-80%]
Otto	[0-5] %	[0-5]%	[0-5]%
Zalando	[0-5]%	[0-5]%	[0-5]%

<sup>231</sup> [Not translated. Please see the German version.]

<sup>232</sup> [Not translated. Please see the German version.]

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Idealo	[0-5]%	[0-5]%	[0-5]%
eBay	[10-20]%	[10-20]%	[10-20]%
Kaufland	[0-5]%	[0-5]%	[0-5]%
AliExpress	[0-5]%	[0-5]%	[0-5]%
ASOS	[0-5]%	[0-5]%	[0-5]%
Etsy	[0-5]%	[0-5]%	[0-5]%
Depop <sup>235</sup>	[0-5]%	[0-5]%	[0-5]%
Fairmondo	n.a.	n.a.	n.a.
Hood	[0-5]%	[0-5]%	[0-5]%
Lenando	[0-5]%	[0-5]%	n.a.
Yatego	[0-5]%	[0-5]%	[0-5]%
Sugartrends	[0-5]%	[0-5]%	[0-5]%
Galeria	[0-5]%	[0-5]%	[0-5]%

Table 12: Market shares of online marketplaces in 2020, based on fees for online marketplace services, online marketplace services excluding logistics, and intermediation services, own calculation based on data in: *Evaluation Note Marketplaces of 25 January 2022, p. 35 f.*

(193) Overall, it can therefore be seen that - irrespective of whether and which other services are taken into account in addition to the intermediation service - a calculation of the market shares on the basis of sales from the provision of online marketplace services results in a market share of more than [70-80 %] for Amazon in both 2019 and 2020. eBay follows as the only significant competitor with a market share of [10-20] % in each case at a large distance. Otherwise, the market is highly fragmented with market shares of less than 5% for the other competitors.

**(b) Trade volumes of the online marketplaces or e-commerce platforms**

(194) The total trade volume (hereinafter: "GHV" [*Gesamthandelsvolumen*]) means the sum of all trade volumes of the commercial and private sellers operating on a (hybrid) e-commerce platform, including any own sales of the operator. The trade volumes include the respective net sales of the seller from all purchase transactions made on the e-commerce platform (excluding shipping costs, costs for gift wrapping and refunds such as returns).<sup>236</sup> The GHV therefore includes the net sales of all purchase transactions that have come about via the e-commerce platform and thus basically reflects the significance of the e-commerce platform in online trading. However, with regard to the relevant market in the present case of the provision of online marketplace services for professional sellers as the market side of a multi-sided market, what matters most is the importance of the platform as a provider of

<sup>235</sup> [Not translated. Please see the German version.]

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such services. For the calculation of the market shares, therefore, the trade volume is first taken as a basis, which is the **sum of the trade volumes of all third-party sellers**. Third-party sellers have been defined in the survey of online marketplaces as professional sellers with the exception of the marketplace operator's own sales.<sup>237</sup>

- (195) This results in a market share of over [60-70 %] for Amazon in 2019 and 2020. In contrast, eBay as the next competitor achieves a market share of [30-40]% in 2019 and a market share of [20-30]% in 2020. The other marketplaces have market shares below 5%.<sup>238</sup> These figures also speak for a dominant position of Amazon on the relevant market.
- (196) It should be borne in mind, however, that some platforms are not designed purely as online marketplaces but, like the Amazon marketplace, as hybrid e-commerce platforms and also operate their online shops under the domain of the online marketplace. Their importance may therefore be underestimated to the extent that they are able to reach end customers and make purchase transactions via their own activities as sellers on their e-commerce platform. Amazon itself considers Amazon Retail to be "just one of those retailers" on its commerce platform, referred to as the "Amazon Store," which is designed to provide a consistent shopping experience for end customers.<sup>239</sup> This would mean, however, that the sales made by Amazon Retail would also be attributable to - albeit vertically integrated - intermediary services, which could be taken into account in the assessment of Amazon's market position. The share of the operators' own retail business in the GHV of such hybrid commerce platforms is in some cases considerable. [...] <sup>240</sup> [...] <sup>241</sup>
- (197) Even if, against this backdrop, a relative view of the platforms surveyed is taken on the **basis of their GHV** - i.e., also including the sales generated by the platform operator with its own sales - this supports the assumption of a significant position of the Amazon e-commerce platform. [...]. eBay and Otto were the next competitors. Specifically, in 2019, eBay's GHV was equivalent to [30-40]% and Otto's GHV was equivalent to [10- 20]% of Amazon's GHV. In 2020, eBay's GHV was equivalent to [20-30]% and Otto's GHV was equivalent to [10-20]% of Amazon's GHV. The GHV of the other competitors surveyed is less than 10% of Amazon's GHV in each case.

Online marketplace	Total trade volume, in % of total trade volume on the Amazon e-commerce platform.
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<sup>237</sup> [Not translated. Please see the German version.]  
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<sup>241</sup> [Not translated. Please see the German version.]

	2019	2020
Amazon	100%	100%
Otto	[10-20]%	[10-20]%
Zalando	[0-10]%	[0-10]%
Idealo	[0-10]%	[0-10]%
eBay	[30-40]%	[20-30]%
Kaufland	[0-10]%	[0-10]%
AliExpress	[0-10]%	[0-10]%
ASOS	[0-10]%	[0-10]%
Etsy	[0-10]%	[0-10]%
Depop	[0-10]%	[0-10]%
Fairmondo	n.a.	[0-10]%
Hood	[0-10]%	[0-10]%
Lenando	[0-10]%	[0-10]%
Yatego	[0-10]%	[0-10]%
Sugartrends	[0-10]%	[0-10]%
Galeria	[0-10]%	[0-10]%

Table 13: Total trade volume of online e-commerce platforms, in % of total trade volume of Amazon's e-commerce platform in 2019 and 2020, own calculation based on data in: Evaluation Note Marketplaces of 25 January 2022, p. 28.

- (198) However, when assessing Amazon's market position on the market for the provision of online marketplace services for professional sellers, it must be taken into account that on the other market side of the multi-sided market, i.e. the end customer side, alternatives to online marketplaces may exist to a certain extent which in principle enable online purchasing. Although the fall-back alternatives do not replace the intermediary service or do not replace it completely, they come into consideration at least for end customers for whom the purchase of a specific product is more relevant and not product and price comparison options. Even if these alternative services are not available to the seller-side or are only available to a very limited extent, Amazon's scope of behaviour could, in principle, be limited and its market share relativized accordingly.
- (199) However, these fundamentally possible alternatives on the end customer side do not limit Amazon's margin to manoeuvre the present case and therefore do not relativize its market position. They therefore cannot change the assumption of a dominant position of Amazon. This proves the importance of the German Amazon e-commerce platform and thus also of the German Amazon marketplace in the overall German online retail. In 2020, the share of the GHV of the German Amazon e-commerce platform in the total sales (i.e., trade volume) in German online retail estimated by HDE Online-Monitor was [50-60%]. Of this [50-60%],

around [30-40%] was attributable to the Amazon marketplace, around [20-30%] to Amazon's own sales, and around [0-10%] to other purchase transactions. This means that in 2020, around one in two euros spent by end customers on online purchases in Germany was spent on Amazon.

[...]

*Figure 4: Amazon's share of total online retail sales 2020, own calculation and presentation based on total online retail sales estimated by the German Retail Association (HDE), see HDE and IFH Cologne, HDE Online Monitor 2021, p. 6, and Amazon's data, see Evaluation Note Marketplaces of 25 January 2022, p. 27.*

**(c) User-based key figures**

- (200) Furthermore, the number of users on both sides of the platform speaks for a strong market position of Amazon compared to its competitors.
- (201) First of all, the number of third-party sellers operating in an online marketplace can be relevant for its market position. However, it is important to consider any limitations both in the survey and in the classification of the figures in order to be able to interpret them appropriately, if necessary also in relation to other key figures. As part of the investigation, "active third-party sellers" were queried and defined as professional sellers who sold at least one product on the marketplace during the period queried. In this way, third-party sellers who have registered as sellers on an online marketplace but have not yet sold any products there, or have not sold any products there for some time, are excluded.
- (202) There were approximately [more than 100,000] active third-party sellers registered on the Amazon marketplace<sup>242</sup> in the fourth quarter of 2019 and approximately [more than 100,000] in the fourth quarter of 2020.<sup>243</sup> The number of third-party sellers has thus increased by around [...].<sup>244</sup> Fewer than 100.000 sellers were active on the eBay marketplace in each of the two quarters, while the other larger competitors - in terms of their retail volume - Otto, Zalando, Kaufland and Galeria Karstadt Kaufhof each had fewer than 10.000 active third-party sellers on their marketplaces. However, the latter four competitors all recorded a high percentage increase in the number of third-party sellers, ranging from around 40% to around 1,100%.<sup>245</sup> However, this enormous increase is probably largely due to the fact that some of these competitors have only recently begun to expand their online shops into a hybrid retail platform and also allow third-party sellers. Overall, however, it can be assumed that Amazon

<sup>242</sup> [Not translated. Please see the German version.]

<sup>243</sup> [Not translated. Please see the German version.]

<sup>244</sup> [Not translated. Please see the German version.]

<sup>245</sup> [Not translated. Please see the German version.]

has by far the highest number of active third-party sellers and that this number will continue to rise.<sup>246</sup>

Online marketplace	Number of active third-party sellers in Q4 2020, in % of third-party sellers active on amazon.de
Amazon	100%
Otto	[0-10]%
Zalando	[0-10]%
Idealo	[0-10]%
eBay	[50-60]%
Kaufland	[0-10]%
AliExpress	[120-130]%
ASOS	[0-10]%
Etsy	[60-70]%
Depop	[0-5]%
Fairmondo	n.a.
Hood	[0-10]%
Lenando	[0-10]%
Yatego	[0-10]%
Sugartrends	[0-10]%
Galeria	[0-10]%

Table 14: Number of active third-party sellers in Q4 2020 on online marketplaces, in % of third-party sellers active on amazon.de, own calculation based on data in: Evaluation Note Marketplaces of 25 January 2022, p. 20.

- (203) According to the Bundeskartellamt's decision-making practice to date, the key figures "visits", "unique visitors" and "unique users" can be used to measure the use of a marketplace by end customers.<sup>247</sup> In the case of marketplaces, transactions are carried out on the platform and can be measured accordingly. The number of monthly *active users* (MAU) and active user accounts - i.e., accounts that have carried out at least one transaction in the queried period - reflects the reach of the online marketplace with regard to end customers and also takes into account the intensity of use.<sup>248</sup> A high number of active customers as well as a large reach is important for the user group of third-party sellers, as this increases the probability of purchase transactions.
- (204) Amazon had an average of around [...] monthly active users (MAU) on its German e-commerce platform in 2019 and an average of around [...] in 2020 - i.e., users who made at

<sup>246</sup> [Not translated. Please see the German version.]

<sup>247</sup> [Not translated. Please see the German version.]

<sup>248</sup> [Not translated. Please see the German version.]

least one transaction there per month - and thus by far the highest number compared with the other online marketplaces surveyed. The MAU on the German marketplace of eBay as the subsequent competitor was equivalent to [30-40] % of Amazon's MAU in both years. By contrast, the MAU of the other competitors on their German online marketplaces or e-commerce platforms corresponded in one case to [10-20] % and in all others to even less than 10% of the MAU on Amazon's German e-commerce platform.<sup>249</sup>

(205) The number of active user accounts is also significantly higher at Amazon than at the competitors surveyed. For example, around [...] user accounts were active on the German Amazon e-commerce platform in the fourth quarter of 2020, of which [...] were user accounts of domestic users. Compared to Amazon, eBay's active (domestic) user accounts as a subsequent competitor were equivalent to [40-50] % of Amazon's active (domestic) user accounts in the same period. The number of active user accounts of Kaufland and Galeria Karstadt Kaufhof each corresponded to [30-40] % of the number of Amazon.<sup>250</sup>

Online marketplace	MAU in 2020	Active user accounts in Germany in Q4 2020
	in % of MAU on the Amazon marketplace	in % of active user accounts in Germany on the Amazon marketplace
Amazon	100%	100%
Otto	[0-10]%	[10-20]%
Zalando	[0-10]%	[10-20]%
Idealo	[0-10]%	n.a.
eBay	[30-40]%	[40-50]%
Kaufland	[0-10]%	[30-40]%
AliExpress	[0-10]%	[0-10]%
ASOS	[0-10]%	[0-10]%
Etsy	[0-10]%	[0-10]%
Depop	[0-10]%	[0-10]%
Fairmondo	n.a.	n.a.
Hood	[0-10]%	[0-10]%
Lenando	n.a.	n.a.
Yatego	[0-10]%	[0-10]%
Sugartrends	[0-10]%	[0-10]%
Galeria	[10-20]%	[30-40]%

Table 15: MAU in 2020 and active user accounts in Germany in Q4 2020 of online marketplaces, each in % of the respective MAU or active user accounts on the Amazon marketplace, own calculation based on data in:

<sup>249</sup> [Not translated. Please see the German version.]

<sup>250</sup> [Not translated. Please see the German version.]

*Evaluation Note Marketplaces of 25 January 2022, p. 17 f.*

**(d) Result**

(206) In summary, the investigations carried out in the present proceeding have shown that Amazon currently has market shares of more than [60-70 %] or more than [70-80 %] on the market which is to be defined as the German market for the provision of marketplace services. These market shares underestimate Amazon's market power because marketplaces that operate a closed model (Zalando, ASOS, Sugartrends and Galeria) or that specialize in certain product categories were also taken into account for the calculation and accordingly do not represent an alternative to Amazon's Marketplace for all third-party sellers. The high number of users on both sides of the market (third-party sellers and end customers) also grant Amazon a significant lead over its competitors, which contributes to continuous growth and secures Amazon's dominant market position.

**(3) Indirect network effects / economies of scale in connection with indirect network effects (Section 18(3a) nos. 1 and 3 GWB)**

(207) Amazon's market dominance is further supported by the reciprocal positive indirect network effects which are strongly pronounced on the (multi-sided) market for intermediary services via online marketplaces. Due to Amazon's considerable market share advantage, network effects lead to a further strengthening of Amazon's market position.

(208) In the case of indirect network effects, the benefit of the platform service for one user group depends on the size (and possibly also the composition) of the other user group. Positive indirect network effects are present when the benefit of a platform for users from one group is greater the more users from another group use the platform, e.g., because more potential transaction partners can thus be reached on the other side. In certain constellations, network effects can have a self-reinforcing effect. In the case of indirect network effects, this is particularly the case if they are reciprocally positive. If there is a leading platform on a market - as in the present case on the national market for the provision of online marketplace services - network effects can ultimately lead to a tipping process which may result in a monopoly.<sup>251</sup>

(209) Marketplaces are characterized by pronounced reciprocal positive indirect network effects. A large number of end customers attracts more third-party sellers; a large number of third-party sellers means a larger product selection and more product offerings, which in turn attracts end customers. These reciprocal network effects thus have self-reinforcing feedback

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<sup>251</sup> [Not translated. Please see the German version.]



effects: New end customers, for whom the advantages of shopping via online marketplaces and in particular the product and price comparison options are important, are likely to prefer those marketplaces where there are many product offerings and a correspondingly large number of sellers. (Third-party) sellers, in turn, are likely to prefer to sell on those marketplaces which are used by many end customers and have a correspondingly large reach. This self-enforcing tendency further increases the attractiveness of a marketplace for both sides and furthers concentration.

- (210) In terms of the size of the user groups on both sides of the market, Amazon has a considerable lead in relation to its competitors. As explained above (see para. (200) ff.), Amazon has both significantly more (active) third-party sellers than its competitors below and many times more active user accounts. Due to the very high number of end customers on the one hand and sellers on the other, the self-reinforcement effect that occurs through indirect network effects is particularly pronounced at Amazon. The tendency of end customers to use Amazon in particular for their product purchases via online retail platforms further strengthens this effect.<sup>252</sup> Overall, this leads to a protection and further strengthening of Amazon's market position.
- (211) The self-reinforcement process of indirect network effects thus contributes to Amazon's continuous growth. [...], no competitor has yet succeeded in significantly reducing the gap to Amazon, even though many marketplaces have been operating in Germany for years (e.g., Otto since 2010, Zalando since 2011, Fairmondo since 2013, Idealo since 2014, Lenando since 2014, Sugartrends since 2014).
- (212) Amazon's strong position on the end customer side is secured and strengthened by the Prime customer loyalty program. This is because Prime customers receive shipping benefits such as particularly fast delivery without additional shipping fees and access to numerous digital content and services for a (monthly or annual) subscription fee (see para. (378) f.). As a result, Amazon succeeds in permanently retaining a large and steadily growing number of end customers on the Amazon e-commerce platform. Thus, on the cut-off date of June 30, 2021, [...] paid Prime memberships and just under [...] free trial subscriptions to Amazon Prime were registered under amazon.de. They thus account for around [...].<sup>253</sup>
- [...]

*Figure 5: Development of user accounts registered on amazon.de and user accounts with Prime subscription, own calculation and presentation based on the information in: Amazon's response of 9 July 2021 to the*

<sup>252</sup> [Not translated. Please see the German version.]

<sup>253</sup> [Not translated. Please see the German version.]

request for information of 18 May 2021, Annex 2, spreadsheet 4.

- (213) In addition to Amazon, other online marketplaces also offer customer loyalty programs that provide various benefits when shopping online. These online marketplaces include Otto (OTTO UP), Zalando (Zalando Plus), eBay (eBay Plus) and Galeria (Galeria loyalty card).<sup>254</sup> However, no loyalty program comes close to the success of the Prime program in terms of the associated customer benefits and the number of subscribers.

Online marketplace	Customer loyalty programs	Registered customers as of the reporting date 31 December 2020
Amazon	Prime	[over 10 million]
Otto	OTTO UP	under 1 million
Zalando	Zalando Plus	under 500,000
eBay	eBay Plus	under 500,000
Galeria	Customer card	under 10 million

Table 16: Customer programs of the online marketplaces and their registered end customers as of the reporting date of 31 December 2020, see Amazon's response of 9 July 2021 to the request for information of 18 May 2021, Exhibit 2, spreadsheet 4, and Evaluation Note Marketplaces of 25 January 2022, p. 21 f.

- (214) Economies of scale support this self-reinforcing process and make it more difficult for competitors to catch up with Amazon's existing lead. Economies of scale allow an undertaking to spread its fixed costs over a larger number of users. Economies of scale are particularly pronounced in marketplaces because marketplaces have a cost structure with comparatively high fixed costs (e.g., for IT infrastructure) and low variable costs, so that costs fall as transactions increase. Additional users cause no or hardly any additional costs. Amazon's economies of scale are also helped by the fact that, due to the large number of services offered, Amazon is in principle able to encourage users of one service to use other Amazon services, both on the Seller side and on the customer side (see also B.III.2).

**(4) Parallel use of several services and switching costs for users, Sec. 18(3a) no. 2 GWB**

- (215) The behaviour of users with regard to the parallel use of one or more online marketplaces also supports the assumption of a dominant position on the part of Amazon.
- (216) User behaviour on both sides of a two-sided market must be taken into account when examining market dominance. According to the economic literature, platforms tend to compete on the platform side where users engage in so-called single-homing, i.e. primarily use a specific platform. On this side, therefore, the intermediary service is often offered free of charge. However, if a platform has a high proportion of such users, it becomes almost

<sup>254</sup> [Not translated. Please see the German version.]

indispensable for the other user side. In such a case, either a monopoly situation already exists or, in any case, a strong market position can be assumed, with the tendency that users on the other side of the market will also tend to single-home.<sup>255</sup> The network effects characteristic of two-sided markets increase the risk of the market tipping and the platform succeeding in attracting all users (on both sides of the market).<sup>256</sup>

- (217) Third-party sellers often may well use several online marketplaces in parallel. For example, a large proportion of third-party sellers operate only on the Amazon marketplace or on the Amazon marketplace and another marketplace. At the same time, however, some of the sellers also operate on three or more marketplaces. This is supported by the results of the seller survey conducted by the Bundeskartellamt, although it should be noted that only Amazon sellers were surveyed. In this respect, the majority of the sellers who participated in the Seller survey indicated that they operate either only on the Amazon Marketplace (39%) or on the Amazon marketplace and another marketplace (37%). But just under 23% of the sellers surveyed operate on three or more marketplace.<sup>257</sup> The eBay marketplace is - by a clear margin - the marketplace most frequently mentioned by the sellers after the Amazon marketplace. Other online marketplaces were mentioned only sporadically by the sellers.<sup>258</sup> However, the results of the seller survey indicate that sales via the other marketplaces do not have the same significance, as can be seen from the distribution of the sellers' sales. The sales generated by the sellers surveyed on the Amazon marketplace in 2020 are on average twice as high as the sales they generated with their nearest competitor eBay. Revenues generated through the Amazon marketplace increased on average between 2018 and 2020, while revenues generated through the eBay marketplace decreased during this period.<sup>259</sup> This – as well as the very high overall trade volume of the Amazon marketplace (see para. (195)) – can be seen as a reaction to end customer behavior that is increasingly limited to an online marketplace.
- (218) In addition, there is much to suggest that Amazon customers tend to concentrate their purchases on Amazon. Especially when Amazon customers want to buy several products, the possibility of so-called one-stop shopping - i.e. buying all products at one central point - suggests that they make their purchases on the Amazon trading platform where they already have a customer account. This is initially rooted in Amazon's comprehensive product range.

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<sup>256</sup> [Not translated. Please see the German version.]

<sup>257</sup> [Not translated. Please see the German version.]

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<sup>259</sup> [Not translated. Please see the German version.]

In public surveys, for example, product availability was cited as the second most common reason (by 69% of the end customers surveyed) for purchasing via Amazon's platform<sup>260</sup> Compared to its competitors, Amazon has a very broad product range, which not only covers numerous product categories (and subcategories), but also offers a wide range of products in the respective product categories. For example, the German Amazon marketplace offered more than [...] items (ASIN) at the end of 2020. In comparison, the number of items listed on the German eBay marketplace is only around [20-30]%.<sup>261</sup>

Online marketplace	Number of items listed as of the reporting date 31 December 2020, in % of items listed on amazon.de
Amazon	100%
Otto	[0-10]%
Zalando	[0-10]%
Idealo	[0-10]%
eBay	[20-30]%
Kaufland	[0-10]%
AliExpress	[10-20]%
ASOS	[0-10]%
Etsy	[0-10]%
Depop	[0-10]%
Fairmondo	n.a.
Hood	[0-10]%
Lenando	[0-10]%
Yatego	[0-10]%
Sugartrends	[0-10]%
Galeria	[0-10]%

Table 17: Number of items listed on the respective online marketplaces as of the reporting date of 31 December 2020, in % of items listed on amazon.de, own calculation based on data in: Evaluation Note Marketplaces of 25 January 2022, p. 22 f.

(219) In addition, the number of items offered on amazon.de has [...] in the last three years [...].

	Number of items listed on amazon.de, as of Dec. 31.
2018	[...]
2019	[...]
2020	[...]

Table 18: Number of items listed on amazon.de as of 31 December in 2018, 2019, 2020, see Evaluation Note Marketplaces of 25 January 2022, p. 24.

(220) In addition, the Prime program strengthens customer loyalty on the end-customer side.

<sup>260</sup> [Not translated. Please see the German version.]

<sup>261</sup> [Not translated. Please see the German version.]

Under the Prime program, Prime customers can use other Amazon services, in particular streaming music and movies, in addition to special shipping benefits for a flat subscription fee.<sup>262</sup> This additional service offering ties Prime customers to the Amazon Marketplace by increasing the switching costs incurred when switching to another online marketplace. [...] .<sup>263</sup> [...] <sup>264</sup> [...] (see para. (384) ff.).<sup>265</sup>

- (221) The strong loyalty of end customers to the Amazon marketplace makes a significant contribution to Amazon's dominant position on the market by making Amazon indispensable to third-party sellers, which is also in line with the picture conveyed by the user figures and market shares determined. The trend toward single-homing is confirmed by the shopping behaviour of end customers. Although end customers have numerous alternatives at their disposal when shopping online, around one in two euros spent by end customers when shopping online is spent at Amazon.<sup>266</sup>

**(5) Access to data relevant for competition (Section 18(3) no. 3, (3a) no. 4 GWB)**

- (222) Furthermore, Amazon's ability to access competitively sensitive data also contributes to its dominant position in the market for the provision of online marketplace services.
- (223) Amazon has direct access to a wide variety of usage-related data of its end customers and business partners ("User Data") through its marketplace business and through its activities in other connected markets. This data includes, for example, data from search and order processes, customer ratings, data on the use of connected services, or location data, which allows Amazon to draw conclusions about the preferences of customers and enables Amazon to improve product search results and - for example in the form of product recommendations - to personalize them. Aggregated data is also used by Amazon to "identify categories and products with high customer demand over time [...] [and] develop new tools and services for customers and sellers [...]."<sup>267</sup> For example, Amazon provides third-party sellers with tools to track the performance of their products on the Amazon marketplace, as well as optimize their sales and other performance metrics.<sup>268</sup>
- (224) Amazon offers consumers a broad range of services and products, including services such as Prime Video, Amazon Music, Audible, Prime Reading, Twitch or Amazon Alexa and

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<sup>262</sup> [Not translated. Please see the German version.]  
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<sup>268</sup> [Not translated. Please see the German version.]

devices such as Amazon Echo, Amazon Fire, Amazon Kindle or Fire TV, which can be accessed via the customer account. Many of the services are also made available in a bundle for Prime customers in the Prime subscription. This enables Amazon to collect and aggregate data about individual users across services, which increases the competitive value of the data.

- (225) In addition, Amazon has a very large user base in Germany compared to its competitors and a significantly larger range of items on its e-commerce platform. For example, as explained (see para. (204)), Amazon has by far the highest number of monthly active users (MAU). In addition, Amazon offers by far the most articles: Approximately [...] items were offered on the German Amazon e-commerce platform at the end of 2020. By contrast, the number of items listed on eBay as the next competitor is only around [20-30] % of the number of items on Amazon (see para. (218)). The aforementioned possibilities resulting from Amazon's corporate structure alone and the size of the user base of its services or the scope of its offering indicate that competitors do not have a directly comparable data pool. Amazon can benefit from data-driven network effects that can further strengthen Amazon's data advantage over competitors. For example, higher end customer numbers tend to generate more customer reviews of the goods on offer, which in turn can serve as a guide for other end customers in their search for and selection of products and thus increase the attractiveness of the marketplace.<sup>269</sup>

**(6) Innovation-driven competitive pressure (Section 18(3a) no. 5 GWB)**

- (226) Amazon's market position is also not threatened by sufficient innovation-driven competitive pressure (Sec. 18(3a) no. 5 GWB).
- (227) The examination of innovation-driven competitive pressure pursuant to Sec. 18(3a) no. 5 GWB is concerned with the extent to which innovation can relativize the market power of an undertaking.<sup>270</sup> In other words, it must be examined on a case-specific basis whether the innovative power of the internet or other factors with the possibility of providing for disruptive changes can lead to the vulnerability of an undertaking's strong market position.<sup>271</sup> Section 18(3a) no. 5 GWB takes into account the fact that market positions of platforms and networks on the internet are theoretically more likely to be attacked by competitors due to the dynamic developments prevailing there as a result of sometimes simple, technological

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<sup>269</sup> [Not translated. Please see the German version.]

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innovations or changing user perceptions at short notice.<sup>272</sup> Possible innovation-driven competitive pressure can result both from current innovation-driven competition and from potential competition from innovative companies.<sup>273</sup>

(228) However, the internet's potential for innovation and revolution cannot be used as a general argument against the market power of internet companies. For a decisive relativization of a strong market position according to other market power criteria, concrete indications of a dynamic or disruptive process are required in each individual case, which can also originate from markets other than the relevant market. Such indications can arise, for example, from the type and number of innovations carried out to date and the length of innovation cycles<sup>274</sup>, the turnover of recent product launches<sup>275</sup>, the budget for research and development<sup>276</sup>, the current market phase and current innovations at upstream market levels<sup>277</sup>. In markets characterized by network effects, the extent to which a new or current entrant rapidly attracts a large number of users through innovation is also of great importance.<sup>278</sup> In contrast, an abstract vulnerability that can be expected at some point in time is not sufficient. After all, even in the internet economy, it is possible for market positions to be largely secured for longer periods of time, in particular through direct and indirect network effects. Rather, a careful case-by-case examination is required to determine whether there is more than just an abstract vulnerability of the market position that is too vague in terms of time. If the mere prospect that a dominant position could disappear at some point were to lead to a denial of market dominance, the accusation of abusive exploitation of this position would per se remain immune from examination.<sup>279</sup>

(229) There is no sufficient innovation-driven competitive pressure that could, at present or in the near future, decisively relativize Amazon's market position on the national market for the provision of online marketplace services for professional sellers. Rather, the high market shares and market share gaps described above already indicate that neither technical upheavals nor competitive offensives by competitors have led to successful pressure on Amazon's market position through innovations. The impetus generated in particular by new e-commerce concepts such as Meta's store function, as well as alternative offerings for

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<sup>272</sup> [Not translated. Please see the German version.]

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<sup>276</sup> [Not translated. Please see the German version.]

<sup>277</sup> [Not translated. Please see the German version.]

<sup>278</sup> [Not translated. Please see the German version.]

<sup>279</sup> [Not translated. Please see the German version.]

individual (sub-)services of online marketplaces such as that of the software provider Shopify, represent substitution competition at the margins and cannot endanger Amazon's market position.<sup>280</sup>

- (230) As explained above (see para. (143) ff.), Meta is currently expanding its field of activity and, with the so-called Shop function, offers new opportunities for sellers to sell products to users via the social networks Facebook and Instagram. Users - if available - have the option of searching for products or brands via the so-called Shop tab, and can thus include products from various Facebook or Instagram stores in their search. However, users in Germany are redirected to the online shop of the respective seller via in-app browsing for the purchase transaction - i.e., for placing the order and payment. A so-called checkout function, in which the user makes a purchase directly on the social network, as has existed in the USA since spring 2019, does not currently exist in Germany.
- (231) Furthermore, there is some evidence to suggest that the sales concepts for selling via online marketplaces and selling via social media platforms differ significantly from the sellers' point of view and are likely to be used by them predominantly in a complementary manner. For example, many third-party sellers on the Amazon marketplace also regard sales links to social media services as an important measure of online sales promotion.<sup>281</sup> However, competitive pressure for Amazon may also arise from the fact that the introduction of a purchase option directly on the social media platform could create a new alternative option for end customers. This applies in particular to Meta with its large user groups on Facebook and Instagram. However, there are also indications in this respect that, due to the special features of a social network, only a very specific purchasing need of the user will be covered. As a result, from the user's point of view, it could also be a complementary rather than an alternative shopping channel in relation to the Amazon e-commerce platform. At any rate, the use of social commerce by consumers is currently limited.<sup>282</sup>
- (232) In view of this, it appears questionable that Meta's e-commerce activities could currently or in the near future significantly restrict Amazon's dominant position in the national market for the provision of online marketplace services. In this regard, particular consideration must be given to the loyalty of customers to Amazon mediated by the Prime program and the fact that Meta does not offer certain supporting services, such as the shipping of goods. These supporting services are competitive factors that are of considerable importance for

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marketplace sales and their absence reduces the competitive pressure exerted by Meta's sales concept.<sup>283</sup>

- (233) Fringe competition from software providers such as Shopify is also unlikely to weaken Amazon's market position in the foreseeable future. Shopify's range of services only replaces individual (partial) services of the marketplace operator by providing standardized solutions for creating a proprietary online sales environment.<sup>284</sup> This is because these services are preliminary services for setting up a seller's own online shop, which, however, as explained (see para. (134) ff.), does not represent any or at best a very limited alternative to marketplace sales for sellers. In addition, Amazon itself counters this fringe competition, as can be seen, for example, in the purchase of the undertaking and Shopify competitor Selz in 2021.<sup>285</sup> It is thus not to be assumed that Amazon's market position on the national market for online marketplace services will be significantly weakened by this fringe competition in the foreseeable future.
- (234) In addition, Amazon has already introduced many new, innovative offers to the market in the past and is regarded as one of the most innovative companies in the world.<sup>286</sup> Many innovations are linked to the Marketplace business and help to make shopping on the online marketplace easier and better, to bind end customers more closely to Amazon and the online Marketplace, and thus to strengthen Amazon's market position vis-à-vis third-party sellers.
- (235) On the one hand, this includes the expansion of the channels (away from the "usual" online channels via websites or apps) through which a purchase can be made on the online marketplace. These include shopping options via the Amazon Alexa voice assistant or via the user interface of Amazon's Fire TV devices.<sup>287</sup> The Dash buttons introduced in 2016, which were discontinued after three years due to violations of consumer protection laws<sup>288</sup>, which enabled customers to reorder selected products via the Amazon marketplace at the push of a button using a WLAN connection, can also be considered such an innovative activity to improve the marketplace business or facilitate shopping.<sup>289</sup>
- (236) At the same time, many of Amazon's innovations impact background processes, which in turn increase the attractiveness of its marketplace for end customers and sellers. For example,

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Amazon is increasingly using robotics<sup>290</sup> and artificial intelligence<sup>291</sup> to run its logistics and marketplace business, which in turn increases productivity and generates efficiencies.<sup>292</sup> At the same time, such measures also help to ensure innovative but costly<sup>293</sup> delivery promises such as one-day delivery with Amazon Prime<sup>294</sup> and thus strengthen its outstanding market position in the online marketplace business.<sup>295</sup>

(237) In view of the only minor innovation-driven competitive pressure faced by Amazon and Amazon's own considerable innovative strength, it is therefore unlikely that Amazon's market position could be significantly weakened in the foreseeable future.

**(7) Financial strength (Sec. 18(3) no. 2 GWB)**

(238) Its great financial strength gives Amazon an additional competitive advantage that further reinforces the undertaking's dominant position on the national market for the provision of marketplace services for professional sellers. This is because financial resources also represent a competitive factor for the market in question. Amazon can draw on both its own funds and third-party funds in order to either be able to make competitive advances itself or to be able to fend off the advances of competitors.<sup>296</sup>

(239) Amazon has outstanding financial strength.<sup>297</sup> This also clearly distinguishes its business opportunities in the market in question from those of its competitors as demonstrated by the financial key performance indicators of Amazon and its largest competitors in the business of marketplace services listed in Table 19.<sup>298</sup> For example, Amazon's business results in 2020 with regard to all relevant financial ratios<sup>299</sup> were several billion euros and many times higher than the results achieved by its closest<sup>300</sup> competitors eBay, Otto and Zalando.

Fiscal year	Sales	Net income	Operating cash flow	Free cash flow
2020	All figures in EUR billion			
Amazon	338.2	18.7	57.9	19.6
eBay Inc.	9.0	5.0	2.1	1.7
Otto Group <sup>301</sup>	15.6	1.0	2.6	2.6

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Zalando SE	8.0	0.2	0.5	0.3
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Table 19: Financial ratios of Amazon and selected competitors in 2020, all figures in EUR million, see fn. 298.

- (240) In view of Amazon's very good development in the financial year 2021 (see para. (569) and para. (577) ff.) with, for example, a sales revenue of EUR 397.2 billion and a net income of EUR 33.4 billion, it is to be expected that Amazon's financial lead over its competitors will continue or even increase.
- (241) This creates further competitive advantages for Amazon, above all because the Amazon Group is able to finance billions of euros in expenditures to make its offerings more attractive. On the one hand, this includes structural investments. For example, Amazon has invested around EUR 40 billion in Germany from 2010 to 2020<sup>302</sup>. In comparison, these investments alone - on an annual average - correspond to half of the annual *global sales* of competitors Zalando and eBay and just under a quarter of Otto Group's revenue. Amazon invests in particular in logistics, among other things to ensure fast delivery times such as one-day delivery for Prime customers and thus to further increase the attractiveness of its e-commerce platform for customers (and thus also for third-party sellers).<sup>303</sup>
- (242) On the other hand, Amazon is able to acquire undertakings through its financial advantage, which leads to the purchase of innovations or relevant market positions and thus further strengthens Amazon's market position.<sup>304</sup> This applies in particular to acquisitions that make the Amazon marketplace more attractive for customers. These acquisitions that increase the attractiveness of Amazon's e-commerce platform include, for example, the acquisition of the Kiva Systems, which introduced robotics technology to Amazon's logistics business. Such investments improve Amazon's logistics offerings and (through improved delivery times) make its e-commerce platform more attractive to customers. The undertaking's own retail offering, which increases the attractiveness of the e-commerce platform and thus also of the Marketplace, was also expanded through corporate acquisitions. On the one hand, this includes Amazon's digital offering, which was expanded through acquisitions of, among others, Audible and LoveFilm as well as Twitch.

#### **(8) Barriers to market entry, Section 18(3) no. 6 GWB**

- (243) Barriers to market entry within the meaning of Section 18(3) no. 6 GWB include all legal, economic and factual obstacles which may prevent companies from entering the market or

<sup>302</sup> [Not translated. Please see the German version.]

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expanding those already active in the market.<sup>305</sup> The higher the barriers to entry, the less likely and effective potential competition is.<sup>306</sup> Particularly in the case of platform markets, possible indirect network effects and the two-sided nature of these markets must be taken into account when assessing barriers to market entry.<sup>307</sup> The platform must reach a critical mass of users on each side of the market so that the indirect network effects of the platform can be internalized and the intermediation service can be provided.<sup>308</sup> This requirement may make market entry more difficult.<sup>309</sup> In addition, if indirect network effects exist, barriers to market entry can also result from the fact that the leading platform can provide users with a superior benefit that can no longer be made up for by competing platforms. This can lead to considerable retention effects, so that users are unwilling to switch to a new platform.<sup>310</sup>

- (244) Based on these principles, the barriers to market entry for the provision of marketplace services are primarily due to the two-sided nature of this market. New providers of marketplace services that do not yet have a user base on either side of the market must attract users on both sides of the marketplace simultaneously. Without a large number of third-party sellers and a broad product selection, new providers cannot attract a large enough customer base. Without a large enough customer base, it is difficult to attract a significant number of third-party sellers and thus a broader product selection. This interdependency creates a significant barrier to entry for marketplaces. In the market entry phase in particular, success on the side of the market from which particularly strong network effects emanate (in the case of marketplaces, predominantly the customer side) is decisive. Market entry is only successful if the marketplace manages to provide sellers with a broad customer base. This is all the more difficult if customers already use an established marketplace and are not very willing to switch marketplaces, as is the case with the German Amazon marketplace (see paras. (212), (220) ff.).
- (245) In particular, the indirect network effects, taking into account Amazon's economies of scale, make it more difficult for potential competitors to enter the market. This is because Amazon has, on the one hand, a very high number of active third-party sellers (see para. (202)) and a correspondingly comprehensive product range (see para. (218)) and, on the other hand, a very broad customer base which is permanently tied to the Amazon retail platform through

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the successful Prime customer loyalty program (see para. (212)).<sup>311</sup>

- (246) This is also evidenced by the (few) market entries that have been at all successful in recent years. Market players such as Otto, Zalando and Galeria, which have built up a complementary marketplace on their internet presence and have allowed sales by third-party sellers or are currently making such a switch, already had well-known online shops with a broad customer base. Nonetheless, they continue to generate the vast majority of their sales from their own retail business, while sales in the marketplace service business are still comparatively low.<sup>312</sup> The supplementary offer of marketplace services by the product and price comparison engine Idealo is to be viewed in the same way. This service offering has not led to a transformation of the product and price comparison engine into an online marketplace; instead, the sellers' offers are posted solely for the purpose of product and price comparison and continue to be displayed alongside the direct purchase offers. In addition, the marketplace services are only provided for certain sellers or products and rather low revenue is generated with them. Overall, it can therefore be seen that these market entries cannot put Amazon's strong market position into perspective. By contrast, other online marketplaces - such as Allyouneed<sup>313</sup> or Rakuten<sup>314</sup> - were unable to establish themselves on the German market and have discontinued their platform operations.
- (247) Amazon's high investments, especially in its own logistics area, also represent additional barriers to market entry. This is because the rapid dispatch of goods is an important competitive parameter in online retailing and the comprehensive logistics infrastructure that Amazon has already built up (see in detail below para. (289) ff.) and increases its lead over its competitors in this respect.<sup>315</sup> It is doubtful whether a new competitor could build up such a logistics infrastructure and catch up with Amazon's existing lead. It is true that Alibaba and Zalando, for example, are also investing in their logistics network - Zalando operates 13 logistics centres in Europe; three further locations are under construction or in planning.<sup>316</sup> Amazon, meanwhile, operates 18 logistics centres in Germany alone, and its European logistics network comprises over 60 locations.<sup>317</sup> According to its own figures, Amazon has invested just under EUR 40 billion in its logistics network in Germany between 2010 and

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2020, including over 10 billion Europe in 2020 alone.<sup>318</sup> By way of comparison, Zalando's total sales from 2010 to 2019 inclusive amounted to EUR 28.75 billion and just under EUR 8 billion in 2020, i.e. 20 per cent less than the investment volume named by Amazon.<sup>319</sup>

**(9) Alternatives available to sellers, Sec. 18(3) no. 9 GWB, and significance of Amazon for the access to sales markets, Sec. 18(3b) GWB**

- (248) Amazon's dominant position on the national market for the provision of marketplace services is further underpinned by the fact that there are no sufficient possibilities for third-party sellers to switch to other undertakings (Section 18(3) no. 9 GWB). Rather, as the operator of the largest marketplace in Germany, Amazon has a significant influence on retailers' access to their sales markets (Section 18(3b) GWB).
- (249) In addition to Amazon, other marketplaces in Germany - in particular those surveyed during the investigations - are available to sellers in principle. In fact, however, these other online marketplaces do not come into consideration as an alternative to the German Amazon marketplace for most sellers. The possibilities for sellers to use other online marketplaces instead of the Amazon marketplace are already subject to restrictions due to the differences in terms of business model, product range and service offering of the marketplace operator.
- (250) Thus, sellers may only register on open marketplaces without further ado and offer basically all their products if they meet the general and any product-specific requirements of such open marketplaces. On closed marketplaces, on the other hand, they can only sell if the marketplace operator admits the specific products and the sellers in question to its marketplace as part of the selection process. Not all third-party sellers operating on the German Amazon marketplace as an open marketplace can therefore switch to closed marketplaces such as those of Zalando, Galeria Karstadt Kaufhof or ASOS with the products they offer on Amazon's Marketplace.
- (251) The differences between marketplaces in terms of the breadth of the product range also limit the alternative options available to sellers. While some marketplaces allow the sale of a broad range of products in different product categories, others specialize in specific product categories. For example, Zalando and ASOS offer exclusively fashion products on their platforms, as well as closely related product categories such as jewellery or bags. For sellers selling other products, a switch to these marketplaces is therefore out of the question. In contrast, the German Amazon marketplace has a very broad product assortment, which at

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<sup>318</sup> [Not translated. Please see the German version.]

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least covers all major product categories in the consumer goods sector.

(252) Furthermore, the respective bundle of services offered by other marketplaces may mean that they are not considered as an alternative for sellers. This is because the range of services differs both in terms of the individual services and in terms of whether they are offered as standard or as an option. Logistics services - namely the shipment of goods - are of particular importance in this respect. Such services, which can make it easier for a seller to ensure fast delivery, are only offered by Amazon with its FBA program and by Zalando with its "Zalando Fulfillment Solutions" (ZFS) program. eBay does cooperate with various shippers (DHL, Hermes, DPD, GLS, UPS) to facilitate shipping and delivery for third-party sellers. However, the commissioning of the logistics providers is done by the sellers and not by eBay. As a result, sellers who cannot or do not want to organize the shipping of goods themselves as part of their business operations are more likely not to switch to marketplaces that do not offer these logistics services.

(253) Notwithstanding these limitations, the main arguments against a switch to other marketplaces are the enormous reach and high customer loyalty of the German Amazon marketplace, which make it irreplaceable for most sellers. As shown by the highest number of monthly active users by far on the customer side (see para. (203) ff.) and the largest total trade volume of the German Amazon marketplace and the German Amazon e-commerce platform (see para. (194) ff.), no other German online marketplace reaches so many customers and is able to retain them permanently. The resulting indispensability of the Amazon marketplace for many sellers is reflected not least in the significant share of the retail volume generated on the Amazon marketplace in the total revenue of German online retail in 2020. In relation to such total volume estimated in the HDE Online-Monitor, the share resulting from the sum of the total trade volumes of all other online marketplaces for 2020 was only [...] of the corresponding total trade volume of the German Amazon marketplace.

[...]

*Figure 8: Share of online marketplaces (i.e., excluding retail business of hybrid retail platform operators) in total online retail sales 2020, own calculation and presentation based on total online retail sales estimated by the German Retail Association (HDE), see HDE and IFH Cologne, HDE Online Monitor 2021, p. 6, as well as data from Amazon and competitors, see Evaluation Note Marketplaces of 25 January 2022, p. 27 f.*

(254) The results of the seller survey conducted as part of this proceeding also indicate that Amazon is the most important marketplace for sellers. After Amazon Marketplace, eBay marketplace is named most frequently by sellers - by a clear margin. Other marketplaces are mentioned only sporadically by the responding sellers and are used in addition to Amazon.

The sales generated by the respondent sellers on the Amazon marketplace in 2020 are on average twice as high as the sales they generated with the marketplace of the nearest - competitor eBay. Sales through the Amazon marketplace increased on average between 2018 and 2020, while they decreased through the eBay marketplace.<sup>320</sup>

**(10) Actual and potential competition, Section 18(3) no. 7 GWB**

- (255) Actual competition from competitors active in the market is therefore not capable of limiting Amazon's market position. In addition, Amazon's market position is also not relativized from the point of view of relevant potential competition.
- (256) The theoretical possibility of competition is not sufficient to assume a disciplining effect of potential competitors on incumbents. Rather, potential competition may only be included in the analysis if there are concrete indications of its effectiveness.<sup>321</sup> The decisive factors are the extent to which it is likely that new undertakings will enter the market in question and whether these market entries can be made in good time and to a sufficient extent.<sup>322</sup> The likelihood of market entry is measured in terms of the opportunities and incentives for market entry, which are influenced in particular by barriers to market entry.<sup>323</sup> Based on these principles, Amazon's margin to manoeuvre is not limited by potential competition.
- (257) Disciplinary pressure from potential competitors is already largely ruled out by the very high barriers to entry on the national market for the provision of marketplace services.<sup>324</sup> In addition, Amazon has a customer loyalty program in the form of the Prime program, which provides a strong incentive for Prime members to remain on the Amazon e-commerce platform and not to leave it.<sup>325</sup> The subscription character of the Prime membership with a flat membership fee as well as the high use of the Prime benefits leads to Prime members being bound to Amazon to a considerable extent. Potential competitors can reach these customers only with difficulty or not at all. In addition, the possibility of free and fast shipping is of great importance for an effective market entry of potential competitors. For example, 56% of online shoppers surveyed in a recent poll cited free shipping as a decision criterion for choosing an online shop.<sup>326</sup> It is not apparent that potential competitors would currently be able to build up the infrastructure required for such shipping in Germany (either

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through their own logistics or by cooperating with shipping partners).

- (258) In addition, the lack of a disciplining effect of potential competition is demonstrated in particular by the fact that not even the expansions of large undertakings in the digital economy into online retail have been able to exert relevant (potential) competitive pressure on Amazon, now and in the past. In particular, Alphabet with the Google search engine is not in a position to relativize Amazon's dominant position through a credible threat of market entry, despite the expansion of its business activities in the area of online retail. In this respect, it is already questionable whether the probability of market entry required for consideration as a potential competitor exists. In any case, market entry would not be possible to the extent required for a disciplinary effect.
- (259) It is doubtful whether Alphabet actually has sufficient incentive to offer the "Buy on Google" service<sup>327</sup>, which is currently only available in the USA, in Germany and thus enter the German market. For instance, the Google manager responsible among other things for online retail, Bill Ready, made the following comment in one podcast published on 6 May 2021 Podcast: *"We're not a retailer, we're not a marketplace. And we're not trying to be a retailer or marketplace [...]. It is not our goal to necessarily keep the user on our platform."*<sup>328</sup> In addition, the "Buy on Google" offer, which was temporarily available in both the U.S. and France and allowed sellers to sell products directly through the Google platform, has already been discontinued in France on 7 December 2021. This also makes a launch in Germany seem unlikely.
- (260) In addition, it would not be possible for Alphabet to enter the German market with "Buy on Google" to the extent required for a disciplinary effect. The first obstacle to this would be the considerable barriers to market entry, the customer loyalty conveyed by the Prime program and the lack of an efficient logistics network. In addition, a consideration of Alphabet's previous attempts to gain a foothold as a marketplace in the USA also makes it appear doubtful that it would be possible to enter the German market with a disciplinary effect on the German Amazon marketplace. For example, according to industry reports, the introduction of "Buy on Google" in the USA did not lead to a significant perception of Alphabet as an online marketplace by sellers or customers. Neither a guarantee offered to customers for orders placed via "Buy on Google" nor the fact that Alphabet began to offer the program free of charge to participating sellers apparently led to sufficient sellers and

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<sup>327</sup> [Not translated. Please see the German version.]

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customers being attracted.<sup>329</sup> Rather, according to the press, only about 8,000 sellers also offered their products via "Buy on Google" at the end of 2020.<sup>330</sup> Despite an existing large user base for its search and comparison services, the range of services offered by the Google platform has thus apparently not yet been successfully extended to marketplace services. This lack of success may also be due to the availability of Buy on Google limited to the USA.

**(11) Result**

(261) With the operation of the German Amazon marketplace, Amazon holds a dominant position on the national market for the provision of marketplace services for professional sellers, taking into account its high market shares, the significant market share gaps to subsequent competitors and the other factors supporting market power in its favour.

(262) However, even if Amazon did not have a dominant position, the foregoing would in any case result in a very strong market position or position of power of Amazon in the area of marketplace services for professional sellers in Germany, which underpins Amazon's paramount significance for competition across markets pursuant to Section 19a(1) GWB.

**b) Amazon's dominant position on other geographic markets**

(263) In addition, other (competition) authorities have already (preliminarily) identified a dominant position of Amazon in other geographic markets for the provision of marketplace services or intermediary services via online marketplaces.

(264) Thus, according to its press release of 10 November 2020, in proceedings against Amazon for the possible abuse of a dominant position due to the systematic use of non-public business data of third-party sellers operating on the Amazon marketplace, the European Commission preliminarily assumes that Amazon holds a dominant position on the market for marketplace services not only in Germany, but also in France. These are the two largest markets for Amazon in the European Union.<sup>331</sup>

(265) In proceedings against Amazon for abusive preferential treatment of its own logistics services by granting advantages to Prime sellers on the online marketplace, the Italian competition authority issued a decision at the end of 2021 finding Amazon to be in a

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<sup>329</sup> [Not translated. Please see the German version.]

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dominant position on the market for intermediary services on marketplaces in Italy.<sup>332</sup>

- (266) For the U.S. market, the Subcommittee on Antitrust, Commercial and Administrative Law on the Committee of the Judiciary of the U.S. House of Representatives also assumes a dominant market position of Amazon as a marketplace in its report "Investigation of Competition in Digital Markets" from 2020.
- (267) These other strong market or power positions of Amazon also contribute to the assumption of its paramount significance for competition across markets.

**2. Vertical integration and activities on otherwise related markets (Section 19a(1) sentence 2 no. 3 GWB)**

- (268) Amazon is active in a large number of different markets which are related through vertical integration or otherwise. This positioning with regard to its business activities, which is accompanied by corresponding economies of scope and is equivalent to an ecosystem, contributes significantly to Amazon's paramount significance for competition across markets pursuant to Section 19a(1) sentence 2 no. 3 GWB.
- (269) The criterion of Section 19a(1) sentence 2 no. 3 GWB intends to cover the special characteristics of digital ecosystems that arise from the vertical and/or conglomerate relationship of their products, services or offerings.<sup>333</sup>
- (270) The term "digital ecosystem", which is frequently used in the economic literature<sup>334</sup> and in competition policy<sup>335</sup>, describes in particular a strategy in which the service provider bundles various products for its customers in an assortment-like manner so that they perform as many activities as possible on its platform or within its "ecosystem". This also includes the formation of an ecosystem around a strong platform without any real bundling of services on the same platform, but users can be guided back and forth between services in the system. The different service offerings from the same provider have the objective of keeping the user or end customer in the ecosystem. The design of the usage relationship may make it cheaper for the user to stay in the ecosystem as switching costs become higher. In particular, bundling offers and customer loyalty programs which offer various (digital) services of the ecosystem, often in a subscription, and give the user incentives to use as many offers as possible within the ecosystem and to dive deeper into it without further additional costs are possible.

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<sup>332</sup> [Not translated. Please see the German version.]

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- (271) However, the criterion of "relatedness" goes beyond user-side content-related connections and, in line with the protective purpose of Section 19a GWB, aims to determine whether vertical integration or other relations between a undertaking's business fields give rise to opportunities to achieve competitive advantages, whether in business areas already occupied, up to and including the control of market access, or in the expansion of its activities into new business fields.<sup>336</sup> In the case of functional or value-added links between products, the possibility of digital ecosystems to leverage or deploy resources and capabilities in different areas of activity represents a significant potential risk in contrast to a mere conglomerate. At the same time, a broad ecosystem makes it possible in a special way to offer certain services without monetary compensation or at very low cost by financing them through revenue elsewhere.
- (272) Moreover, the criteria of vertical integration and activity on otherwise related markets do not have different weightings. Rather, they represent the two perspectives of "depth" and "breadth". Vertical integration is already a well-established concept in antitrust law as a way of exploiting competitive scope. In the internet industry, however, where the boundaries between "genuine" vertical integration and other contexts that open up similar possibilities are blurring, it is precisely the latter that is of importance. As the explanatory memorandum makes clear, the aim of determining the scope of activities and offerings is to cover the potential for conglomerate effects, i.e., effects that are not (only) based on the combination of value-added stages that build on one another, but also for effects that result from activities in different fields that are otherwise related to one another. In this respect, the explanatory memorandum speaks at one point, for example, of "particular potential threats, especially as a result of increased opportunities for vertical and conglomerate exploitation of economic power"<sup>337</sup> and at another point even only of "the fact that companies that operate digital platforms and networks can be of central importance for various markets due to the advantages of conglomerate structures and the occupation of key positions that are relevant for competition".<sup>338</sup>
- (273) Amazon's business portfolio comprises vertically integrated or conglomerate business activities in this sense, with which comes the expanded possibilities of an ecosystem in terms of conglomerate effects.
- (274) On the one hand, Amazon is in many cases active with corresponding economies of scope at upstream or downstream market levels - i.e. vertically integrated in the classic sense - or

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<sup>336</sup> [Not translated. Please see the German version.]

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<sup>338</sup> [Not translated. Please see the German version.]

in otherwise - i.e. in any case conglomerate - related business fields. Looking at these business activities as a whole, it becomes apparent that Amazon increasingly occupies all business areas of a comprehensive supply chain for consumer goods of almost all kinds across all relevant market levels (see a)). [...] <sup>339</sup>

(275) On the other hand, Amazon's portfolio of offerings for consumers is such that Amazon's very extensive range of physical goods and digital content and services very largely covers the consumption needs of private consumers in particular which are accessible to online sales. These can meet their needs predominantly uniformly via the Amazon e-commerce platform or in any case under the domain under which Amazon also operates its e-commerce platform and thus demand from Amazon "at a central point". For Amazon, too, this perspective of a uniform customer experience is, by its own admission, decisive. <sup>340</sup> The linking of the various products and services results not only from the uniform offer via the e-commerce platform and the uniform customer account, but also from other (e.g. functional) connections which bring competitive advantages for Amazon and establish a stronger bond between the end customers and Amazon's ecosystem (see b)).

**a) Amazon's related business activities**

(276) Amazon is particularly active in online retailing and in various other business areas that are significant for the functionality of online retailing. The activities in these other business areas are also linked to Amazon's e-commerce platform. In addition to Amazon's own sales activities on its e-commerce platforms, this relates in particular to intermediary activities, the logistics and advertising business, Amazon Web Services and Amazon Pay (see aa)).

(277) In this context, many business activities have to a certain extent developed out of Amazon's own need for these services and the infrastructure required for them. This leads to the special situation that many of Amazon's services are demanded both by Amazon itself and by third parties, some of which are direct competitors in other markets. However, it also shows that Amazon is able to quickly and effectively launch new business activities in adjacent markets by being able to build on its already established activities in other business fields, in particular its e-commerce platform. Likewise, the associated business activities bring further economies of scope. The resulting opportunities contribute significantly to the competitive threat potential emanating from Amazon and its conglomerate structures (see on the whole bb)).

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<sup>339</sup> [...]

<sup>340</sup> [Not translated. Please see the German version.]

**aa) Overview of interrelated business activities**

- (278) Amazon has not only evolved from an online bookseller to an online commerce platform with a very broad range of goods offered by Amazon as a retailer and by a variety of third-party sellers. Rather, Amazon is now also active in many upstream and adjacent areas of retailing such as manufacturing, logistics, advertising and payment processing – both within the Group and for third parties. The necessary IT infrastructure is also provided via AWS for the undertaking's own use and offered to third parties for use. It is therefore becoming apparent that Amazon could become a comprehensive supply chain for consumer goods of all kinds and across all relevant market levels and business areas.
- (279) On the one hand, Amazon uses the e-commerce platform as an online shop for its own sales activities as an online retailer (Amazon Retail), and on the other hand, Amazon operates an online marketplace (Amazon Marketplace) for third-party sellers there. In addition, Amazon is active in the manufacture of its own products and is thus increasingly vertically integrated with regard to its activities as a retailer (for the whole, see (1) below). Furthermore, the logistics business (to ensure fast and problem-free deliveries) and the online advertising business (to reach end customers) are of very great importance for online retail; in both areas, Amazon has been able to expand its business activities to a significant extent within a few years (see (2) and (3) below). The Amazon Web Services business area, in turn, operates the IT infrastructure required in particular for online retail, including the operation of the e-commerce platforms, and makes this available intragroup, but also offers IT services to third parties (see (4) below). Finally, Amazon Pay offers payment services to third parties - based on the customer information and customer base of the e-commerce platform - in order to reach Amazon customers (see (5) below). In detail:

**(1) Amazon's online e-commerce platform and its activities as an online marketplace, online retailer and manufacturer**

- (280) Amazon operates country-specific e-commerce platforms with a hybrid structure. On the one hand, Amazon itself operates as an online retailer (Amazon Retail) with its own online shop under the respective domain and offers end customers a wide range of goods as well as other products and services.<sup>341</sup> On the other hand, Amazon operates online marketplaces (Amazon Marketplace) under the respective domain, through which Amazon as an intermediary mediates transactions between the (third-party) sellers and end customers and third-party sellers can thus sell products to end customers. The offers of Amazon Retail and

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<sup>341</sup> [Not translated. Please see the German version.]

third-party sellers to end customers are presented uniformly on the e-commerce platform.

- (281) This hybrid structure has grown historically. Under the first domain on the home market (amazon.com) - and also under amazon.de - the undertaking initially operated a pure online shop for books (active in Germany since 1998), before expanding its product range in a next step<sup>342</sup> and then (in Germany since the end of 1999) commencing the business as an online marketplace by opening up the e-commerce platform to third-party sellers.<sup>343</sup> Initially, the two formats "Amazon Auctions" and then "Amazon ZShops" were introduced, in which the products offered by third-party sellers in an auction format or on their own shop pages were presented separately from Amazon's own product offerings. In parallel, however, Amazon developed and introduced the product detail page, which was able to attract more end customers and thus proved to be more successful.<sup>344</sup> As a result, other listing formats were discontinued and third-party sellers were asked to list their products on the respective product detail pages.<sup>345</sup> Amazon's online marketplace and online retail activities now each operate via the same internet presence and a uniformly designed e-commerce platform. Amazon uses the term "Amazon Store" here.<sup>346</sup> In particular, the products offered by - Amazon Retail or the third-party sellers on the online marketplace are listed together on the e-commerce platform and displayed, for example, in search results (see, *e.g.*, Figure 7) as well as displayed on uniform product detail pages to the extent that the respective offers relate to the same product and are thereby assigned to a common ASIN (see, for example, Figure 8). Amazon also assumes that end customers perceive "Amazon as a holistic customer experience with a broad selection of products and services" that does not distinguish between Amazon Retail and third-party sellers in its presentation.<sup>347</sup>

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<sup>342</sup> [Not translated. Please see the German version.]

<sup>343</sup> [Not translated. Please see the German version.]

<sup>344</sup> [Not translated. Please see the German version.]

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<sup>346</sup> [Not translated. Please see the German version.]

<sup>347</sup> [Not translated. Please see the German version.]

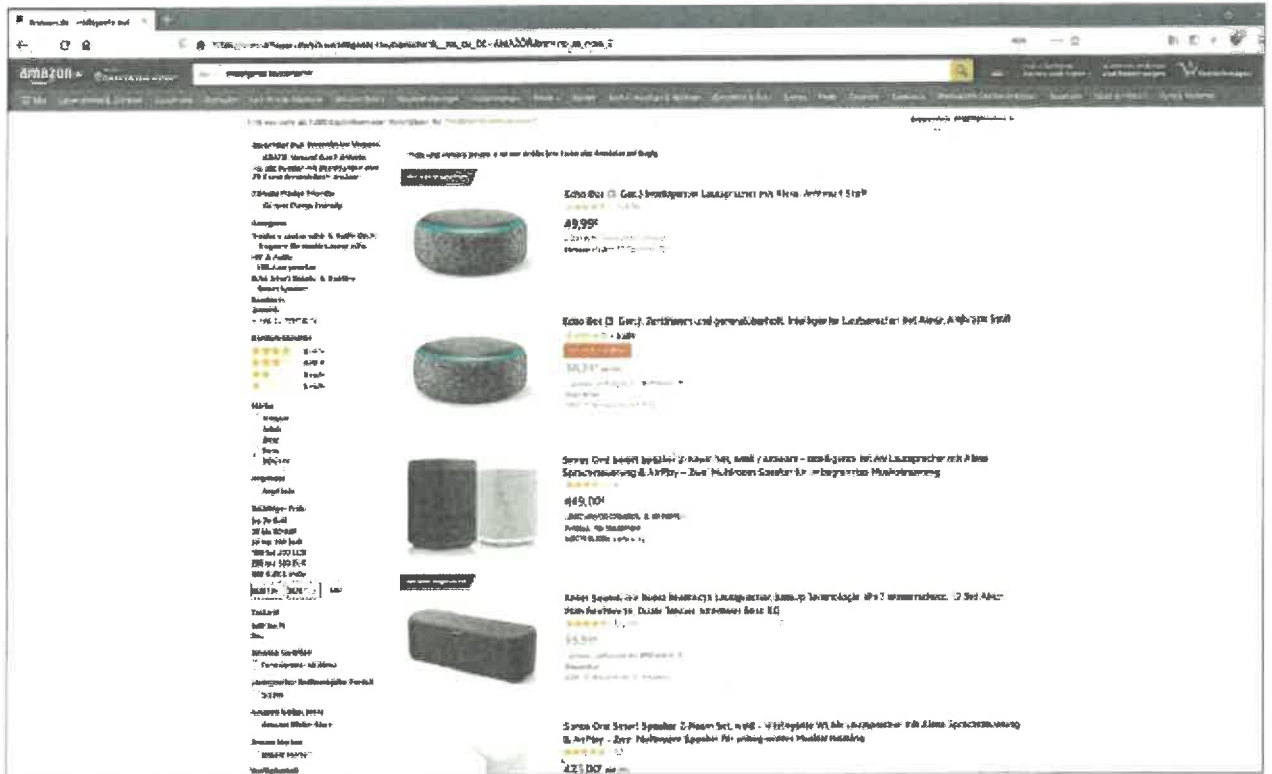


Figure 7: Offers of smart speakers by product search on amazon.de, screenshot from [https://www.amazon.de/s?k=intelliaente+lautSDrecher&mk\\_de\\_DE-%C3%85M%C3%85%C5%BD%C3%95%C3%91&ref=nb\\_sb\\_noss\\_2](https://www.amazon.de/s?k=intelliaente+lautSDrecher&mk_de_DE-%C3%85M%C3%85%C5%BD%C3%95%C3%91&ref=nb_sb_noss_2). Retrieved 3 December 2021.

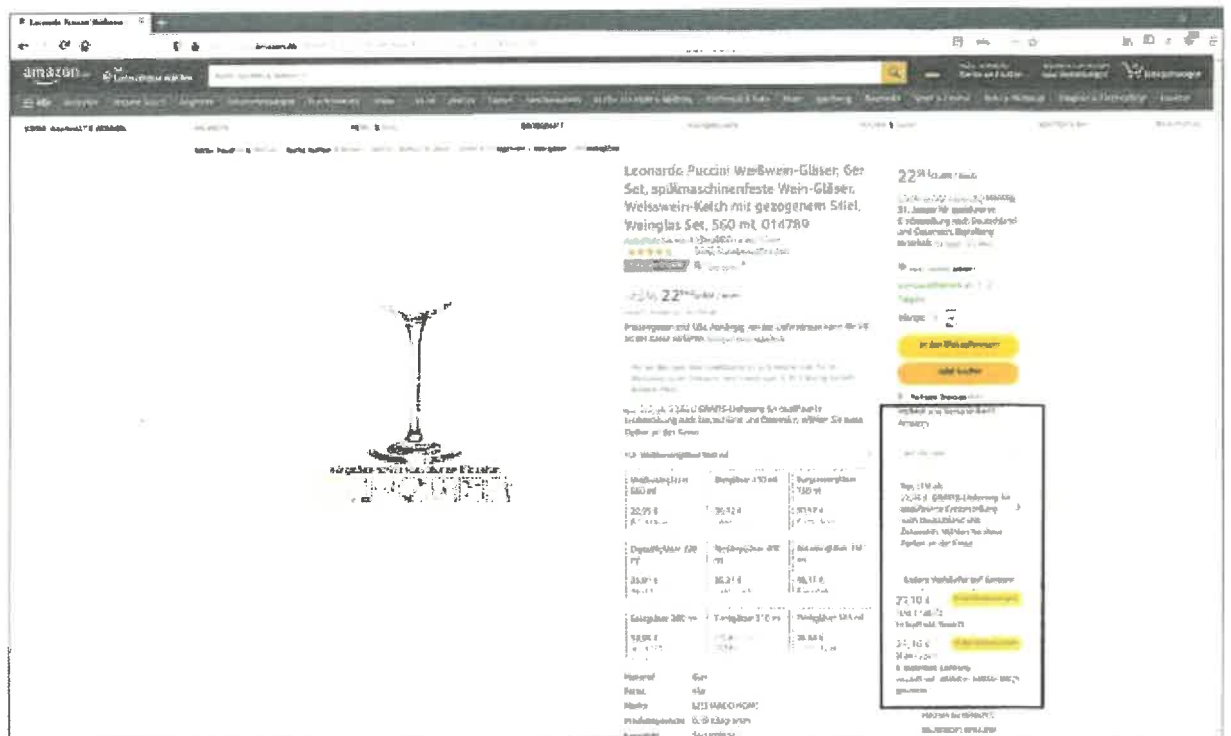


Figure 8: Different suppliers on a product detail page, see modified screenshot (black frame added for emphasis) from <https://www.amazon.de/Leonardo-014789-weinalas-Puccini-klar/do/BOOZCKSöFO>.



Retrieved 25 January 2022.

- (282) The majority of the items listed articles (ASINs) and offers<sup>348</sup> on the German e-commerce platform come from third-party sellers (around [...] each, see Table 20 and Table 21). Third-party sellers also account for [...] of the total trade volume on amazon.de, i.e., it is generated via the online marketplace (see Table 22).<sup>349</sup>

As of 31 December 2020 (number in millions / share in %)		Listed items/ASINs	
Total		[...]	[...]
...of it	only from Amazon Retail	[...]	[...]
	only from Third-party sellers	[...]	[...]
	from Amazon Retail as well as from Third-party seller(s)	[...]	[...]

Table 20: Number of listed items (ASINs) on the German Amazon marketplace as of 31 December 2020, broken down by Amazon Retail and third-party sellers. [...]. See Amazon's response of 18 October 2021 to the request for information of 1 October 2021, Annex 2, p. 10 f.

As of 31 December 2020 (number in millions / share in %)		Offers	
Total		[...]	[...]
...of it	from Amazon Retail	[...]	[...]
	from third-party sellers	[...]	[...]

Table 21: Number of listings on the German Amazon marketplace as of 31 December 2020, broken down by Amazon Retail and third-party sellers. [...]. See Amazon's response of 18 October 2021 to the request for information of 1 October 2021, Annex 2, p. 10 f.

In EUR billion / in % of total trade volume		2019		2020		first half of 2021	
Total trade volume		[...]	[...]	[...]	[...]	[...]	[...]
...thereof through	Amazon Retail	[...]	[...]	[...]	[...]	[...]	[...]
	Third-party sellers	[...]	[...]	[...]	[...]	[...]	[...]

Table 22: Total trade volume on the German Amazon marketplace in 2019, 2020, and first half of 2021, broken down by Amazon Retail and third-party sellers, see fn. 350.

- (283) [...]
- (284) [...] of the total revenue generated by Amazon in connection with the operation of its German online retail platform - namely around [...] or EUR [...] in 2020 - is attributable to

<sup>348</sup> [Not translated. Please see the German version.]

<sup>349</sup> [Not translated. Please see the German version.]

Amazon Retail. This compares with a revenue of around EUR [...] in 2020 from third-party sellers on amazon.de (see Table 23).<sup>350</sup>

In EUR billion / in % of total revenue		2019		2020		first half of 2021	
Total revenue		[...]	[...]	[...]	[...]	[...]	[...]
...of it	Amazon Retail	[...]	[...]	[...]	[...]	[...]	[...]
	with sellers	[...]	[...]	[...]	[...]	[...]	[...]

Table 23: Total revenue generated by Amazon in connection with the operation of the German online marketplace in 2019, 2020 and the first half of 2021, broken down by Amazon Retail and third-party sellers, see fn. 350.

- (285) It should be noted that [...] of the revenue generated by Amazon with third-party sellers on the marketplace come from basic fees for the use of marketplace (EUR [...]) and sales commissions (EUR [...]). In addition, the logistics business ([...] of total sales to marketplace third-party sellers or EUR [...]) and the advertising business (EUR [...]) in particular account for the remaining sales, although these are also fundamentally linked to the online marketplace.<sup>351</sup>
- (286) Amazon Retail acts purely as a retailer and sells the products of its suppliers. These include retailers and manufacturers acquired in the course of the so-called vendor program. Participation in the vendor program is only possible upon invitation by Amazon. The conditions for the participation in the program and purchase prices are determined in annual negotiations between the supplier and Amazon Retail. The vendor is then only active in a business relationship for Amazon Retail (as a supplier), but is at the same time responsible for the presentation of its products (including possible advertising measures) on the e-commerce platform. Amazon Retail, in turn, acts as a retailer vis-à-vis end customers and handles logistics and shipping, all customer contact and, in particular, pricing. Although the vendor program is primarily aimed at manufacturers, participation is also open - following an invitation from Amazon - to sellers of the online marketplace.<sup>352</sup>
- (287) On the other hand, Amazon is also active as a manufacturer upstream and produces both physical goods and digital content that are sold to end customers under Amazon Retail's own brands. Amazon has continuously expanded its private label business in recent years. Whereas at the end of 2016 physical products were offered under just under [...] ASINs

<sup>350</sup> [Not translated. Please see the German version.]

<sup>351</sup> [Not translated. Please see the German version.]

<sup>352</sup> [Not translated. Please see the German version.]

under Amazon's own brands on amazon.de, by the end of 2020 there were already almost [...] ASINs. The number of private labels in the various product categories increased from [...] <sup>353</sup>. Net sales generated with physical products under private labels have also risen [...], [...]. <sup>354</sup>

- (288) Moreover, to the extent that Amazon offers digital media content, i.e. movies, series, eBooks, audio books, among other things, it is also increasingly vertically integrated. This is because Amazon itself is also active as a producer here. In particular, Amazon (co-)produces "films and series for the Prime Video service" with its subsidiary Amazon Studios. <sup>355</sup> Some of these are shot in co-production with other production and distribution companies <sup>356</sup> and some are also distributed via cinemas. Amazon also seems to be expanding its business activities with Amazon Studios, e.g. through expensive and prestigious in-house productions <sup>357</sup> or through the acquisition of the film production studio Metro Goldwyn Mayer for almost EUR 7 billion. <sup>358</sup> Amazon is also active as a producer of audio books (Audible Studios) <sup>359</sup> and as a producer of video games (Amazon Games Studios or Amazon Games Publishing Services). <sup>360</sup> In addition, Amazon is active with Amazon Publishing as a publisher of books as paperback, eBooks and audiobooks. With *Kindle Direct Publishing*, Amazon also offers a self-publishing service in which authors and other publishers can publish their works as ebooks or print editions and have them sold via Amazon or Kindle and receive royalties - in varying amounts depending on the program. <sup>361</sup>

## (2) Amazon's logistics business

- (289) Logistics and, in particular, logistics services for the handling and processing of transactions are of great importance for the functioning of e-commerce. This is all the more true in the face of steadily rising demand due to the increase in online retail and the associated utilization of existing transport capacities. <sup>362</sup> Fast, error-free delivery of physical goods is important for customers and therefore a key competitive parameter. Accordingly, Amazon - initially to meet its own growing needs - has significantly expanded its business activities in this economic sector in recent years and now holds a strong position, particularly in logistic

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<sup>353</sup> [Not translated. Please see the German version.]  
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<sup>361</sup> [Not translated. Please see the German version.]  
<sup>362</sup> [Not translated. Please see the German version.]

services in the so-called CEP sector ("courier, express, parcel"). Amazon acts as a provider, intermediary and buyer of logistics services. In this respect, Amazon is able to build on the existing logistics infrastructure for the operation of its e-commerce platform, which also includes the storage and distribution of physical goods. On the other hand, Amazon can access not only the demand for logistics services of its own retail business, but also the demand of third-party sellers bundled via the offer of marketplace-related logistics services. This is because third-party sellers depend the ability to guarantee fast and functioning shipping for good visibility on the Amazon marketplace and, in particular, for the use of the Prime label.

**(a) Amazon's logistics infrastructure**

- (290) On the route of the physical goods from the seller or supplier to the customer, a basic distinction can be made between the "first mile", the "middle mile" and the "last mile". The "first mile" refers to the transport of goods from warehouses of suppliers or sellers (such as third-party sellers who use Amazon's fulfilment<sup>363</sup>) to fulfilment centres; the "middle mile" refers to the delivery from fulfilment centres to sorting centres, where the parcels are sorted by delivery region, and the subsequent transport to the delivery stations. The "last mile" refers to transport from delivery stations to customers.
- (291) Amazon's own logistics infrastructure initially comprises - in purely structural terms - [...] first-mile fulfilment centres, [...] middle-mile sorting centres and [...] last-mile delivery stations in Germany alone.<sup>364</sup> In addition, Amazon operates [...] fulfilment centres in Poland, the Czech Republic and Slovakia, which are also involved in the processing of orders via amazon.de,<sup>365</sup> and [...].<sup>366</sup> The fulfilment centres are basically where goods (from Amazon Retail and Amazon's logistics customers) are received, stored, picked,<sup>367</sup> packed and shipped on. The processing of customer returns also takes place in fulfilment centres. Finally, the sorting and distribution centres sort parcels based on their delivery addresses.<sup>368</sup>
- (292) In the actual transport to the customer, i.e., on the 'last' mile, Amazon does not employ its own staff. Instead, Amazon commissions larger and generally nationwide delivery service providers such as Deutsche Post (DPAG) with DHL and DHL Express, DPD, Hermes or

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<sup>363</sup> [Not translated. Please see the German version.]

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<sup>368</sup> [Not translated. Please see the German version.]

UPS, which transport and deliver shipments in their own name. On the other hand, Amazon organizes the transport itself via the Group's own Amazon Logistics division and uses smaller service providers (so-called delivery partners) for the execution, which operate with their own personnel and delivery vehicles.<sup>369</sup> These delivery partners transport the shipments using the Amazon logo and thus appear externally in the name of Amazon.<sup>370</sup> In addition, Amazon operates a network of its own pick-up stations, so-called "Amazon Hubs", from which end customers can pick up their shipments and from which returns can also be sent.<sup>371</sup>

**(b) Amazon's shipping programs**

- (293) Building on this logistic infrastructure, Amazon offers a broad and continuously evolving range of logistics services to third-party sellers on its marketplace through its optional logistics and shipping programs. Two different shipping channels are available to third-party sellers for their physical goods offered on the marketplace, the **Amazon Fulfilment Network** (hereinafter "AFN") and the **Merchant Fulfilled Network** (hereinafter "MFN"). In general, the third-party sellers can select the shipping channels individually for each product they offer via the marketplace.<sup>372</sup>
- (294) The AFN includes all services provided by Amazon's fulfilment and sortation centres and delivery stations, as well as the organization of shipping to customers by Amazon (via external delivery service providers or Amazon Logistics). In particular, Amazon organizes the fulfilment of all logistics services for third-party sellers using the **Fulfillment-by-Amazon** program (hereinafter "FBA"). The FBA program, which was introduced in Germany in 2008, is optional and can be used by third-party sellers on a product-by-product basis. To do so, the seller has to send the products for which it has selected FBA to an Amazon fulfilment centre. Amazon then handles order processing, warehousing, picking, packing and shipping the goods to the customer, as well as other services such as return management or refunds. Sellers do not have to meet any minimum requirements to participate in the FBA program. Amazon charges shipping fees, storage fees, and, if applicable, fees for processing customer returns in certain product categories. Subscription or participation fees are not charged.<sup>373</sup> For third-party sellers, using the FBA program is valuable not only because it simplifies the shipping organization but when sellers use FBA,

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<sup>369</sup> [Not translated. Please see the German version.]

<sup>370</sup> [Not translated. Please see the German version.]

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<sup>373</sup> [Not translated. Please see the German version.]

they are also able to meet the shipping-related quality criteria that Amazon uses to internally evaluate seller performance. In addition, products fulfilled via FBA are eligible for Prime shipping and the Prime logo, which enables better access to the attractive user group of Amazon Prime customers (see para (380) ff. below).<sup>374</sup>

(295) In addition, as part of the AFN, Amazon has been offering to third-party sellers in Germany that use the FBA program the supplementary shipping program **Multi Channel-Fulfillment** (hereinafter "MCF") since 2009. This enables sellers to use the entire AFN infrastructure (such as storage in fulfilment centres) also for orders via their distribution channels outside the Amazon marketplace, such as their own online shop or marketplaces of other providers.<sup>375</sup> However, unlike FBA orders on the Amazon marketplace, sellers are responsible for their own customer service when using MCF. [...] <sup>376</sup>

(296) [...] <sup>377</sup> [...] <sup>378</sup>

(297) IT integration is mandatory for delivery service providers that transport shipments within the AFN. [...] <sup>379</sup>

(298) Under the MFN, in contrast, third-party sellers on Amazon's marketplace that do not use FBA for all or some of their products process the orders for the products in question themselves, including packaging, storage and shipping. However, Amazon also offers optional shipping programs for sellers using MFN. The program **Buy Shipping through Seller Central** (hereinafter: "Buy Shipping")<sup>380</sup> allows sellers to order and process shipping services for their MFN orders from carriers approved for Buy Shipping via the Seller Central<sup>381</sup> portal. In this case, Amazon acts as an intermediary. The process encompasses the creation of shipping labels for the seller and tracking numbers for the customer. In addition, the tracking numbers are automatically uploaded so that the shipment status of the shipment is automatically updated in the Amazon system. Amazon is able to monitor the performance of carriers and sellers through automated data transfer. While the use of shipping intermediary services via Buy Shipping is free of charge for sellers, the carriers

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<sup>380</sup> [Not translated. Please see the German version.]

<sup>381</sup> [Not translated. Please see the German version.]

integrated into Buy Shipping pay a transaction fee to Amazon.<sup>382</sup>

- (299) Another optional shipping program for third-party sellers who fulfil and ship their orders themselves within the MFN is the **Seller-Fulfilled Prime** program (hereinafter "SFP")<sup>383</sup>. It allows third-party sellers that have been approved for shipping with SFP to offer their products on the marketplace under the Prime label and in Prime shipping, even if they do not use FBA to that extent. Instead, the respective shipments will be transported by carriers approved by Amazon for the SFP program, without any additional costs for Prime customers. To participate in the SFP program, sellers can register themselves. However, they must meet certain qualification criteria. After successfully completing a test phase, during which - compliance with all criteria is verified and the Prime logo may not yet be used, sellers are approved for the SFP.<sup>384</sup> The criteria include, for example, a very high accuracy of the shipping forecast<sup>385</sup> and a very low cancellation rate<sup>386</sup>. In addition, the shipping label must be purchased through Buy Shipping for at least 98% of orders.<sup>387</sup> Approved sellers are required to prepare SFP orders for shipment on the same day (if the order is received before the daily cut-off time) or otherwise on the following day, and to purchase the shipping label through Buy Shipping from an SFP-approved carriers. Any returns of SFP orders will be managed by the sellers themselves, meanwhile<sup>388</sup> customer service requests will be handled by Amazon.<sup>389</sup>
- (300) For delivery service providers to carry shipments in Buy Shipping or SFP requires that they be integrated with Amazon's IT systems.<sup>390</sup> [...] <sup>391</sup> To be eligible for SFP shipping, a carrier must meet additional criteria, most notably the ability to offer next-day delivery. In addition, carriers must meet certain prime performance metrics, [...] <sup>392</sup>
- (301) Finally, as part of the **Ship-with-Amazon** program (hereinafter: "SWA"), Amazon offers to pick up parcels from sellers with products that they have sold via the Amazon marketplace or via other distribution channels from their warehouses and feed them into the existing Amazon network for sorting, transport and delivery. However, SWA is not (yet) available

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<sup>382</sup> [Not translated. Please see the German version.]

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<sup>390</sup> [...]

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<sup>392</sup> [...]

in Germany.<sup>393</sup>

**(c) Amazon's roles in logistics**

- (302) Based on the shipping programs Amazon offers and its own needs, Amazon is both a provider of logistics services, in particular shipping services, and a buyer of shipping services. In addition, Amazon acts as an intermediary of logistics services between carriers and third-party sellers using MFN programs.
- (303) With its AFN shipping programs, Amazon acts as a provider of shipping services and other logistics services to third-party sellers, e.g., with the organizational processing of the shipping of goods, the storage of goods and return management (see para. (294) f. above). Amazon also provides these services within the group for the goods of Amazon Retail. The increasing importance of this offer for third-party sellers is illustrated in particular by the rising sales revenue generated by Amazon through the fees incurred in this respect. The revenue generated by Amazon with FBA fees increased from approximately [...] in 2018 to a total of approximately [...] in 2020, an increase of [...] within two years.<sup>394</sup>
- (304) Amazon is also an intermediary for shipping services for goods shipped via the MFN Buy Shipping and SFP programs. The importance of these programs also increased from 2018 to 2020. [...]
- (305) Since Amazon takes over the delivery of goods (in the AFN) for third-party sellers within FBA and MCF programs and at the same time the goods from Amazon Retail's own sales have to be delivered through the AFN, Amazon has a high demand for logistics services. To the extent that Amazon does not provide these services itself with the help of independent contractors as part of Amazon Logistics, it procures them on the market from carriers and is thus also a buyer of shipping services. In Germany, Amazon mainly requests shipping services from [...]. The carriers commissioned in the AFN generally deliver both Prime and non-Prime orders.
- (306) For its business partners, Amazon is usually by far the most important (external) customer. Thus, the sales generated with Amazon are usually at least twice as large as sales generated by the companies surveyed with the next largest business customer, and account on average for around [10-20%] of the total sales generated with business customers.<sup>395</sup>

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<sup>393</sup> [Not translated. Please see the German version.]

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- (307) Amazon's importance as a buyer is also evident from the fact that Amazon accounts for a significant share of the total shipment volume of the CEP market in Germany. [...]. In 2020, it is estimated that the total shipment volume of the CEP market in Germany amounted to 4.05 billion shipments. Of these, 2.27 billion shipments, or 56%, were B2C shipments.<sup>396</sup> Based on these volumes, the shipments sent via Amazon's AFN program correspond to [...] of the shipment volume of the entire German CEP market and as much as [...] of the shipment volume of the German B2C market in 2020.
- (308) The aspect of demand bundling is of particular importance here. [...]
- (309) While on the one hand Amazon has a large demand for shipping services on the market, on the other hand the undertaking is also increasingly expanding its own delivery network with Amazon Logistics. For example, the volume of shipments that Amazon transports on its own via Amazon Logistics using delivery partners over the last mile has increased significantly in recent years. [...].<sup>397</sup> It should be noted, however, that mixed parcels (Amazon Retail and FBA items sent in one parcel to the same recipient) could not be excluded and are therefore included in both shipment volumes. In this respect, there is a certain uncertainty - at least with regard to the absolute shipment figures.<sup>398</sup>

[...]

*Figure 9: Amazon retail shipments by shipping service provider, own representation based on: Amazon's response of 18 October 2021 to the request for information of 23 September 2021, para. 37 f. and Annex 2, spreadsheets A. 1.*

[...]

*Figure 10: FBA shipments by shipping service provider, own representation based on: Amazon's response of 18 October 2021 to the request for information of 23 September 2021, para. 37 f. and Exhibit 2, spreadsheets A.1.*

- (310) As its own shipping activities increase, Amazon is thus not only a strong buyer of logistics services, but is also increasingly competing with delivery service providers themselves, insofar as the services are provided for third parties.

### **(3) Amazon's advertising business**

- (311) Amazon's online advertising business, Amazon Advertising, is linked to and builds on various business activities of the group. This is because Amazon can install ad inventory across different offerings and use it both for intragroup advertising (see below para. (393)

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<sup>396</sup> [Not translated. Please see the German version.]

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ff.) and for further monetization via Amazon Advertising. Above all, the e-commerce platform is available as ad inventory, and the customer base of Amazon Advertising consequently consists largely of third-party sellers on Amazon's online marketplace.

(312) Amazon Advertising revenue has increased significantly in recent years, most recently in Germany from EUR [...] in 2017 to EUR [...] in 2020, [...] within three years (global revenue: EUR [...] in 2017 and EUR [...] in 2020, + [...]%). [...] <sup>399</sup>

(313) The Sponsored Ads offers include three different advertising offers:

- "Sponsored Products", i.e. advertising on search results pages (search-linked) or on product detail pages (search-unlinked) on the Amazon e-commerce platform for products available there,
- "Sponsored Brands", i.e. search-linked advertising on search results pages of the Amazon e-commerce platform for products of a brand or supplier available there,
- "Sponsored Display," i.e., search-unrelated advertising on Amazon's ad inventory (e.g., e-commerce platform, Twitch, Prime Video) and outside of Amazon for products available on Amazon's e-commerce platform.

(314) The business success of Amazon Advertising in this context is attributable in particular to Sponsored Products, which already generated [...] of total Amazon Advertising revenue in Germany in the first half of 2021 (i.e., [...]).

(315) In addition, Amazon offers streaming TV ads and online video ads both on Amazon websites, devices and offers such as Fire TV, IMDb.com or Twitch and outside Amazon (on external websites). Amazon also offers audio ads that are played in the free tier of Amazon Music, e.g., via Echo or Fire TV devices or apps. In principle, advertisers can run their ads across multiple Amazon advertising channels at the same time to reach their target audience.<sup>400</sup> According to Amazon, this type of combined advertising placement is - particularly effective for increasing product detail page views, new customer purchases, or sales generated by advertising.<sup>401</sup>

(316) While Sponsored Ads can only be used by Amazon's selling partners, i.e. by sellers and vendors who offer their products (either themselves or via Amazon Retail) on Amazon's e-commerce platform, video and audio ads are also open to other undertakings. In addition,

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<sup>399</sup> [Not translated. Please see the German version.]

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Amazon offers further advertising opportunities for advertisers, such as so-called "Stores", i.e. own websites integrated into the retail platform for brands registered or eligible in - Amazon's trademark registry ("Brand Registry") or interactive livestream advertising broadcasts.<sup>402</sup>

- (317) In addition to its activities as a supplier of its own ad inventory, Amazon is also active in the area of mediating ad inventory between suppliers ("publishers") and buyers ("advertisers") of ad inventory, among other things with the services Amazon DSP ("Demand Side Platform"), Sizmek Ad Suite or Amazon Publisher Services. Amazon also offers other advertising services such as Amazon Attribution, a tool for measuring the success of online advertising.
- (318) Particularly valuable, especially with regard to the advertising business, appears to be the various customer data that Amazon receives from different sources and can combine (see in this regard para. (484) ff.). This enables the group to offer its advertising customers the placement of advertising not only on the basis of relevant keywords or products, as in the case of Sponsored Products and Sponsored Brands, for example, but also to use contextual as well as interest-based advertising.<sup>403</sup> Contextual advertising uses, among other things, website- and device-related information to place ads.
- (319) For interest-based advertising, i.e. target group-specific advertising based on selected characteristics of the target group, Amazon uses, among other things, (pseudonymized) information on search queries, product purchases or product views on the Amazon commerce platform, information from other Amazon services such as Prime Video, Amazon Music, IMDb.com or Twitch as well as other information such as location, account or device information in order to form target groups. [...].<sup>404</sup> Advertisers can select from different target groups based on this.<sup>405</sup> In addition to "in-market target groups", [...]<sup>406</sup>, advertisers can choose from the categories "lifestyle", "interests" and "life events".<sup>407</sup> Here, advertising can be targeted for specific target groups such as "Environmentally Conscious", "Just moved", "Upcoming trip", "Interested in Canadian history", "Interested in IMDb thriller movies and TV shows".<sup>408</sup> Custom audiences are also possible, based on the viewing, browsing or purchase history of Amazon customers. Advertisers can also use Amazon DSP's

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<sup>408</sup> [Not translated. Please see the German version.]

Advertiser Audiences program to combine their own and third-party customer information with Amazon's and store so-called pixels on their own websites to use additional (pseudonymized) customer data for even more specific targeting.

- (320) Another advantage for the advertising business is the opportunity of cross-service advertising, which arises from the interconnection between Amazon's different offers and is also used by Amazon itself in advertising campaigns.<sup>409</sup> Amazon actively promotes this opportunity and highlights the increased effectiveness of cross-service advertising.<sup>410</sup>

#### (4) Amazon Web Services

- (321) Amazon Web Services (AWS) is an independent business line that initially provides the information technology infrastructure for the group and for all of Amazon's digital offerings be they e-commerce offerings such as the online Marketplace, Alexa or Prime Video, or AWS's own offerings. In this respect, it is of central importance to Amazon as a group. Historically developed from the IT infrastructure of the online e-commerce platform, AWS not only provides its services internally, but also offers them as cloud computing services to third parties on the market and is now one of the world's most important providers in this area. As a result, Amazon assumes a dual role as provider and corporate user of AWS services and resources.
- (322) Amazon is regarded as a cloud computing pioneer and the first provider of cloud-based IT infrastructure services.<sup>411</sup> Before Amazon offered such services publicly for the first time in 2006 with AWS, the group was already using a highly scalable IT infrastructure for the operation of its e-commerce platform, among other things, and had discovered - also in conjunction with its "merchant.com" offering<sup>412</sup> - that its own expenditure for the development of new products and services could be considerably reduced by means of - standardized IT interfaces and systems introduced within the group. Amazon recognized that such standardized interfaces and systems, the corresponding expertise and the available resources could also be made commercially viable by offering them to third parties.<sup>413</sup>
- (323) Amazon now offers companies in 190 countries more than 200 different cloud computing

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<sup>409</sup> [Not translated. Please see the German version.]

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services<sup>414</sup> and is one of the most important providers in this area.<sup>415</sup> The service portfolio includes a wide range of different services at different levels of cloud computing.<sup>416</sup> Most recently, Amazon announced an expansion of AWS, particularly in Germany, which provides supplementary infrastructure for "local zones" with locations in Berlin and Munich, enabling particularly fast response times in the single-digit millisecond range for demanding applications (Amazon cites as examples "remote real-time gaming, media and entertainment content creation, live video streaming, engineering simulations, augmented and virtual reality, machine learning inference at the edge") in Germany as well.<sup>417</sup>

(324) Amazon ranks the cloud computing services it offers by industry (e.g., advertising and marketing, financial services, etc.) and in technology categories such as computing, storage, databases, networking, analytics, robotics, machine learning and artificial intelligence, and Internet of Things.<sup>418</sup> The top five revenue-generating AWS offerings are the following services:<sup>419</sup>

- [...] <sup>420</sup> [...]
- [...] <sup>421</sup>
- [...]
- [...] <sup>422</sup>
- [...] <sup>423</sup> [...] <sup>424</sup> [...]

(325) AWS customers include numerous internationally active undertakings, but also public administration organizations.<sup>425</sup> [...] <sup>426</sup> The high importance of AWS for a large number of undertakings and organizations - in particular also undertakings active in the digital economy - was also made clear by a partial AWS outage on 7 December 2021. For example, the streaming services Netflix and Disney Plus were unavailable for numerous users; other

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affected services included such diverse offerings as the Roomba smart vacuum robot, the Duolingo language learning service, the Tinder dating platform, and the League of Legends and Valorant PC games.<sup>427</sup>

(326) [...] <sup>428</sup> [...] <sup>429</sup> [...]. The manifold value-added connections between AWS and the other Amazon business lines were exemplified by the wide range of other Amazon services that were also down as a result of the aforementioned partial AWS outage on 7 December 2021. For example, the website Amazon.com and Amazon Alexa, Amazon Music and Kindle were partially unavailable, and work also had to be stopped in affected Amazon fulfilment centres.<sup>430</sup> [...] <sup>431</sup>

(327) Intra-group usage of AWS services accounts for significant shares of total usage in some cases. Amazon's usage of the five top-selling AWS services ranged from [...] to [...] of total usage in 2020:

Service	Unit of measurement	Total usage	Use by		Usage in %	
			Amazon	External customers	Amazon	External customers
[...] <sup>432</sup>	[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]	[...]	[...]

Table 24: Usage of the five largest AWS services by Amazon and external companies, own representation based on: Amazon's response of 8 November 2021 to the request for information of 22 November 2021, para. 11, and Exhibit 2, spreadsheet 1.4.2.

(328) An estimate based on external revenues and usage figures shows that intra-group usage of AWS services was worth approximately at least EUR [...] in 2020:<sup>433</sup>

Service	External revenues	Estimated value in use due to Group's own use (internal revenues)

<sup>427</sup> [Not translated. Please see the German version.]  
<sup>428</sup> [...]  
<sup>429</sup> [...]  
<sup>430</sup> [Not translated. Please see the German version.]  
<sup>431</sup> [...]  
<sup>432</sup> [...]  
<sup>433</sup> [...]

	worldwide, 2020, in EUR million	
[...]	[...]	[...]
[...]	[...]	[...]
[...]	[...]	[...]
[...]	[...]	[...]
[...]	[...]	[...]

Table 25: External revenues from enterprise customers of the five largest AWS services and estimated monetary value of use of these services. Own presentation and calculation, see fn. 433.

(329) [...] <sup>434</sup> [...] <sup>435</sup> [...] <sup>436</sup>

**(5) Amazon Pay**

(330) Amazon Pay is a payment processing service that allows Amazon customers to use it to pay for purchases made on external websites and apps, provided the website in question participates in the Amazon Pay program. The payment methods stored in the Amazon customer account are used. Amazon Pay thus offers existing customers of the e-commerce platform a further simplification of online shopping, as they do not have to register again or create an account with participating external web stores. Amazon also offers them an additional service guarantee (the so-called A-to-Z guarantee) for certain products paid for via Amazon Pay.<sup>437</sup> In addition, customers can also use the Alexa voice assistant via Amazon Pay to pay by voice.<sup>438</sup>

(331) The use of Amazon Pay is free of charge for consumers. Sellers pay an authorization fee of EUR 0.35 and a processing fee of less than 2% of the value of the goods for each transaction processed via Amazon Pay.<sup>439</sup> Total global revenue with Amazon Pay amounted to [...] in 2020 (in Germany: [...]).<sup>440</sup> In Germany, Amazon Pay is the third most-used online payment service after PayPal and Klarna, according to a survey.<sup>441</sup>

(332) Sellers who use Amazon Pay for their online sales outside the Amazon marketplace benefit from the increased sense of security that consumers have with this payment method, as they only deposit their relevant data once with Amazon. In this way, sellers can reduce the

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inhibition threshold that consumers may have when buying from an online shop that is still unknown to them, without having to resort to the payment method of purchase on account, which is less favourable for them because of the possible risk of default. Amazon itself advertises that using Amazon Pay can result in reduced payment time, fewer shopping cart abandonments, a higher conversion rate, more purchases and more expensive orders.<sup>442</sup> At the same time, integrating Amazon Pay makes it possible for online retailers to target the large customer base on the Amazon e-commerce platform. In 2020, just under [...] payment transactions were carried out via Amazon Pay in Germany, with an average of around [...] monthly active users.<sup>443</sup> The attractiveness of Amazon Pay, [...],<sup>444</sup> is therefore based on the importance of Amazon's retail platform and the size of its customer base.

- (333) Connections are also made with other Amazon services, especially Alexa. For example, Amazon advertises that external companies can be "one of the first in voice commerce" by using the connections between Amazon Pay and Amazon's Alexa voice assistant. Since an Alexa integration is required to use Amazon Pay in "voice commerce," businesses are encouraged to develop their own Alexa skill<sup>445</sup>.<sup>446</sup> Advertisements for Amazon Advertising services will also be displayed to companies interested in Amazon Pay.<sup>447</sup>

**bb) Competitive advantages due to the related activities**

- (334) The fact that the various business activities predominantly build on each other in the sense of market stages or value chains or are otherwise interlinked gives Amazon various competitive advantages. These include competitive advantages of the group in already covered business areas as well as the facilitation of a fast and effective start-up of further business activities. In particular, Amazon can rely on the success of its e-commerce platform and its large customer base, infrastructure and organization for most of its business activities, which is not possible for competitors or at least not to a comparable extent.
- (335) Amazon can benefit in particular from the fact that the digital products or services offered by the undertaking often require similar input factors.<sup>448</sup> For example, Amazon can draw on its own - highly efficient - IT infrastructure and the AWS business line with its innovation potential as well as extensive data (see B.III.4 below) for its existing and new digital

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offerings as so-called "shareable inputs".<sup>449</sup>

- (336) In addition, the operation and organization of the respective business activities are facilitated by the intragroup links and connections. For example, Amazon's infrastructure is often based on the e-commerce platform and has grown historically from it. Amazon Web Services, in particular, was largely developed from the technological infrastructure of the e-commerce platform.
- (337) In addition, Amazon can use positive indirect network effects that arise from the links between various business activities and the e-commerce platform, or promote them in a targeted manner. This is because the competitive significance of these offerings in many cases depends significantly on the number and, in some cases, also the purchasing behaviour of consumers and, in particular, Prime members on the e-commerce platform. Accordingly, Amazon's offers in the logistics and advertising area, for example, are addressed almost exclusively to third-party sellers of the marketplace, which, if used, can (better) reach the end customers who shop via the e-commerce platform. This applies in particular to Prime customers, who increasingly buy Prime eligible products because of Prime shipping, and often also use other Amazon services through which they can receive ads.
- (338) In view of these close links between the business activities, it is also obvious that further economies of scope can arise in the joint operation and cross-divisional use of the data collected. An examination of individual business activities indicates the following:
- (339) **Amazon Retail** benefits from the hybrid structure of the e-commerce platform, i.e., the operation of both its own online shop and the online marketplace under the same internet presence. By admitting third-party sellers, a broad product range can be offered, and individual products are also frequently offered by several sellers. Because of this expanded product range and the resulting improved search and comparison options, more end customers can be attracted to the e-commerce platform. This not only increases the customer base of the online marketplace, but also the customer base of Amazon Retail. Furthermore, Amazon Retail has access to a great deal of data from the online marketplace or the entire e-commerce platform, which can significantly influence its offer and pricing strategy. At the same time, Amazon can identify significant supply gaps on the online marketplace (see on this below para. (534), (539) ff.) and compensate for them through its online retail business.
- (340) In the **logistics segment**, the first fulfilment centres for the retail business were set up. The entire infrastructure and organization of the AFN is used equally for the storage, shipping

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<sup>449</sup> [Not translated. Please see the German version.]

and processing of returns of both Amazon Retail goods and goods from third-party sellers. With regard to shipping services in particular, this can create advantages through the bundling of demand. In addition, data from the marketplace business can lead, for example, to better demand forecasting, shortened delivery times, improved warehousing, etc. On the one hand, the logistics services offered by Amazon to third-party sellers also aim to simplify shipping processing. On the other hand, however, certain service offerings, namely the FBA and SFP programs, are mainly significant for the third-party sellers because they entitle them to use the Prime label and thus achieve better visibility on the online marketplace as well as better access to Prime customers. Thus, the larger the number of Prime customers, the more significant such optional logistics offerings from Amazon become. An introduction of the SWA program, which is already offered in the USA, Great Britain, Italy and India, could also further strengthen the reach and significance of Amazon's logistics offerings in Germany. Under SWA, logistics services would also be provided (for the first time) to sellers who are not third-party sellers on the Amazon marketplace. This would allow Amazon to bundle an ever-growing demand and achieve an even stronger negotiating position. Further economies of scale could also accrue for Amazon, which would make the expansion of its own logistics network, and possibly a further opening of Amazon's own delivery services to sellers active outside the Amazon online Marketplace, attractive.

(341) Amazon's **advertising business** is largely based on ad inventory on the e-commerce platform (which partly replaces the previously used product suggestions). In principle, Amazon can decide for itself whether ad inventory is made available internally or externally. At the same time, the advertising business benefits from the possibility of personalized advertising based on data that Amazon collects through its platform business and other business activities such as its digital media offerings. In this respect, Amazon benefits from the fact that, due to the broad product range and the large number of offers, many end customers start their product search directly on the Amazon e-commerce platform.<sup>450</sup> The group's advertising offers are therefore particularly interesting for third-party sellers, as they enable them to better reach end customers on the marketplace.

(342) **Amazon Pay** uses the customer account of the e-commerce platform and the payment information provided by the customers there. The importance of Amazon Pay also depends to a large extent on the trust that consumers place in the Amazon e-commerce platform and from which sellers can also benefit in sales via other online sales channels by offering their customers this payment option. At the same time, this provides Amazon with transaction

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<sup>450</sup> [Not translated. Please see the German version.]

data on its users' purchases outside the e-commerce platform.

- (343) Incidentally, the links between its various business activities mean that Amazon operates in a dual role in almost all of these business areas, in some cases even in multiple respects. On the one hand, Amazon is not only a supplier, but also an (intragroup) buyer of its own services, as shown in table 26:

Offers	Intragroup demand
E-commerce platform amazon.de	Amazon Retail
Logistics business	Amazon Retail
Advertising business	Amazon services and products
Amazon Web Services (AWS)	Amazon services and products
Amazon devices (e.g. Fire TV, Echo)	Complementary services from Amazon (e.g. Prime Video, Alexa)

Table 26: Amazon services and their internal customers, own illustration.

- (344) On the other hand, the external business customers are mostly competitors of the group in another business area, as shown in Table 27, are thus less strongly integrated and in this respect cannot benefit from economies of scope or at least not to the same extent as Amazon. For example, third-party sellers and Amazon Retail compete on the amazon.de e-commerce platform. Also, AWS customers are Amazon's competitors in other business areas, such as Netflix and Disney in the area of video streaming services. The same applies to the logistics area, with Amazon both demanding services from DHL, for example, and competing with the undertaking for shipment volumes from third-party sellers. Such dual roles also exist in the Internet of Things space: Amazon, for example, offers a platform with the Fire TV that Netflix and Disney can use to reach smart TV users - at the same time, they are in competition with Amazon's Prime Video service for precisely these users.

Offers	External supplier or customer	In competition with
E-commerce platform amazon.de	Third-party sellers	Amazon Retail
Amazon Web Services (AWS)	e.g. Netflix, Disney	Prime Video
Logistics business	e.g. DHL	Amazon Logistics
Amazon's devices (e.g. Fire TV)	Complementary services (e.g. Netflix, Disney)	Amazon services (e.g. Prime Video)

Table 27: Amazon's offerings, their external customers, and Amazon's services with which they compete, own presentation.

- (345) These dual roles entail additional competitive advantages for Amazon and, conversely, threats for competition, to the extent that Amazon can not only benefit from the advantages

of vertical integration vis-à-vis less integrated competitors, but that it is also, thereby, fundamentally possible for Amazon to exert significant influence on the business activities of competitors within the framework of the vertical business relationship.

- (346) In addition to the described economies of scope and competitive dangers that can accompany dual roles, this can ultimately also lead to Amazon - in other business areas - benefiting from the success of its competitors itself.<sup>451</sup>

**b) Broad interconnected offer to the consumer**

- (347) The fact that Amazon's business activities are conglomerate in nature is also evident from the demand-side perspective. The conglomerate positioning in this respect is based on the large number of different offers addressed to consumers in various business areas. The broad portfolio of products and services is interconnected in whole or in part in various respects or opens up corresponding opportunities (see aa)). Due to the manifold linkages of the offers, Amazon also presents itself as an ecosystem from the consumer's point of view, which brings with it various competitive advantages or opportunities for Amazon to exploit such advantages (see on this bb)).

**aa) Portfolio of products and services and their interconnectedness from the consumer's point of view**

- (348) Starting with the online offering of books, Amazon has continuously expanded its range of products and services that consumers can obtain via Amazon. In the meantime, its users can cover their needs in the area of mainly private consumption very extensively (see below (1)). The offerings are interconnected or can be interconnected in various ways for consumers (see below (2)).

**(1) Offers to the consumer**

- (349) Amazon's offerings to consumers essentially fall into the areas of intermediary services via online marketplaces, retail and (home) entertainment as well as smart home. In this context, primarily physical goods and digital (media) content and services are offered; a special role in the area of physical goods is played by the devices that Amazon offers for the use of digital content and services (in the area of home entertainment and smart home).
- (350) In the area of physical goods, Amazon itself as a retailer (Amazon Retail) offers a variety of

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<sup>451</sup> [...]

consumer products via the online shop operated on the Amazon e-commerce platform.<sup>452</sup> In addition, Amazon grants consumers access to product offerings from third-party sellers via the online marketplace also operated on the e-commerce platform, which consumers can purchase there as end customers. The uniform product offering via the e-commerce platform enables Amazon to offer consumers a broad range of goods. As a result, Amazon enables consumers to search for products among [...] <sup>453</sup> items listed on the e-commerce platform, to obtain information about the products offered, and to compare products and offers (from Amazon Retail and third-party sellers) through customer reviews, among other things.

- (351) Amazon is also a provider of many different digital (media) content and services. Digital content is often offered both for purchase (usually as a download) and for temporary use (in streaming).
- (352) This includes video content such as movies, series, live sports broadcasts<sup>454</sup> and paid TV programs that Amazon offers via its video streaming service Prime Video. Currently, Amazon's offer in Germany includes the following: As a *video-on-demand service*, Prime Video is part of the Amazon Prime membership (see recital (379) ff. below), so that Prime customers can access a free movie and series catalogue of "thousands of movies and series episodes"<sup>455</sup> via Prime Video. In addition, Prime customers can use the *TV-on-demand offering* Amazon Channels for an additional charge per TV channel. Incidentally, all Amazon customers (i.e., all customers with a customer account on amazon.de)<sup>456</sup> have access to Prime Video as an *online video store*, through which they can buy or rent and stream individual movies and series. Prime Video has around [...] monthly active users in Germany.
- (353) Amazon also offers music content and other audio formats digitally, firstly as MP3 (music) downloads for purchase and secondly in streaming via Amazon Music, an audio streaming service via which radio stations, podcasts and radio plays can be streamed in addition to music. Content can be obtained in three versions via Amazon Music. *Amazon Music Free* is free, but only offers a limited range of content; audio advertising is also integrated. The other two offerings are ads-free. *Amazon Music Prime* (also: Prime Music) is integrated into the Prime subscription; Prime customers can access around 2 million songs as well as playlists,

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<sup>452</sup> [Not translated. Please see the German version.]

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- radio stations, podcasts and a selection of radio plays here at no additional cost.<sup>457</sup> Prime Music has [...] monthly active users.<sup>458</sup> The most comprehensive audio streaming service with a significantly larger selection and additional options is *Amazon Music Unlimited* for a flat monthly fee (EUR 9.99 per month or EUR 7.99 per month for Prime customers),<sup>459</sup> to which around [...] subscribers in Germany have subscribed (with Prime customers accounting for around [...] thereof).<sup>460</sup>
- (354) With Audible, Amazon offers another, but more specialized audio service, which does not offer music, but audiobooks, audio plays and podcasts by monthly subscription or for purchase<sup>461</sup> Audiobooks, audio plays and podcasts come from third parties as well as from Amazon itself (so-called "Audible Originals", produced in-house). At the end of 2019, the number of Audible subscriptions in Germany was [...].<sup>462</sup>
- (355) Amazon also offers so-called eBooks, which can be read either via the group's eBook reader, the Amazon Kindle, or on tablets, smartphones and computers (then via Amazon's Kindle app<sup>463</sup> ). The eBooks offered by Amazon can either be purchased individually or used via the *Prime Reading* offers (restricted free selection of eBooks and audiobooks for Prime customers) or *Kindle Unlimited*<sup>464</sup> (subscription for a monthly flat rate of EUR 9.99 per month and with a free selection of over one million eBooks, e-magazine subscriptions as well as over 2,000 audiobooks, approx. [...] subscriptions in 2020<sup>465</sup>).
- (356) Amazon is also active with online streaming platforms and online video games. On the one hand, since the acquisition of Twitch in 2014, Amazon has maintained a live streaming video platform on which mainly online video games are streamed (live). [...] <sup>466</sup> On the other hand, Amazon offers video games from third parties as well as from its own production under the name Amazon Games.<sup>467</sup> Since 2020, Amazon has also offered a cloud gaming platform called Amazon Luna.<sup>468</sup> Other Amazon services in the digital field include, for example, the Fire OS operating system, which is, however, only available on Amazon devices such as the

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<sup>457</sup> [Not translated. Please see the German version.]

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Fire tablet, the Amazon Appstore or the online storage services Amazon Drive and Amazon Photos.

- (357) Finally, Amazon offers one of the three leading general voice assistants with its digital service Amazon Alexa.<sup>469</sup> Alexa is preinstalled on the smart speakers of the Amazon Echo series in particular (see below), but can also be used on other "Alexa-enabled" devices. Alexa is operated via voice commands. Over 10,000 functions (so-called skills) can be accessed via the "Alexa Skills Store" in Germany.<sup>470</sup> For example, information, weather, time, news, etc. can be retrieved, audio books or music can be played, calls can be made and games can be played. In particular, orders can also be placed via the internet (especially the Amazon e-commerce platform). An important function of the voice assistant also represents the access to other devices connected to Alexa in the area of the so-called Internet of Things or Smart Home, e.g. intelligent vacuum robots, light switches, speakers, thermostats, televisions or security devices. Voice assistants such as Alexa thus function both as a platform for voice and audio applications and as an operating option for devices in the Internet of Things/Smart Home area.<sup>471</sup>
- (358) Amazon also acts as a manufacturer and seller of devices to consumers, in particular devices that play back digital content or are to be located in the area of the so-called "Internet of Things" or "Smart Home".
- (359) Amazon's first own device in this area was an eBook reader in 2007, the Amazon Kindle. eBooks purchased or borrowed via the Amazon e-commerce platform or its sub-website "Kindle Shop" can be read on this device; eBooks from other providers cannot be used on the Amazon Kindle without further ado. On the other hand, it is possible to play audio books on newer models. In Germany, about [...] of all households own an Amazon Kindle, and there are about [...] monthly active users.<sup>472</sup>
- (360) Amazon also offers the Amazon Fire tablet (formerly: Kindle Fire), which uses, among other things, the Fire OS operating system developed by Amazon, which is based on Android, and other proprietary Amazon developments such as the Amazon Appstore and the Amazon Silk web browser. In Germany, about [...] of all households own a Fire tablet, and there are about [...] monthly active users.<sup>473</sup>

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<sup>469</sup> [Not translated. Please see the German version.]

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<sup>472</sup> [Not translated. Please see the German version.]

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- (361) With the Fire TV series, Amazon sells streaming media adapters that enable the transmission of multimedia content (mostly video, but also audio or pictures) via the internet (so-called Over-the-top content) to TVs and turn them virtually into smart TVs. The Fire TV is a set-top box, the Fire TV Stick an HDMI stick; the Fire TV Cube is a streaming media player that is controlled by voice (instead of remote control) like Echo devices (see below).<sup>474</sup> If you connect such a device to a TV and to the internet via a Wi-Fi network, you can access video and audio content from Amazon (i.e. Prime Video or Prime Music if you have a subscription) as well as preinstalled apps via the user interface and partly also via Alexa voice commands. Via the Amazon Appstore integrated into the Fire OS operating system, additional apps from third-party providers such as ARD, ZDF, joyn and waipu.tv as well as Netflix, Disney+ or Sky, which provide analogue TV or video media libraries digitally for streaming, can be downloaded and used if they are not already preinstalled. In Germany, around [...] of all households own a Fire TV, and there are around [...] monthly active users.<sup>475</sup>
- (362) Amazon also sells other devices in the smart home sector. These include in particular the Amazon Echo series of intelligent speakers (so-called "smart speakers"), which is considered the leader in this area.<sup>476</sup> The Echo devices can be used primarily to access Amazon's Alexa voice assistant and, via it, other Internet of Things devices connected to the Echo device. In addition, the devices serve as "regular" speakers for playing audio content. In Germany, about [...] of all households own an Echo device, and there are about [...] monthly active users.<sup>477</sup> In addition, Amazon offers other smart home devices. In particular, the Blink<sup>478</sup> and Ring<sup>479</sup> brands are worth mentioning here, under which Amazon has been offering smart-home devices in the area of home security technology since acquiring the respective companies of the same name in 2017 and 2018, respectively. These include, for example, security cameras and doorbells with integrated video cameras that can be connected and remotely controlled via the internet with mobile devices such as smartphones and tablets. Amazon also offers other smart home devices such as "smart" outlets<sup>480</sup> and mesh Wi-Fi systems under the name Amazon eero<sup>481</sup>. Various other products from Amazon are likely to

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<sup>474</sup> [Not translated. Please see the German version.]

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<sup>481</sup> [Not translated. Please see the German version.]



reach market maturity soon, including a household robot (Amazon Astro)<sup>482</sup> or a projector for video telephony, especially for children (Amazon Glow)<sup>483</sup>.

## **(2) Interconnectedness between offerings to consumers**

(363) From the consumer's point of view, almost all of Amazon's offers can be accessed via Amazon's e-commerce platform or via the internet presence under which it is operated, as well as via the uniform customer account. All offers are linked with each other in this respect. Thus, in particular the internet presence under which the e-commerce platform is operated has developed into a comprehensive offer portal for consumers (hereinafter: "Amazon offer portal" or, for the German internet presence, "offer portal under amazon.de" or "amazon.de"), during the use of which it is not always clear to consumers whether they are (still) on the e-commerce platform or accessing a separate offer which is not attributable to the trading platform (see (a)). Amazon itself also speaks of a "uniform customer experience with a broad selection of products and services".<sup>484</sup> In addition, there are close content links between Amazon's digital (media) offerings and the complementary playback devices that Amazon sells (see (b)). Furthermore, with the range of offers, there are further opportunities for connections between the respective services and products of the group, which Amazon also uses. In particular, Amazon Prime, a customer loyalty program<sup>485</sup> and an essential component for promoting cross-service and cross-product use, bundles consumer-facing offerings of the Group in a subscription (see (c)). In addition, Amazon is further deepening the links between offerings in different markets, e.g., through bundling offers and the placement of advertising for its own services and devices on the various channels available to the group (see on this (d)).

### **(a) Links via the offer portal or the e-commerce platform**

(364) The respective country-specific internet presence or the offer portal accessible under it forms the central access point for consumers to Amazon's offers. Under the domain, consumers can uniformly access most of the offers, whether they are offers of the e-commerce platform (consisting of the offers of third-party sellers via the Amazon marketplace and the offers of Amazon Retail) or other offers, in particular digital services. Almost all Amazon products, services and devices can be found, accessed and generally purchased by consumers via the offer portal. Other links - such as (internal) advertising measures (see para. (393) ff. below)

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<sup>485</sup> [Not translated. Please see the German version.]

or the further monetization of Amazon's various offers (see para (403) ff. below) - also build significantly on the internet presence.

- (365) The customer account on the country-specific offer portal (such as amazon.de) serves as the central log-in for almost all of Amazon's offers addressed to consumers. This is because the consumer must have created such a customer account and logged in via it in order to purchase or use them (so-called "single sign-on"). This applies beyond the e-commerce platform both to services switched via amazon.de, such as Prime Video or Amazon Music, and to offers such as Audible, which also have their own website. Even the use of physical products such as Fire TV or Echo devices requires logging in via an amazon.de customer account.<sup>486</sup> Under the customer account, which is usually created for the use of the e-commerce platform, many other offers are thus also bundled for the consumer. This allows them to manage products and services centrally via the offer portal using a single log-in and to access existing and new Amazon offers easily. This is reflected, for example, in the "My Account" menu of the website, because this contains, at least in the case of a Prime membership, the following menu items, for example: My Account, My Orders, My Memberships and Subscriptions, My Prime Membership, My Content and Devices, My Prime Music, My Amazon Drive, My Prime Video, My Kindle Unlimited, My Watchlist, My Purchased and Rented Videos, My Games & Software Library, My Apps & Devices. Furthermore, this also applies to other third-party websites and offers if they use the "Login with Amazon" program.<sup>487</sup>
- (366) In addition, most of Amazon's offers are placed on subpages of the website on which the country-specific offer portal is operated (i.e., in Germany, the offer portal under amazon.de). This includes the eBook offering via the Kindle Store<sup>488</sup> and the digital content offerings Prime Video<sup>489</sup> and Amazon Music<sup>490</sup>, but also the Alexa Skills Store<sup>491</sup>. These offerings can therefore be accessed regularly via the portal.<sup>492</sup>
- (367) Due to the size of its consumer customer base, Amazon's e-commerce platform represents an important sales channel for Amazon's services and products. Amazon's offers are always prominently displayed as a separate category on amazon.de (see the following illustrations).

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<sup>486</sup> [Not translated. Please see the German version.]

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<sup>491</sup> [Not translated. Please see the German version.]

<sup>492</sup> [Not translated. Please see the German version.]

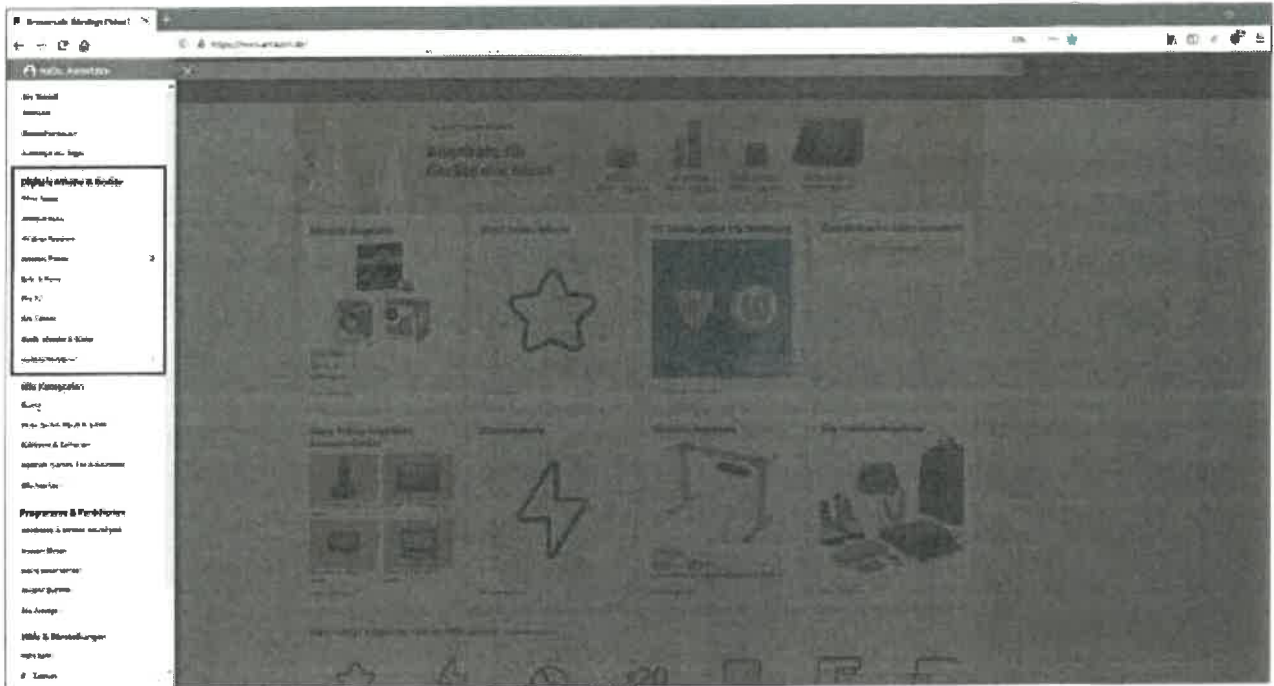


Figure 11: Display of Amazon's digital services and devices under the 'All' tab on its own website, see modified screenshot (black frame added for emphasis) from <https://www.amazon.de/> on 23 November 2021.

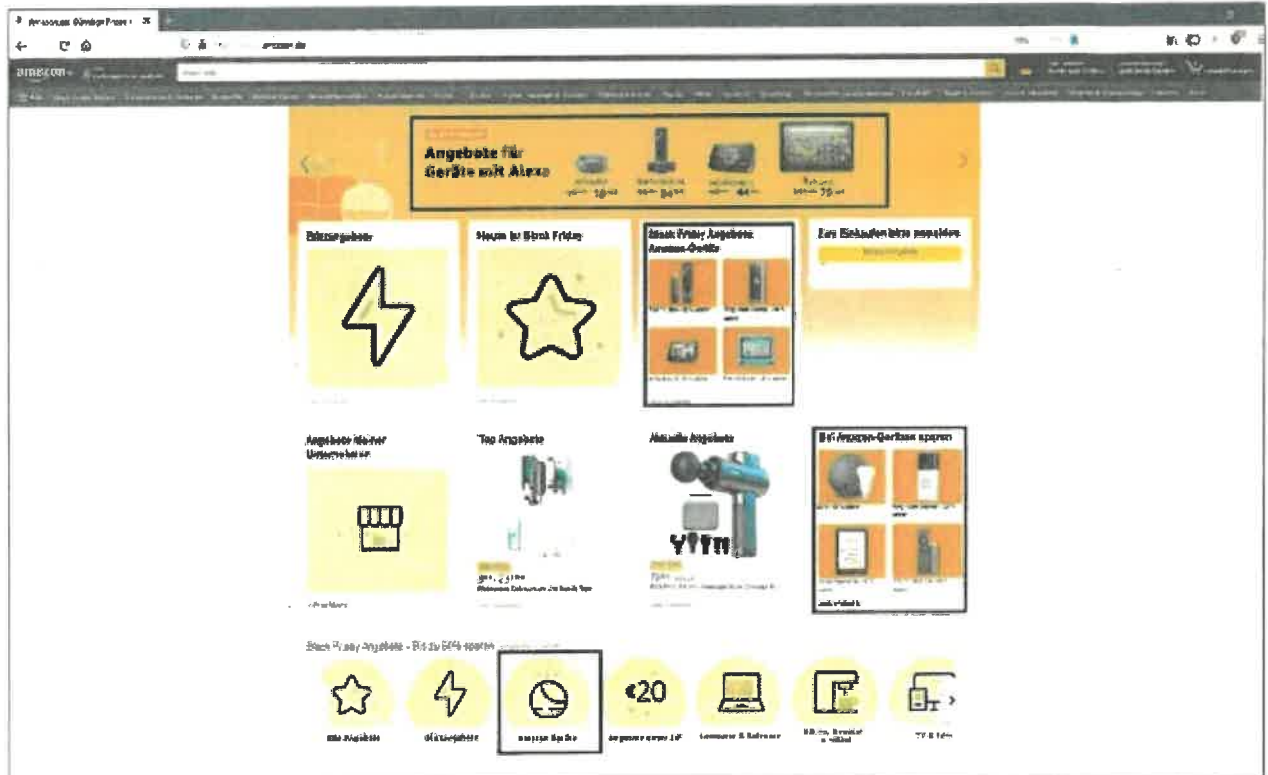


Figure 12: Display of and advertising for devices from Amazon on its own website, see modified screenshot (black frames added for emphasis) from <https://www.amazon.de/> on 23 November 2021.

(368) The various offers of Amazon in the audio, video, but especially in the book sector, coupled

with the use of the e-commerce platform as a sales channel, also allow Amazon to steer its customers from one offer format to another through advertising (see para. (393) ff.) and the deliberate placement of its offers. Thus, Amazon uniformly offers print-books as well as eBooks and audio books via its e-commerce platform. For a book, a website with offers in each format (printed, audiobook, eBooks, partly mp3) is switched, partly with additional advertising for other formats such as eBooks for Kindle or Audible.



Figure 13: Amazon's book offerings in various formats on its own e-commerce platform (Kindle eBook, Audible audiobook, and hardback or paperback), see modified screenshot (black frame added for emphasis) from <https://www.amazon.de/quick-thinking-langsames-Daniel-Kahneman/dp/3886808866> on 23 November 2021.

(369) The same applies to video formats, where a web page refers to both the Prime Video streaming offer and DVDs, each of which is offered by Amazon.

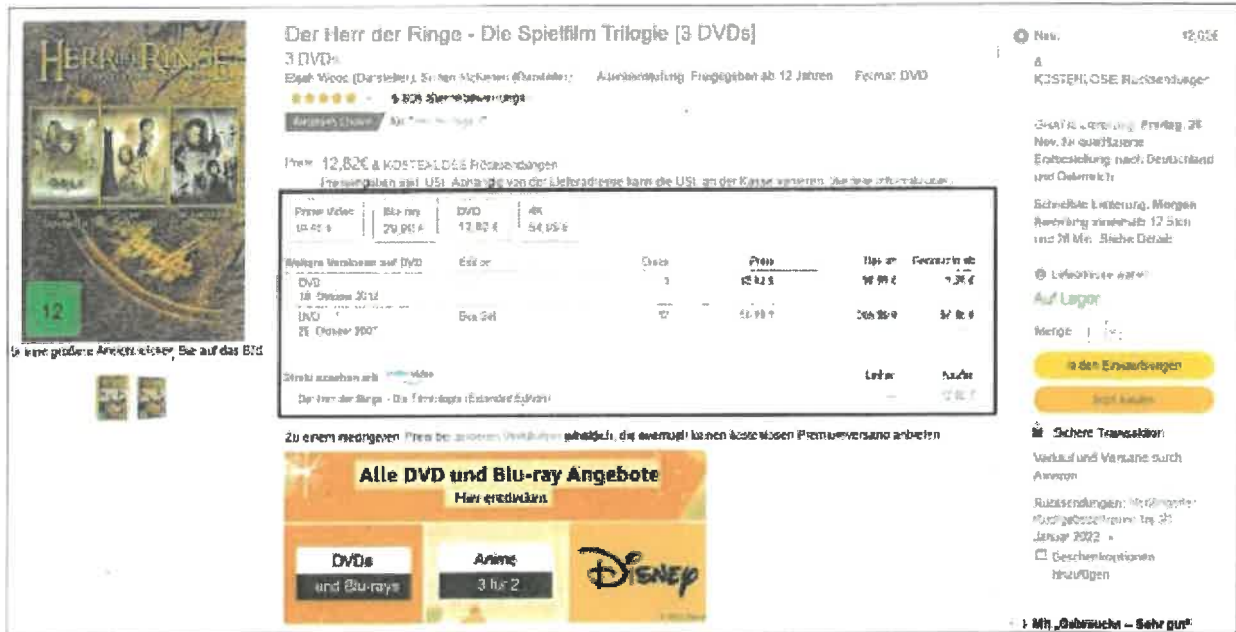


Figure 14: Amazon's movie offering in various formats on its own e-commerce platform (stream on Prime Video, Blu-Ray, DVD, 4K), see modified screenshot (black frame added for emphasis) from <https://www.amazon.de/Herr-Ringe-Spielfilm-Trilogie-DVDs/do/B0096MFPKS> on 23 November 2021.

(370) [...]<sup>493</sup>

(371) Incidentally, the importance of the e-commerce platform for Amazon's other services and products can also be seen from the usage and sales figures. For example, [...]<sup>494</sup> [...]<sup>495</sup>

(372) Furthermore, the devices offered by Amazon are also predominantly sold online, i.e. via Amazon's e-commerce platform. [...]<sup>496</sup> [...]<sup>497</sup>

**(b) Links between Amazon's devices and (Prime) services**

(373) Amazon offers devices and digital services in the home entertainment segment that, for product-related reasons, belong to neighbouring markets. Here, consumers can meet their demand for digital content and the complementary players in the areas of video, audio and books "from a single source" at Amazon.

(374) In the video and multimedia segment, Amazon offers streaming media adapters with the Fire TV series as well as the matching media services Prime Video (video streaming and online video store) and Amazon Channels (TV on demand). In the audio segment, Amazon is active

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 494 [...]  
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both with the Echo speaker as a player and with Amazon Music or Amazon Music Unlimited (music streaming and podcasts) and with Audible (audio books) as a provider of the matching digital content. In the area of books, Amazon offers the eBook reader Amazon Kindle, at the same time sells eBooks via its Kindle Store and offers the Prime Reading or Kindle Unlimited services.

- (375) In addition, similar links result from smart home functions. For example, products in the Echo segment are not just speakers, but can also serve as control devices for other ('executing') smart home devices via Amazon's Alexa voice assistant, some of which are also offered by Amazon (especially in the security technology segment with the Blink and Ring devices). The Fire TV can also be controlled via Alexa (e.g. in the newer versions via a microphone built into the Fire TV remote control or via Echo devices).<sup>498</sup> One in [...] monthly active users of Fire TV in Germany uses Alexa to search for content on the Fire TV.<sup>499</sup>
- (376) Furthermore, Amazon's e-commerce platform is linked to Amazon's various devices. Thus, it is possible to make purchases or complete a Prime registration via Alexa.<sup>500</sup> Via the Fire TV, it was at least temporarily possible in the past to visit product detail pages on the e-commerce platform and add products to the shopping cart.<sup>501</sup>

**(c) Links via Amazon Prime**

- (377) Beyond the single and uniform access via the customer account created on the Amazon offer portal, the links which exist between Amazon's various activities with which Amazon offers products and services to consumers are reflected in the Amazon Prime program, which was launched in Germany in 2007. The same applies to the economies of scope associated therewith.
- (378) Amazon Prime is an optional membership or subscription for certain (additional) services for a flat annual or monthly fee. Amazon itself describes Amazon Prime as a loyalty program;<sup>502</sup> however, it must also be seen as a (paid) flat-fee offer for a bundle of individual services and price benefits, which Amazon also considers as an independent revenue source like other subscriptions.
- (379) In Amazon Prime, certain (additional) services or package deals relating to various services

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<sup>502</sup> [Not translated. Please see the German version.]

that can be used with a Prime membership are combined into a uniform subscription. These services are referred to as "Prime benefits". When Amazon Prime was introduced, it initially offered (only) an improved shipping service, with which Prime eligible goods - apart from the Prime membership fee - could be purchased on the e-commerce platform without additional shipping costs. In the following, further offers or perks were introduced, predominantly related to various digital media content.<sup>503</sup> The following tables provide an overview of the most important offers currently included in Amazon Prime<sup>504</sup> as well as price and program changes over time. The costs for Amazon Prime currently amount to EUR 7.99 per month or EUR 69 per year - after a free period of 30 days.

Prime Benefit	Description	Launch day
Prime shipping	Free premium shipping as well as same-day delivery for orders placed on the online Marketplace (in available regions)	November 2007
Prime Video	Streaming of movies, series and sports broadcasts as well as Amazon Channels (TV-on-demand for additional EUR 3.99/channel)	February 2014
Amazon Prime Photos	Unlimited storage for photos with Amazon Photos	November 2014
Prime Music	Ad-free streaming of approx. 2 million songs and podcasts and reduced price for Amazon Music Unlimited (EUR 7.99 instead of EUR 9.99)	November 2015
Twitch Prime	Free subscription to a Twitch channel	September 2016
Amazon Fresh	Grocery deliveries in selected cities within 2 hours (including Prime Now)	May 2017
Prime Reading	Free eBooks and e-magazines to download via Kindle app or Kindle Reader.	June 2017
Prime Gaming	Exclusive as well as free offers for in-Game content and games (incl. Twitch Prime).	August 2020

Table 28: Description and launch date of selected Prime Benefits, see (1) <https://www.amazon.de/b?ie=UTF8&node=14593479031>, (2) Amazon Prime Photos: [https://www.amazon.de/b/?node=12153288031&ref=ao\\_uhc\\_unrec](https://www.amazon.de/b/?node=12153288031&ref=ao_uhc_unrec), (3) PrimeGaming: <https://gaming.amazon.com/> and TheVerge.com, Amazon rebrands Twitch Prime as Prime Gaming, 10 August 2020, <https://www.theverge.com/2020/8/10/21358463/amazon-twitch-prime-gaming-rebrand>, each retrieved 2 February 2022.

Date	Price and program changes
November 12, 2007	Launch of Amazon Prime in Germany with Prime shipping for 29 EUR/year

<sup>503</sup> [Not translated. Please see the German version.]

<sup>504</sup> [Not translated. Please see the German version.]

March 27, 2012	Prime Student (discounted Prime offer for students)
February 26, 2014	Price increase to 49 EUR/year
November 8, 2016	Monthly subscription for 8.99 EUR/month
February 1, 2017	Price increase to 69 EUR/year
August 24, 2017	Price reduction for monthly subscription to 7.99 EUR/month

Table 29: Chronological overview of selected developments of the Prime program, own representation based on: Amazon's response of 9 July 2021 to the request for information of 18 May 2021, [...]

(380) [...]

Prime Benefit	Monthly active users	
	Average first half of 2021	...in % of Prime members <sup>505</sup>
[...]	[...]	[...]
[...]	[...]	[...]
[...]	[...]	[...]
[...]	[...]	[...]
[...]	[...]	[...]

Table 30: Monthly active users of selected Prime benefits, own presentation or calculation based on Amazon's response of 8 November 2021 to the request for information of 22 September 2021, para. 155 ff. and Appendix A, spreadsheet 10.3.

(381) As of 30 June 2021, [...] paid Prime memberships were registered on the amazon.de offer portal. This means that [...] user account on amazon.de has a paid Prime membership. In addition, there are almost [...] free Prime trial subscriptions, see Figure 15.

[...]

Figure 15: Customer accounts on amazon.de with and without Prime subscription, as of 30 June 2021, own representation based on: Amazon's response of 8 November 2021 to the request for information of 22 September 2021, Annex A, spreadsheet 10.3.

(382) Given the Prime benefits, Prime members represent a customer base that increasingly uses Amazon's offerings and for whom there are additional incentives to meet their demand via Amazon and to remain in Amazon's ecosystem for this purpose. The subscription nature of Prime membership with a flat membership fee (with no further marginal costs/usage fees for the use of multiple Prime benefits) encourages Prime customers to make extensive use of Prime benefits. This is evident from the following key figures, among others:

<sup>505</sup> [...]



- [...] <sup>506</sup>

Furthermore, Amazon's calculations based on actual user behavior reveal the following information for "active" Prime members <sup>507</sup> with an annual subscription:

- [...] <sup>508</sup> [...] <sup>509</sup>

- [...] <sup>510</sup>

- [...] <sup>511</sup> [...] <sup>512</sup>

(383) The frequent use of Prime benefits means that the associated (media) services and, in particular, the e-commerce platform are also used more frequently. As a result, Prime members are the [...] customer group for many of Amazon's offerings, because they are the largest and most active customers. Some offerings [...] are almost exclusively targeted at Prime customers. [...] <sup>513</sup>

(384) The increased use by Prime customers is particularly evident on the e-commerce platform. Here, Prime customers are significantly more active and spend more money compared to customers without a Prime membership. For example, the total trade volume of Prime customers on amazon.de in 2020 was just under EUR [...], compared with a total trade volume of EUR [...] generated there. <sup>514</sup> Although they account for [...] of all accounts registered on amazon.de, <sup>515</sup> Prime customers are thus responsible for around [...] of the total trade volume on amazon.de.

[...]

*Figure 16: Comparison of prime and non-prime customers, see fn. 514 and fn.515.*

(385) Accordingly, Prime customers are also the largest customer group for Amazon's online retail business. [...] <sup>516</sup> [...] <sup>517</sup>

(386) Prime members are also the largest customer group for Amazon devices (see Table 31

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<sup>506</sup> [Not translated. Please see the German version.]

<sup>507</sup> [Not translated. Please see the German version.]

<sup>508</sup> As of March 2021, [...].

<sup>509</sup> [...]

<sup>510</sup> As of March 2021, [...]

<sup>511</sup> [...]

<sup>512</sup> [Not translated. Please see the German version.]

<sup>513</sup> As of Q1 2021, [...]

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<sup>516</sup> [...]

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below). The mutual penetration of devices and Amazon Prime is also a key component of Amazon's objective. Thus, the long-term goal is described in an internal document as: [...] <sup>518</sup> [...]. <sup>519</sup>

Device	Share of paid Prime members in the total number of device owners in Germany
[...]	[...]
[...]	[...]
[...]	[...]
[...]	[...]

Table 31: Importance of Prime members as device buyers and users, so-called "prime mix" in 2020, [...].

(387) Overall, spending per registered Prime account in 2020 was approximately [...], while spending of a registered Amazon account without a Prime subscription was only around [...]. <sup>520</sup>

[...]

Figure 17: Average spending by consumers with and without Prime membership, estimate for 2020, see fn. 520.

(388) [...]. <sup>521</sup>

**(d) Further links between and joint advertising of service offerings**

(389) In addition to the links already described, the links between Amazon's various activities are also reflected in the fact that offers - even beyond the Prime subscription - can be bundled (see (aa)) and jointly advertised in a variety of ways (see (bb)). The examples given demonstrate the diverse possibilities to link offerings from which the proximity and connectedness of Amazon's various offers results with regard to the customer. This is not contradicted by the fact <sup>522</sup> that individual offers in a certain form do not bring the desired commercial success. <sup>523</sup> The fundamental business opportunities are decisive here.

**(aa) Offer bundles**

(390) Amazon can bundle its devices and services into "special offers" in a wide variety of ways.

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<sup>523</sup> [Not translated. Please see the German version.]

In addition to the Prime program, for example, there are bundles with free vouchers for purchases on the e-commerce platform with the purchase or use of another offer. [...] <sup>524</sup>  
 [...] <sup>525</sup> [...] <sup>526</sup> [...] <sup>527</sup>

(391) [...] <sup>528</sup> [...] <sup>529</sup> [...] <sup>530</sup> [...] <sup>531</sup> [...] <sup>532</sup> [...] <sup>533</sup> [...] <sup>534</sup> [...]

(392) With regard to devices and (digital) services from Amazon, links are also possible in other ways, especially through pre-installations. For example, the remote control for the current Fire TV devices even includes special buttons for Amazon Music and Prime Video (besides buttons for the services of the competitors Netflix and Disney+). <sup>535</sup>

**(bb) Joint advertising measures**

(393) Due to its conglomerate services offering, Amazon has multiple touch points and access points to end customers which can also be used for advertising, not only by external advertisers but also by Amazon itself. Together with extensive customer and usage data which even allows for the possibility of identifying specific target groups (see below B.III.4), Amazon can thus induce customers to use further services or to use services again. For - example, customers who already use an Amazon device can be reached in order to acquire new customers for other services, e.g., Prime. <sup>536</sup>

(394) First, Amazon can advertise its services and product offerings on the Amazon website or mobile app, <sup>537</sup> where it operates its highly frequented e-commerce platform with around [...] user accounts and approximately [...] monthly active users under the amazon.de domain <sup>538</sup>. Ad inventory exists, for example, on the home page, product detail and search results pages, or during the shopping process. These advertising opportunities exist in principle for all Amazon service and product offerings and are also used for advertising, e.g. for Amazon

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<sup>537</sup> [...]  
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devices (see Figure 12 above), for Amazon Prime,<sup>539</sup> Amazon Music,<sup>540</sup> Prime Video,<sup>541</sup> Kindle Unlimited,<sup>542</sup> Audible,<sup>543</sup> the Amazon credit card<sup>544</sup> and Amazon Pay<sup>545</sup>. The same applies to the online presences of other (digital) services. For example, Prime Video has already been used to advertise Amazon Music, including by [...].<sup>546</sup> Advertising opportunities also exist, for example, via the free version of Amazon Music, Amazon Music Free, which has already been used by Amazon Payments<sup>547</sup>, Alexa<sup>548</sup> or Prime<sup>549</sup>, or Twitch<sup>550</sup>.

(395) Amazon can also serve ads through its devices such as the Fire TV and through Echo devices or, concomitantly, Alexa and the Alexa app. [...] <sup>551</sup> The ad inventory is often used by Prime Video (e.g. by advertising a Prime Video movie and a "Start your 30d Free Trial" message including a direct registration option via the Feature Rotator<sup>552</sup>). In some cases, advertising for Amazon Alexa<sup>553</sup> or Amazon Prime<sup>554</sup> is also shown on the ad inventory of the Fire TV. Via Echo devices or Alexa, advertising is primarily placed for Amazon Music and Prime. In this regard, in particular, the Alexa App - over the starting screen<sup>555</sup> or push notifications<sup>556</sup> - is available. Another option Amazon tested was to draw customers' attention to Amazon Music during communication with Alexa.<sup>557</sup>

(396) [...] <sup>558</sup> [...] <sup>559</sup> [...] <sup>560</sup> [...] <sup>561</sup> [...] <sup>562</sup>

(397) Finally, Amazon is also able to reach the respective target group across channels (i.e., via

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different access points). [...] <sup>563</sup> [...] <sup>564</sup> [...] <sup>565</sup> [...] <sup>566</sup>

(398) In this respect, a particular advantage for Amazon results from the available user data and the resulting possibility of personalized advertising. In particular, specific target groups for intragroup advertising can be formed and addressed. The following examples include (personalized) ads via the e-commerce platform for targeted customer groups of other Amazon offerings: Prime members who do not use Prime Video much or at all should be persuaded to stream through targeted advertising, <sup>567</sup> [...] <sup>568</sup> [...] <sup>569</sup> [...] <sup>570</sup>

**bb) Competitive advantages due to the linked offers**

(399) The broad portfolio available to consumers described above, with its links and opportunities for combining the various activities, brings with it economies of scope for Amazon which are not available in this way to competitors in particular those who are not or are at least less broadly positioned, and which are a significant element in the undertaking's paramount significance for competition across markets. In particular, the connected portfolio makes it easier for Amazon to retain its customers in the Amazon ecosystem and to expand its - business activities. Furthermore, it gives Amazon the opportunity to monetize or cross-subsidize individual offers via other services used by consumers.

(400) The links between Amazon's various consumer-facing offerings described above can lead to lasting and high customer loyalty to Amazon or its ecosystem and potentially foreclose them from the remaining competition in the various markets. This is because Amazon offers most digital content and devices an exceptionally extensive range of goods online "from a single source". In addition, there are the aforementioned advertising opportunities, bundling options, and Amazon Prime, which is billed on a monthly or annual basis and thus provides the consumer with the various Amazon offers after a single billing without any further additional costs. <sup>571</sup> Accordingly, the Prime program in particular can contribute significantly to retaining customers on Amazon and lead to Prime customers increasingly meeting their consumption needs on Amazon. With these incentives and opportunities to draw users'

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<sup>568</sup> [...]  
<sup>569</sup> [...]  
<sup>570</sup> [...]  
<sup>571</sup> [Not translated. Please see the German version.]

attention entirely to the group's offerings while keeping the customers away from the competition, Amazon can build and strengthen customer loyalty across markets and thus secure its competitive position in business areas already covered. Contrary to the view of Amazon<sup>572</sup>, the lock-in effect referred to here is not about a complete (and pure) "single homing" of users, but rather about keeping users in the system through the ability to make offers that are linked to one another and to lead users from service to service. This is a significant competitive advantage over undertakings with a product and service portfolio that is less broad.

- (401) At the same time, Amazon's conglomerate offer to consumers gives it the opportunity to reach and win over users of individual services or devices also as (potential) customers of (possibly newly offered) services or devices on other markets, for example as described above through bundled offers or internal advertising measures. The e-commerce platform (in itself) already represents a particularly effective advertising and sales opportunity with which Amazon can reach many (potential) customers. Through corresponding links or cross-referencing of offers, Amazon has in particular the opportunity to increase sales of offers which previously were in less demand due to the success of offers in other markets and to be able to offer new products or services to a large customer base from the outset, which in turn fundamentally enables a rapid and effective start-up and expansion of business activities in further, as yet unoccupied markets. Conversely, expansions of the digital offering in particular can strengthen Amazon's brand in the digital space.<sup>573</sup>
- (402) Amazon group can also make use of so-called customer-oriented "shareable inputs" (i.e. the options to contact customers through the account and through the website, customer account information and other data) with regard to the possible expansions of its activities as well as in the course of ongoing business operations. These inputs increase the attractiveness of Amazon's offerings, e.g., through the simplified use or personalized user experiences, search results or advertising.
- (403) The multiple monetization and cross-financing opportunities for its various offerings constitute particular economies of scope for Amazon, e.g., through advertising opportunities for external companies or revenue in other business areas generated by cross-service and cross-device usage.
- (404) Above all, Amazon's entire consumer-facing business model seems designed to monetize and thus finance its various devices and services via revenue across offerings and services.

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<sup>572</sup> [Not translated. Please see the German version.]

<sup>573</sup> [Not translated. Please see the German version.]

However, this possibility only arises through the links established between the consumer offerings and the conglomerate structure of the Amazon group.

(405) [...] <sup>574</sup> [...] <sup>575</sup> [...] <sup>576</sup> [...]

[...]

Table 32: [...]

[...<sup>577</sup>]

Table 33: [...]

(406) These key data points exemplify the importance of the broad offer of the Amazon ecosystem for the monetization of the individual offerings and consequently for the (consumer-side) business model of the group. [...] In addition to monetization through increased use of the e-commerce platform, other offerings within the Amazon ecosystem also play an important role for these devices (e.g., the sale of eBooks on Amazon Kindle).<sup>578</sup>

(407) The fact that monetization across offered products and services, i.e., monetization beyond the use of the originally perceived offer, appears to represent a fundamental component of Amazon's business model becomes clear, for example, in a public statement made by the then CEO of Amazon, Jeff Bezos, in 2016 with regard to the Prime program:

*"We can monetize [Prime Video] in a very unusual way. If we win a Golden Globe, that helps us sell more shoes. And it does that in a very direct way. Because if you look at Prime members, they buy more from Amazon than non-Prime members, and one of the reasons is that once they pay their annual fee, they look around to see, "How can I get more value out of the program? And so they look around at more categories - they shop more. A lot of their behaviours are changing in ways that are very attractive to us as a company. And customers are using our services more."<sup>579</sup>*

(408) Senior Vice President of Devices and Services, Dave Limp, for example, made similar comments in an October 2021 interview regarding the Alexa voice assistant, which is intended to generate revenue not directly but through the use of, for example, Amazon

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<sup>574</sup> [...]

<sup>575</sup> [Not translated. Please see the German version.]

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<sup>579</sup> [Not translated. Please see the German version.]

Music, Audible or the commerce platform,<sup>580</sup> and regarding the Alexa-powered Echo Dot device or the Amazon Kindle.<sup>581</sup>

- (409) With these opportunities available to Amazon due to its broad cross-market portfolio of offerings, Amazon has an advantage over competitors with less broad portfolios. This is because Amazon's competitors are often only active in one or a few markets and are therefore dependent on economic success in these very markets. They are therefore generally not even close to a position to take advantage of the opportunities available to Amazon whether these are the simplified accessibility of customers, the various options for bundling offers, or cross-financing and monetization across a broad portfolio of offers.<sup>582</sup>
- (410) In this context, the Bundeskartellamt does not fail to recognize that a broad positioning does not automatically lead to increases in market share (up to the point of tipping over into market dominance) in all markets covered<sup>583</sup> or guarantee successful market entries.<sup>584</sup> For the determination of a paramount significance for competition across markets and the norm addressee status pursuant to Section 19a(1) GWB, it is rather a question of abuse control provisions also covering positions of power, which in principle provide for increased possibilities of vertical or conglomerate exploitation of economic power and which can therefore put undertakings with such power in a position (and thus harbour the danger) to distort the competitive process to their own advantage, in particular in markets which are not yet dominated; the competitive process is thus to be protected precisely with regard to markets which are not yet dominated.<sup>585</sup> With its consumer-oriented ecosystem with the many and frequently linked offers, Amazon is - as shown - in a position to influence competitive processes from other markets in its favour to a significant extent.
- (411) All in all, the many links and possibilities to link products and services within the extremely broad portfolio, which also presents itself as a consumer-oriented ecosystem, open up - extensive opportunities for Amazon to draw competitive advantages from this in order to ultimately secure and expand its business activities.

### **3. Relevance for third-party access to supply and sales markets and related influence on business activities of third parties (Section 19a(1) sentence 2 no. 5 GWB)**

- (412) Amazon's activities as an operator of a hybrid e-commerce platform, as a purchaser, provider

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<sup>580</sup> [Not translated. Please see the German version.]

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<sup>584</sup> [Not translated. Please see the German version.]

<sup>585</sup> [Not translated. Please see the German version.]



and intermediary of logistics services and as a supplier in the Internet of Things segment is of considerable importance for the access of third parties to supply and sales markets. This results in the possibility of Amazon to influence the business activities of third parties (Section 19a(1) sentence 2 no. 5 GWB). This also contributes to Amazon's paramount significance for competition across markets.

- (413) The importance of the entrepreneurial activity for the access of third parties to supply and sales markets and the associated influence on the business activities of third parties are mentioned in Section 19a(1) sentence 2 no. 5 GWB as aspects which are to be taken into account in particular when determining the paramount significance for competition across markets. Dependencies on the part of other market participants and the opportunities to shape the competitive process according to its own ideas or to distort it to its own advantage resulting therefrom can be an essential criterion for the designation of an undertaking as addressee of Section 19a(1) GWB.<sup>586</sup>
- (414) The criterion focuses on the (potential) business customers of a norm addressee and aims in particular at including the so-called "intermediation power"<sup>587</sup> or the "rule-making power"<sup>588</sup> of an undertaking into the concept of significance across markets. The concept of intermediation power is originally derived from one of the constituting elements of dominance described in Section 18(3b) GWB for multi-sided markets. However, for the purposes of Section 19a(1) sentence 2 no. 5 GWB, it is to be understood in a broader cross-market sense. This characteristic, too, is thus intended to capture above all the danger that individual digital undertakings can become gatekeepers who control the access to their users by expanding their range of products and services or by creating their own ecosystems.
- (415) An intermediation activity can generally take very different forms. As in the case of e-commerce platforms or booking portals, it can consist of the mediation of specific transactions. However, it can also involve the provision of information or the creation of awareness in the run-up to such transactions, as is the case with search engines or advertising platforms. The characteristic feature is that the intermediary can select or prioritize the offers and information and determine the parameters and conditions for their presentation. If this activity is sufficiently important, the undertaking can thus exert a significant influence on the visibility of third-party offerings or their access to customers.

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<sup>586</sup> [Not translated. Please see the German version.]

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- (416) Insofar as third-party providers are dependent on the access to these users, for example for the marketing or sale of their products, e.g. because the users use the ecosystem exclusively or at least predominantly, these digital undertakings have a considerable position of power vis-à-vis the third-party providers and can dictate the terms of access to them.<sup>589</sup> In addition, the sovereignty over the design and presentation of the offering and the superior information from comprehensive data collection regularly result in a wide variety of opportunities to influence and steer user behaviour. For third-parties who depend on access, this can lead to a considerable limitation of their margin to manoeuvre and compete. Similarly, this can lead to a shift of the value creation which may move deeply into the ecosystem.
- (417) "Rule-making power" therefore refers first and foremost to the ability to dictate the conditions under which companies can use the offerings of the ecosystem. In addition, however, rule-making can also be understood as "regulation" of the sales and procurement channels created by the platforms within the ecosystem and of the conditions of competition. This is because within the system - e.g., with regard to large e-commerce platforms or within a proprietary operating system – significant routes to market may emerge which are indispensable for companies where the framework and general terms and conditions, including the characteristics of the products, their visibility or certain sales strategies, have been determined by the ecosystem or its sub-sections.
- (418) As the operator of the largest e-commerce platform in Germany, which comprises both an online marketplace and Amazon's retail business and through which the majority of online retail in Germany is processed, Amazon has a significant influence on third-party access to supply and sales markets.<sup>590</sup> Particular significance for access to suppliers and customers and the opportunities to exercise influence associated therewith, exists with regard to Amazon's relationship with regard to sellers who sell their goods via the Amazon marketplace (see a)) and with manufacturers who present their brands on the e-commerce platform so that customers who purchase their goods on the Amazon marketplace take note of them (see b)). There is also considerable scope for influencing both sellers and delivery service providers in terms of offering and arranging logistics services (see c)) as well as companies operating in the area of the Internet of Things that have to ensure the compatibility of their products with Amazon's Alexa voice assistant (see d)).

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<sup>589</sup> [Not translated. Please see the German version.]

<sup>590</sup> [Not translated. Please see the German version.]

**a) Access to retail markets for (third-party) sellers**

(419) Due to the large reach and the high degree of customer loyalty - further strengthened by the Prime subscription program - the German Amazon marketplace is largely indispensable for third-party sellers. This gatekeeper position for access to (Prime) customers on its e-commerce platform gives Amazon considerable opportunities to exert influence not only on the design of the sales activities of third-party sellers via the Amazon marketplace and the sales activities of manufacturers, but also more generally the design of online retail for consumer goods.

**aa) Relevance of the (German) Amazon marketplace for customer access**

(420) As already explained, the German Amazon marketplace is very well-known, and has by far the highest number of monthly active users (MAU) and active user accounts, as well as exceptionally high customer loyalty. This customer loyalty is further enhanced by the Prime subscription program. Access to this broad and loyal customer base through the Amazon marketplace is of great importance critical for the operations of most sellers.

(421) This is because of the total trade volume of all 15 German online marketplaces or e-commerce platforms surveyed in 2020, the vast majority – over [60-70 %] is accounted for by the German Amazon e-commerce platform alone.<sup>591</sup> Based on the total volume of the German online retail (as estimated by HDE Online Monitor for 2020), [50-60 %] of sales in German online retail were generated via the German Amazon e-commerce platform (see para. (199)). More than every second euro spent by German consumers on online purchases in 2020 was therefore spent on the Amazon e-commerce platform. In view of this customer penetration, many sellers, who generate a major part of their sales via online marketplaces<sup>592</sup>, are dependent on sales via the Amazon marketplace.<sup>593</sup>

(422) The importance of the German Amazon marketplace as a key customer access point is also supported by the results of the seller survey conducted in the present proceeding<sup>594</sup>. They indicate that (open) online marketplaces and the Amazon marketplace in particular play an important role as a sales channel. The great importance of sales via open online marketplaces for sellers is supported by the fact that almost all responding sellers indicated that sales via open marketplaces are important or very important for reaching customers. This is further

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<sup>591</sup> [Not translated. Please see the German version.]

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<sup>594</sup> [Not translated. Please see the German version.]

supported by the fact that just about half of the respondents expect domestic sales on open online marketplaces to be higher or much higher in the next three years.<sup>595</sup>

Ways to reach customers	Proportion of responses: "important" / "very important"
Distribution via own brick-and-mortar retail stores	18%
Distribution via department stores (shop-in-shop)	7%
Distribution via own online shop	66%
<b>Sales via open online marketplaces</b>	92%
Sales via closed online marketplaces	32%
Use of price comparison and product search engines	36%
Sales link to social media services	23%
Use of keyword advertising	58%

Table 34: Assessment of various options for third-party sellers to reach their customers, see Evaluation Note Third-Party Sellers of 21 January 2022, p. 7.

- (423) Another indication of the great importance of the Amazon marketplace for access to end customers is the fact that the vast majority of the sellers participating in the survey (77%) stated that they operate on up to two online marketplaces. Admittedly, it must be taken into account that only Amazon sellers were surveyed, so that Amazon's online marketplace is mentioned most frequently. However, eBay is mentioned second to Amazon in terms of the number of mentions by a considerable distance behind Amazon. Other marketplaces are mentioned only sporadically by the responding sellers.<sup>596</sup> Around one third of the responding sellers also stated that they were not active on any other online marketplace apart from Amazon.
- (424) In addition, the sales generated by participating sellers on the German Amazon marketplace in 2020 were on average twice as high as the sales they generated on the marketplace of Amazon's closest competitor eBay. Seller sales via the online marketplace on amazon.de increased on average between 2018 and 2020.<sup>597</sup> According to a survey by the Bundesverband Onlinehandel e.V. ("BVOH"), an Amazon seller generates on average more than half of its total sales via the (German) Amazon marketplace.<sup>598</sup>

<sup>595</sup> [Not translated. Please see the German version.]

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<sup>597</sup> [Not translated. Please see the German version.]

<sup>598</sup> [Not translated. Please see the German version.]

(425) Furthermore, the responses of the sellers surveyed on the alternatives to the German Amazon marketplace also indicate its great importance for sellers' access to the retail markets. In this respect, just under half of the sellers surveyed said that, if Amazon were not available, there would be no good alternative to the Amazon marketplace. Only around a third of the sellers surveyed stated in each case that their own online shop or other open marketplaces were a good or very good sales alternative.<sup>599</sup>

Sales alternatives if amazon.de were not available	Proportion of responses: "good" / "very good"
Own brick-and-mortar stores	6%
Department stores (shop-in-shop)	2%
Own online shop	32%
(Other) Open marketplaces	32%
Closed marketplaces	15%
Other <sup>600</sup>	29%

Table 35: Assessment of various sales alternatives for third-party sellers if amazon.de were not available, double answers were possible, see Evaluation Note Third-Party Sellers of 21 January 2022, p. 12.

bb) **Amazon's ability to influence the business activities of sellers (rule-making power)**

(426) Due to its importance as an important customer access point, Amazon has considerable opportunities to influence the sales activities of third-party sellers operating on the Amazon marketplace and also to influence the sales activities of German online retailers in general. This is done in particular by setting the rules - i.e. the General Terms and Conditions (T&Cs) - for the business activities of third-party sellers on the Amazon marketplace. These terms essentially consist of the so-called Business Solutions Agreement (BSA)<sup>601</sup>, which is concluded with Amazon Services Europe S.à r.l. and contains the basic regulations for the sale of third-party sellers via the Amazon marketplace, as well as the so-called Program Conditions and Program Guidelines<sup>602</sup>, which each regulate certain aspects of marketplace sales and are part of the BSA in their respective applicable version. In addition, the T&Cs also include the so-called Amazon Payments Europe User Agreement (Amazon Payments Agreement - APV)<sup>603</sup>, which is concluded with Amazon Payments Europe s.c.a. and regulates the mandatory establishment of an Amazon Seller account for sales via an Amazon

<sup>599</sup> [Not translated. Please see the German version.]

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<sup>603</sup> [Not translated. Please see the German version.]

marketplace as well as the payment processing for online sales via this account.

- (427) Within the framework of private autonomy, undertakings and thus also Amazon are in principle free to determine business relationships with other companies by standardized contractual conditions - i.e. by T&Cs - in order to avoid new contractual negotiations. - However, it must be taken into account that the user can design the T&C unilaterally and thus - in accordance with his entrepreneurial interest - try to pass on as many risks as possible to his contractual partners. In particular, if there is a significant power imbalance to the detriment of the user's contractual partners, the latter may lack a self-determined decision on the inclusion of the T&C with the consequence that there is no sufficient balance of interests between the contractual parties with regard to the distribution of contractual risks. This applies all the more if the user of the T&C is of considerable importance for access to sales and supply markets and, due to this gatekeeper position, a business relationship involving its T&Cs is indispensable for third companies. This scenario enables the gatekeeper to set the T&Cs for the access of third companies to and their activities on these sales and supply markets and to structure them accordingly.
- (428) On the other hand, contrary to Amazon's view<sup>604</sup>, it is not necessary for the assumption of the rule-making power of a gatekeeper as a special position of power that the use and/or enforcement of individual or all T&Cs in itself constitutes conduct that violates antitrust law, for example in the form of an exploitative abuse pursuant to Article 102 TFEU, Section 19 GWB. Therefore, it is also not relevant in this context whether positive competitive efficiencies for the Amazon marketplace and in particular for the end customers who search for and purchase products there result from the design and structuring of the marketplace through the T&Cs. Rather, it is decisive and sufficient that Amazon has the possibility to determine the conditions for access of third-party sellers to and their use of the Amazon marketplace.
- (429) When it comes to the determination and design<sup>604</sup> of its T&Cs, Amazon has such a position of power vis-à-vis third-party sellers due to its function as gatekeeper for the access to the many end customers who use the e-commerce platform and who third-party sellers indispensably need to have access to. In this respect, Amazon assumes a position as a "rule maker" and has rule-making power. This rule-making power is demonstrated - as shown below by way of example - by individual provisions of the Amazon T&Cs, some of which have already been the subject of proceedings by the antitrust authorities (see (1)). In this context, compliance with T&C clauses that are disadvantageous for third-party sellers can be enforced not only

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<sup>604</sup> [Not translated. Please see the German version.]

by contractual sanctions under the BSA, but also in particular by the possibility of withholding credit balances or collected purchase prices from the seller account in accordance with the APV. In addition, Amazon's rule-making power is also reflected in the possibility to determine the criteria for the allocation of the so-called Buy Box, via which the purchase decisions of end customers are steered and via which Amazon can put pressure on third-party sellers to comply with the regulations in the T&Cs and other specifications. (see (2)). In this respect, it is also relevant that Amazon, through its retail business, can set standards for customer rights on the e-commerce platform. If only to achieve a good seller rating and thus the chance of occupying the Buy Box, these standards must also be implemented by the third-party sellers (see (3)). In detail:

**(1) Rules applicable to sellers in the Amazon T&Cs**

(430) It must be taken into account that Amazon's general terms and conditions not only concern the actual business relationship between Amazon and the third-party sellers - i.e. the provision and use of the marketplace services - but some provisions also directly regulate the contractual relationship between the seller and the end customer and in this respect include specific stipulations, in particular on customer rights. Amazon's general terms and conditions for third-party sellers have already been the subject of proceedings by the German Bundeskartellamt for abuse of a dominant market position, in which Amazon's rule-making power vis-à-vis the marketplace sellers was demonstrated, even though the provisions taken up in Amazon's general terms and conditions were amended in the course of and in response to these proceedings by the antitrust authorities. In addition, Amazon's T&Cs are now, in part, also addressed by the so-called Platform-to-Business Regulation of the European Union (hereinafter also referred to as "P2B Regulation").<sup>605</sup> Nevertheless, Amazon continues to have considerable opportunities to design T&Cs according to its ideas and to enforce them vis-à-vis third-party sellers.

**(a) Rules governing the provision or use of online marketplace services**

(431) The provisions in the BSA regarding the provision or use of the online marketplace services relate, among other things, to terminations and account blocks, required product information and licenses or rights to use to be granted to Amazon in this respect. Furthermore, there are, among other things, rules on the processing of returns within the FBA-service as well as on the possibility of upload of (external) product ratings. With these rules, access to the Amazon marketplace and its use are or have been designed and structured - in part - significantly to

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<sup>605</sup> [Not translated. Please see the German version.]

the advantage of Amazon and to the disadvantage of third-party sellers.

- (432) Section 3 of the BSA in the version applicable until July 2019 ("BSA old version")<sup>606</sup> on terminations and suspensions provided that the contractual relationship as a whole or also with regard to individual programs or additional services used by the third-party seller could be terminated or suspended at any time and without cause with immediate effect. Terminations and suspensions could therefore also come as a complete surprise to sellers and without sufficient or even any justification, without them having the opportunity to avert this or to adjust to it.
- (433) With regard to the "required product information" (product description and also product images) that third-party sellers must provide for each product they offer on the Amazon marketplace, Section S-4 BSA old version provided that this must be of at least the same quality as the highest quality information displayed or used on the seller's other sales channels (so-called parity). Third-party sellers were required to grant Amazon irrevocable and perpetual very broad worldwide usage rights to this "required product information" for any form of commercial use (including modification, editing, and intercompany - sublicensing). Amazon was entitled to modify the product information posted on the product detail page at any time in its sole discretion (Section S-6. BSA old version). Nevertheless, third-party sellers were obligated to indemnify Amazon with regard to the 'required product information from all possible liability claims for infringements of intellectual property rights (Sec. 6 BSA old version). Third-party sellers were thereby prevented from offering better or higher quality product material when selling in other sales channels - in particular in their own online shops in order to be able to win customers in these sales channels as well due to a better product presentation.
- (434) With regard to the processing of returns, Sections S-2 and S-3 of the BSA old version stipulated that Amazon had the sole right to decide at its own discretion whether to accept returns and that this decision was binding on the third-party seller. Even in cases where end customers made (recognizable) improper use of the option to return (e.g., in the case of their own wear and tear or damage), third-party sellers were therefore obligated to bear the costs associated with the reversal of the purchase.
- (435) In November 2016, Amazon changed its regulations on the creation of customer reviews and very largely restricted the possibilities for third-party sellers to receive reviews for the products they sell on the Amazon marketplace. This was done to prevent fake or manipulated

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[...]



product reviews to protect consumers.<sup>607</sup> According to the new rules, reviews are no longer permitted that have been made in exchange for payment or where the reviewer has received the test product free of charge. In addition to reviews of products that the reviewer has purchased from Amazon ("Verified Purchase"), however, reviews of products that the reviewer has received (for free) as part of the Amazon Vine program are also exempt from this ban.<sup>608</sup> However, the Vine program can only be used by vendors<sup>609</sup> as well as by third-party sellers that are registered as brand representatives in the Amazon brand registry. Accordingly, Vine reviews are possible in particular for those products that are (also) offered by Amazon as a seller on the e-commerce platform, while most third-party sellers are excluded from this possibility to promote the sale of their products.

**(b) Rules governing the contractual relationship between the third-party seller and the end customer**

(436) In addition, as explained (see para. (429)), Amazon also makes provisions in its T&Cs that have a direct effect on the contractual relationship between the third-party seller and the end customer by making specific stipulations regarding the rights that the third-party seller must grant to end customers. In many cases, these rights go far beyond the buyer or consumer protection provided for by law and are sometimes associated with additional contractual risks for third-party sellers. Examples of this are the provisions on extending return periods to up to three, allowing (certain) end customers to use the "purchase on account" payment method, and deciding on applications under the A-to-Z guarantee. In this context, the content and scope of the rights that third-party sellers have to grant buyers are also partly linked to the standard that Amazon grants its buyers as a retailer. This has the consequence that third-party sellers automatically have to implement corresponding business decisions of Amazon Retail if they sell via Amazon Marketplace to get the indispensable access to end customers. In this respect, Amazon's objection that by specifying and enforcing largely uniform rules for the quality of service and performance vis-à-vis the end customer and thus providing for a level playing field between third-party sellers and Amazon Retail, without which "the business model" cannot function<sup>610</sup>, is irrelevant. Irrespective of the question whether, in this way, equal and fair competitive conditions are actually realized for third-party sellers on the one hand and Amazon Retail on the other hand, it is decisive for the rule-making power at issue here that Amazon also exerts influence on the activities of third-party sellers on the

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<sup>607</sup> [Not translated. Please see the German version.]

<sup>608</sup> [Not translated. Please see the German version.]

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retail markets through the possibility to shape the distribution via the marketplace.

- (437) For example, the T&Cs stipulate that Amazon sets the return conditions uniformly for the e-commerce platform, i.e. for its own retail business as well as for all third-party sellers. Third-party sellers must therefore offer their end customers a 30-day return guarantee for most items. Amazon also adjusts these return periods more broadly and situation-based. For example, most orders purchased between 1 November and 31 December 2021 could be returned until 31 January 2022.<sup>611</sup> In 2020, Amazon had even implemented returns through 31 January 2021, for purchases made on or after 1 October 2020.<sup>612</sup> This meant that all sales during Black Friday and in the run-up to Christmas were covered by the extension of the return period. In deviation from the statutory withdrawal period for distance contracts of two weeks beginning with the receipt of the goods, sellers must therefore still expect a reversal of the purchase transaction after two or even three months as well as the fact that they cannot subsequently resell the product in question or can only do so at a possibly significant discount.
- (438) Another example of Amazon's rule-making power concerns the possibility for end customers for whom Amazon has performed a credit check to pay with the payment method "purchase on account".<sup>613</sup> Third-party sellers must allow this payment method for the end customers concerned if Amazon so specifies. In these cases, the purchase price will be paid no later than 15 days after the invoice due date stipulated by Amazon. In view of the general 30-day return period, however, this means that sellers must generally assume a period of at least six weeks until the purchase price is credited to their seller account.
- (439) Finally, Amazon's rule-making power has also been demonstrated in the regulations on the so-called A-to-Z guarantee, with which Amazon assures end customers of the contractual condition and timely delivery of the purchased item and in this way "wants to ensure a safe purchase". If certain problems occur during delivery or purchase processing or if the purchased product has a defect and an agreement with the seller was not possible, end customers can submit a request to Amazon for rescission of the purchase in accordance with the A-to-Z guarantee. Under the provision provided for in Sec. S-3-2 BSA old version, Amazon could decide in such a case alone and at its own discretion whether and to what extent there was a claim for refund of the purchase price. Amazon's decision was final and binding on the third-party seller. Even in cases where the requirements of an A-to-Z guarantee claim were not met and Amazon granted the refund as a gesture of goodwill, the

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<sup>611</sup> [Not translated. Please see the German version.]

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third-party seller therefore had to bear the associated costs.

(440) By enforcing regulations that go beyond the statutory or standard customer rights, Amazon's e-commerce platform can become more attractive for end customers and more end customers can be directed to the marketplace to the benefit of the marketplace, but also to the benefit of Amazon as a seller. In principle, this can also be advantageous for third-party sellers operating on the Amazon marketplace. However, for the relevant question here of whether Amazon has rule-making power due to its gatekeeper position, it is not a matter of whether any efficiencies exist on the customer side and possibly also on the seller side, and in particular third-party sellers who have to bear the costs due to the additional contractual risks associated with these rules. Rather, the only decisive factor in this respect is that Amazon has a position of power that allows the undertaking to establish and enforce such regulations for third-party sellers.

**(c) Abuse proceeding by the Bundeskartellamt due to the general terms and conditions used by Amazon vis-à-vis third-party sellers**

(441) Due to numerous seller complaints, the Bundeskartellamt initiated a proceeding against Amazon in November 2018 on the suspicion of an abuse of a dominant position through the use of the T&Cs applicable to third-party sellers<sup>614</sup>, which concerned some of the aforementioned provisions - in particular those relating to the provision of online marketplace services. Objections included the liability regulations applicable to Amazon, a lack of opportunities for sellers to clarify disputed issues, the disadvantageous treatment of sellers in connection with customer reviews, the obligation of sellers to comprehensively transfer rights of use to product material (including images), the obligation of sellers to bear costs in the event of obviously unjustified customer returns under FBA and in the event of obviously unfounded A-to-Z guarantee claims, and the fact that terminations and suspensions were sometimes carried out surprisingly and were not justified or only justified in formulaic terms. In addition, the then valid jurisdiction clauses in Section 19 BSA and Section 11.7 APV were taken up, according to which the exclusive place of jurisdiction for all disputes in connection with the BSA or the APV is Luxembourg.

(442) The proceeding was discontinued in July 2019 after Amazon made changes to the rules subject to investigation that led to significant improvements for sellers.<sup>615</sup> Among other things, Amazon restricted and tightened the disclaimer provided in its favour and improved the regulations on terminations and suspensions for sellers. In the case of ordinary

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<sup>614</sup> [Not translated. Please see the German version.]

<sup>615</sup> [Not translated. Please see the German version.]

terminations, a 30-day period applies since then, and in the case of extraordinary terminations as well as suspensions, Amazon is obliged to inform the sellers, including a justification of the measure. Furthermore, the clause on rights of use that the third-party sellers had to grant Amazon for the product material to be provided by them was restricted. They can now use higher quality or more specific product information in their other sales channels. Finally, the rules that gave Amazon sole and final decision-making authority to accept returns under FBA and to refund the purchase price on A-to-Z guarantee claims were changed. Now, third-party sellers can object to the acceptance of a return or an A-to-Z guarantee claim and, if necessary, assert a compensation claim against Amazon in the internal relationship if they consider the return or the A-to-Z guarantee claim to be unjustified.<sup>616</sup> In addition, a non-exclusive place of jurisdiction in Luxembourg has been provided for in particular instead of the exclusive place of jurisdiction. Sellers located in Germany can therefore now also take action against Amazon before a German court if a special place of jurisdiction can be established.

**(d) EU Platform-to-Business Regulation**

(443) The Platform-to-Business Regulation (P2B Regulation)<sup>617</sup> of the European Union, which has since come into force, now also sets out requirements for many of the provisions discussed in the above-mentioned proceedings. It obliges platform operators to provide more fairness and transparency to commercial users and contains, in particular, various information obligations of the platform operator, including changes to the terms and conditions, the reasons for suspending, restricting or terminating services, and the main parameters for ranking. In addition, platform operators must explain in their T&Cs whether and to what extent, if any, their own products or products of companies affiliated with the platform are given preference, and they must set up an internal free-of-charge complaints system for commercial users. The P2B Regulation is enforced in Germany on the basis of the Unfair Competition Act (*Gesetz gegen den unlauteren Wettbewerb – UWG*). Its provisions are classified as market conduct rules within the meaning of Section 3a UWG, and violations of them as unfair acts. Any resulting claims for injunctions, removal of the infringement, and damages must therefore be asserted by commercial users in civil court.<sup>618</sup>

**(e) Possibilities of enforcing the T&Cs**

(444) However, Amazon continues to have various options at its disposal to induce third-party

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<sup>616</sup> [Not translated. Please see the German version.]

<sup>617</sup> [Not translated. Please see the German version.]

<sup>618</sup> [Not translated. Please see the German version.]

sellers to comply with the rules in the T&Cs, including those that may be disadvantageous to them. These enforcement options manifest the rule-setting power resulting from its gatekeeper function.

- (445) First of all, Amazon can impose contractual sanctions and exclude a third-party seller who violates the T&Cs from selling on the Amazon marketplace temporarily by blocking him or permanently by terminating him. This will block his access to end customers who use the Amazon marketplace. As a rule, the third-party seller is indeed given the opportunity to remedy a violation of the T&Cs and to submit an action plan showing how it intends to avoid such violations in the future. However, in the case of certain serious violations (e.g., a suspicion of "deceptive or fraudulent activities"), the existence of which Amazon decides upon after appropriate review, termination or blocking can also take place without notice and without indication (Sec. 3 BSA). Even in cases where the alleged breach of contract does not actually exist, the affected third-party seller is thus initially cut off from customer access with immediate effect and must first take action against Amazon's decision.
- (446) In addition, several provisions in the BSA can be implemented directly by Amazon due to the direct access to the seller accounts in accordance with the APV, without requiring the involvement of the respective third-party seller. Since refunds and other compensation payments in connection with sales made via the marketplace must be made exclusively via the seller account (Section 2.5.2 APV) and the third-party seller can be obliged to maintain a minimum credit balance there or to set up a reserve account (Section 2.6 APV), decisions on the acceptance of returns or A-to-Z guarantee claims, for example, can be handled directly by Amazon. In addition, Amazon may (temporarily) restrict access to and availability of an account balance, e.g. if Amazon is exposed to a financial risk (e.g. due to expected chargebacks) or if there is a dispute in connection with the seller account or a transaction linked to it (Section 2.7. lit. a), d) APV). Third-party sellers are thus exposed to the risk that they may not be able to withdraw funds from their seller account.
- (447) Furthermore, the Buy Box exerts considerable pressure on third-party sellers to comply with T&Cs that are also disadvantageous for them, as the allocation of the Buy Box in most cases determines which seller offer the customer selects. This is because one of the key criteria in the ranking and selection process carried out by Amazon for the allocation of the Buy Box is the seller's performance, which can also include compliance with the T&Cs - in particular the rights to which the buyers are entitled thereafter (see in detail para. (449) ff.). Insofar as the very far-reaching buyer rights provided for by Amazon are not observed by a third-party seller in fact or in the opinion of the end customer, this can result in a poor customer rating,

which can adversely affect the seller rating of the third-party seller and lead to its offer no longer being considered for placement in the Buy Box. Third-party sellers therefore have a considerable interest in complying in particular with the T&C provisions provided for the benefit of end customers, even if they might be disadvantageous for them.

- (448) Finally, it must be taken into account that despite the results achieved in the proceedings regarding the T&Cs for third-party sellers and the entry into force of the P2B Regulation, it cannot be ruled out that in individual cases or even increasingly there will be an incorrect implementation of the (amended) T&C regulations or the requirements of the P2B Regulation that is disadvantageous for the third-party seller concerned, e.g., an only formulaic and therefore incomprehensible justification of a termination or blocking or an excessively far-reaching assumption of an endangering circumstance as an exception to the obligation to give reasons. It is now also possible for third-party sellers to take civil action before a German court against inappropriate clauses in Amazon's T&Cs. However, in view of the enforcement and sanction options described above, for many sellers, recourse to civil courts will often not be considered viable, or only as a very last resort, due to their reliance on the access to end customers provided by Amazon. This is because they regularly want to achieve, above all, an early readmission for sale as well as the release of retained funds on their seller account. For this reason, it is also not possible to refer to the fact that some of the options available to Amazon for enforcing its T&Cs - such as termination with and without cause - are common in German civil law and are also used by other companies that are not gatekeepers.<sup>619</sup> This is because a civil court review of Amazon's exercise of these measures will often not take place if third-party sellers fear all the more in this case the loss of the access to customers in retail markets via the German Amazon marketplace, which is very important for them.

## **(2) Ranking and selection process for Buy Box occupancy**

- (449) Furthermore, Amazon can influence the sales activities of the third-party sellers operating on its marketplace by designing the ranking and selection process for the use of the Buy Box. The Buy Box is located in the upper right-hand area of the product detail page and displays separately and clearly the offer of a third-party seller or Amazon Retail that has qualified as the "best" offer for the Buy Box during the ranking and selection process. With a single click on the "Add to Cart" button, the end customer can add the item to their shopping cart, which is why the Buy Box is also referred to as the shopping cart box. Alternatively, the end

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<sup>619</sup> [Not translated. Please see the German version.]

customer can buy the product immediately with a single click via the "Buy now" button.

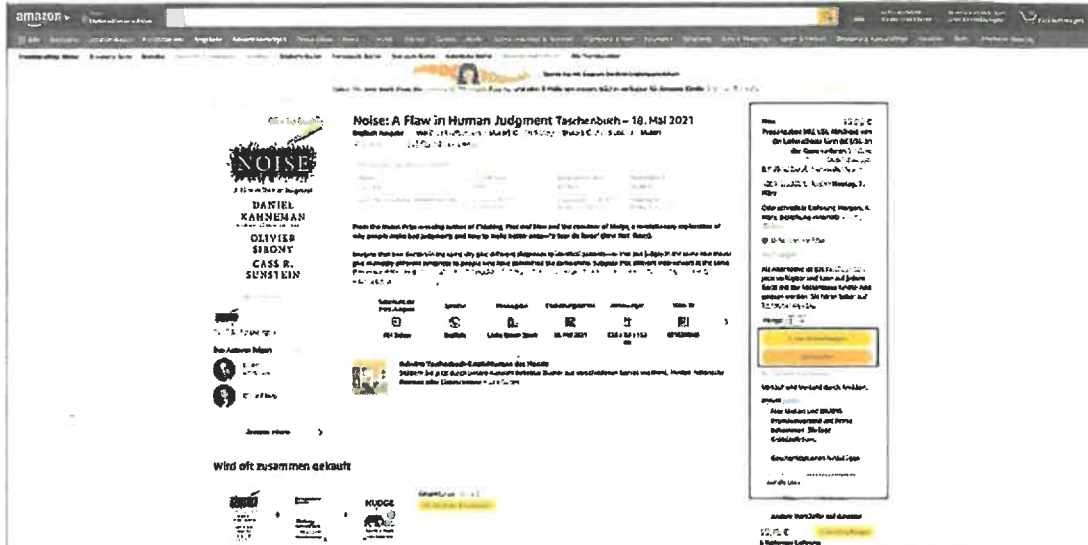


Figure 18: Buy Box and shopping buttons on the Amazon commerce platform; see modified screenshot (black frame added for emphasis) from <https://www.amazon.de/Noise-Human-Judgment-Daniel-Kahneman/dp/0316266655/> on 3 March 2022.

(450) The use of the so-called product detail pages on the Amazon e-commerce platform already greatly reduces the factors with regard to which the third-party sellers can compete with each other and, if applicable, with Amazon Retail as part of the end customer's decision-making process as to which seller to buy the product from. Since on the product detail pages all seller offers are generally displayed uniformly with the same product description and with the same product photos, third-party sellers cannot differentiate their offers from the offers of other sellers in particular through a better or higher-quality product presentation. Rather, key - competitive parameters are price, shipping time, and seller rating. This competition is further narrowed by the Buy Box. The fact whether a seller's offer is in the Buy Box as a so-called "Highlighted Offer" (hereinafter also: "Featured Offer") has a significant impact on whether the seller is economically successful or not with the sale of the respective product on the Amazon marketplace. This is because, according to a procedural press release of the European Commission, over 80% of all transactions on the Amazon e-commerce platform are initiated via the Buy Box.<sup>620</sup> Other estimates put the figure at 90%.<sup>621</sup> By deciding which seller offer qualifies as a Featured Offer, the customer's purchase decision is thus significantly influenced. In the competition for the customer's selection decision, it is therefore crucial for third-party sellers to fulfil the criteria that are decisive for occupying the Buy Box in the best possible way. By setting these criteria alone and by controlling the

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 621 [Not translated. Please see the German version.]

ranking and selection process alone through the programming of the underlying algorithm, Amazon can also exert considerable influence on the sales activities of third-party sellers.

- (451) In order for its offer to be considered in the ranking and selection process, a third-party seller must first meet certain basic requirements. For example, the third-party seller must (1) have a professional seller account, (2) comply with minimum values regarding the rate of order defects, the cancellation rate, and the rate of late deliveries, and (3) have achieved a sufficiently high order volume.<sup>622</sup> Between the eligible offers, an algorithm used by Amazon determines which of the offers is displayed in the Buy Box. This is done based on various factors, which include estimated delivery speed, past seller performance, and product price.<sup>623</sup> Although there is transparency regarding the key criteria for selecting the Buy Box offer, the exact weighting of the criteria and the exact algorithm that leads to the selection of the respective Featured Offer are not known.
- (452) Decisive for winning the Buy Box are above all the pricing and the seller performance of the seller. The product price in particular is checked separately by Amazon. Thus, Amazon can remove a product offering or exclude it from the Buy Box selection process as soon as the displayed price exceeds certain thresholds. Third-party sellers are shown reference prices with regard to pricing in Seller Central (on the so-called *Pricing Health Page*), which they should take into account when setting prices. The price for the current Featured Offer is also displayed on the Pricing Health Page. Sellers will receive a notification if their offer is not suitable for Buy Box occupancy and will be asked to adjust their price accordingly.<sup>624</sup> With regard to their pricing decisions for products offered on the Amazon marketplace, sellers are subject to specifications from Amazon, which they must observe in order for their offers to qualify for the Buy Box. This is because the seller offer that is in the Buy Box on the respective product detail page is - as explained - very likely to be selected by customers when they make a purchase. This also indicates that third-party sellers cannot, or can only to a very limited extent, reflect and incorporate the increased business risks resulting in - particular from the T&Cs that relate to the contractual relationship with the end customer into their prices. At the same time, Amazon as the operator of the Amazon marketplace benefits in any case and without restriction from an increase in the attractiveness of the Amazon marketplace, which can keep users on the trading platform and attract new users.
- (453) Amazon, meanwhile, not only reviews prices, but also the general seller performance of third-party sellers on its marketplace. The rating is based on various indicators, including

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<sup>622</sup> [Not translated. Please see the German version.]

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the rate of order defects, the cancellation rate and the rate of late deliveries. Sellers must strive to maintain a seller performance of "Good." If their rating is below this threshold, they risk having their seller account deactivated.<sup>625</sup> According to a study by the BVOH, the majority of sellers who responded to the questionnaire in question rate seller performance compliance as difficult to unfeasible. They had already been confronted with violations of the T&Cs.<sup>626</sup>

- (454) In this way, third-party sellers may be under considerable pressure to comply with provisions in the T&Cs that are also disadvantageous for them - in particular those that go (far) beyond statutory or standard buyer rights - even though they may not be able to factor the increased costs associated with these additional contractual risks into their pricing. This is because, on the one hand, if they want to "win" the Buy Box, they must also take into account the pricing requirements described above and, on the other hand, they are subject to very strong price competition due to the largely uniform sales environment on the e-commerce platform for all sellers. Fulfilling the criteria for occupying the Buy Box - i.e., on the one hand the T&Cs the other hand the specifications for pricing - can therefore be associated with a possibly significant reduction in margins for the sellers.
- (455) In addition, it is in principle possible for Amazon to design the criteria for the Buy Box and their weighting in the ranking and selection process in such a way that it is easier for Amazon as a retailer to get into the Buy Box with its offer. For example, in proceeding against Amazon for possible abuse of a dominant position under Article 102 TFEU, the European Commission is currently investigating whether the criteria for selecting the Buy Box offer and the conditions for using the Prime label result in Amazon's own retail offers and the offers of third-party sellers that use the FBA program and thus Amazon's logistics and shipping services being given preferential treatment in the allocation of the Buy Box.<sup>627</sup> In a further proceeding, the German Bundeskartellamt is investigating whether and to what extent Amazon influences the pricing of sellers through price control algorithms. In particular, the German Bundeskartellamt is examining the extent to which Amazon blocks third-party sellers' product offerings or excludes them from participating in the Buy Box ranking on the basis of their pricing.<sup>628</sup>

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<sup>625</sup> [Not translated. Please see the German version.]

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**(3) Effects on online retail**

(456) In particular, the fact that Amazon has more extensive buyer rights than the statutory or standard market rights and, because of the specifications for the win of the Buy Box, can possibly also enforce more favourable prices for products across platforms than those charged in other (online) distribution channels, which further strengthens the pull effect towards the Amazon e-commerce platform. Indeed, this can be an additional incentive for customers to shop on the Amazon e-commerce platform. This can not only influence sales activity on the Amazon e-commerce platform, but also have an impact on other (online) distribution channels, for example if rules set by Amazon develop into a cross-platform standard and prices or other conditions have to be based on the "benchmark" set by Amazon. In this respect, Amazon's rule-setting power not only has an impact on the sales activities of third-party sellers on the Amazon marketplace, but also on (online) retail as a whole.

**(4) Result**

(457) Amazon holds the position of gatekeeper for access to customers and therefore has a key position for retailers' access to their sales markets, i.e., the respective retail markets for the products they offer. On this basis, Amazon can exert considerable influence on the sales activities of third-party sellers on its marketplace. This is done, on the one hand, by way of rule-making through T&Cs, including those that might be disadvantageous to the third-party sellers. For example, rules are also set in Amazon's T&Cs that contain provisions that affect the contractual relationship between the third-party seller and the customer and that in some cases go far beyond statutory or customary buyer rights. On the other hand, Amazon exerts influence via the ranking and selection process for the presentation in the Buy Box, which is carried out by Amazon. Amazon also determines the relevant criteria in this respect, including pricing criteria, and weighting of such criteria. Last but not least, the rules set on the Amazon marketplace can also spill over to sales activities of sellers in online retail outside the Amazon e-commerce platform.

**b) Access to sales markets for (brand) manufacturers**

(458) It is also increasingly significant for manufacturers - especially for manufacturers of branded products - that their (brand) products are offered on the Amazon marketplace. In view of the large number of customers who use the Amazon marketplace to search for and purchase products, it is important for manufacturers that their brands and products are presented on the marketplace so that this large group of customers takes note of the products and takes them into account in their purchasing decisions. In this respect, it is also relevant that

Amazon is also increasingly active as a manufacturer itself in many product areas. Amazon now also offers products under Amazon's private brands in almost all product categories and the number of products offered under such private brands is constantly increasing.

- (459) According to Amazon's own data, as of 31 December 2016 Amazon offered its own products under [...] ASINs on the German e-commerce platform as of 31 December 2016. As of 31 December 2020, there were already [...] ASINs, [...]. At the same time, the net revenue generated by Amazon on the German e-commerce platform through the sale of Amazon's own products also [...].<sup>629</sup> In addition to Amazon's own devices such as Fire TV, Echo, etc., Amazon offers goods in the "Softlines Private Label" and "Home" product categories in particular. In the "Softlines Private Label" product category, the number of ASINs offered increased from 2016 to 2020 from [...] to [...] ([...]), and in the "Home" product category from [...] to [...] ([...]). The achieved revenue increased by around [...] (Softlines Private Label, from [...] to [...]) and by [...] (Home, from [...] to [...]). [...].<sup>630</sup> Since Amazon also has the possibility of increasingly promoting Amazon-owned products on its e-commerce platform, it is important for manufacturers to be able to work towards ensuring that their brands and products are not displaced by Amazon-owned brands and products in the perception of customers.
- (460) Against this background, it is obvious that it is also becoming increasingly important for manufacturers to sell their products on the Amazon marketplace themselves as third-party sellers in order to be able to control the presentation and distribution of their products as well as the presentation of their brand on the e-commerce platform. For this purpose, Amazon provides additional incentives with its brand registration program ("Amazon Brand Registry Program") in the event that manufacturers register as the owner of their brand. On the one hand, such registration gives manufacturers better control options to ensure that their brand is presented correctly on the product detail pages. This involves special IT tools to search specifically for any infringements of trademark rights in the Amazon product catalogue and to report these to Amazon. On the other hand, brand owners in the Amazon Brand Registry Program have more extensive options for presenting their brand and their products on the Amazon marketplace. These include, for example, higher-level editing rights with regard to the relevant product listings and the possibility of setting up a Brand Store<sup>631</sup>, in which the brand and products can be presented with their own texts, images and videos and thus better

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<sup>629</sup> [Not translated. Please see the German version.]

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than the form specifications on the "classic" product detail page allow.<sup>632</sup> In addition, Amazon provides registered brand owners with "Amazon Attribution", a free tool with which brand owners can (better) assess the effects of sales and marketing activities in other distribution channels on the success of their brand on the Amazon e-commerce platform. In addition, brand owners registered in the Amazon Brand Registry Program are authorized to solicit customer reviews for their products as part of the Vine program.

- (461) The aforementioned possibilities with which the presentation of the brand and the products can be managed and controlled within the framework set by Amazon exist only for third-party sellers who are registered for their brand as brand owners in the Amazon Brand Registry Program and for vendors, i.e., companies that supply Amazon as retailers. Even if manufacturers choose to operate as third-party sellers on the Amazon marketplace and register their brand accordingly with Amazon, however, they must also regularly supply - Amazon as retailers. This results from the so-called product availability policy for manufacturers. This guideline obligates manufacturers who offer their products themselves as sellers on the Amazon marketplace and at the same time also sell them via other retailers or distribution partners to also supply Amazon with these products as retailers.<sup>633</sup>
- (462) However, since manufacturers do not sell their products exclusively in direct sales via their own sales outlets, but also via retail partners, it is obvious that the obligation to also supply Amazon as a retailer is the rule. The possibility to manage and control the presentation of their brand and products on the Amazon e-commerce platform within the framework set by Amazon therefore typically requires that manufacturers authorize or supply Amazon as a retailer - irrespective of the concrete design of their distribution system. Insofar as Amazon points out that the rule serves to avoid free-riding by manufacturers, who could use the Amazon marketplace as a free showcase for their branded products without being interested in actual sales via the marketplace,<sup>634</sup> - as explained (see para. (428)) - this is not relevant for the question of the rule-making power as gatekeeper. Furthermore, this also does not appear plausible from the point of view of the Bundeskartellamt. On the one hand, Amazon decides which products can be listed for sale on the Amazon marketplace and can thus, for example, avoid listing "outdated" products. On the other hand, it seems obvious that the goal of manufacturers to present their brand in the best possible way on the Amazon marketplace could not be realized if they offered "only outdated products or products at unrealistic prices" there, as Amazon claims.

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**c) Access to sales and supply markets for shipping and logistics services**

(463) By offering comprehensive logistics services to third-party sellers operating on its marketplace, Amazon also has significant importance for access to sales and supply markets for shipping and logistics services. This is because Amazon can incentivize or pressure third-party sellers that rely on customer access through the Amazon marketplace to reach customers to have Amazon store, pack, and ship their goods under FBA or to use SFP if the seller ships the goods themselves. Furthermore, Amazon can get third-party sellers that ship their products themselves to have Amazon arrange the commissioning of the shipping service in the Buy Shipping program by means of determining specifications the non-fulfilment of which can lead to an account block. For carriers, in turn, the provision of shipping services (also) for shipments triggered by transactions on the Amazon marketplace is also increasingly important in view of the high shipment volumes, so that they must observe the framework conditions which Amazon has set in this respect on its marketplace with the shipping programs for third-party sellers.

**aa) Access to sales and supply markets for shipping services**

(464) Amazon has set particularly strong incentives on its marketplace for third-party sellers to ship their products under FBA or, at least, under SFP. This is because third-party sellers can only use the Prime logo if they use one of these two shipping programs. In this way, third-party sellers can, on the one hand, ensure compliance with the required delivery time and thus get a good seller rating in this respect and, on the other hand, more effectively reach the large and high-turnover group of Prime customers, for whom shipping Prime products is not associated with additional shipping costs. For example, [...] of the trade volume of sellers on the German Amazon marketplace ([...]) was generated by orders shipped using Prime shipping.<sup>635</sup> [...] % of all Prime customers use Prime shipping at least once a month and receive approximately [...] orders per year using Prime shipping.<sup>636</sup> It is also possible to search specifically for Prime offers using filter settings on the amazon.de website.<sup>637</sup> The Prime logo also represents a kind of seal of approval for fast and reliable shipping for sellers.<sup>638</sup>

(465) In addition, Amazon itself points out to third-party sellers that offering Prime shipping has a positive effect on seller's chances of placing its product in the Buy Box and that with the

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<sup>635</sup> [Not translated. Please see the German version.]

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<sup>637</sup> [Not translated. Please see the German version.]

<sup>638</sup> [Not translated. Please see the German version.]

Prime logo comes increased visibility of the products.<sup>639</sup> This is because the allocation of the Buy Box<sup>640</sup> and the seller performance relevant in this respect depend, among other things, on the shipping quality. Poor seller performance can even lead to the block of the seller account.<sup>641</sup> However, several of the relevant criteria - e.g., the cancellation rate, the rate of delayed shipments, or the rate of valid tracking numbers - only apply to product listings that are not shipped under FBA or SFP. When participating in the FBA program or the SFP program, however, they are not taken into account in the evaluation of the third-party seller performance or in an evaluation by customers. Accordingly, third-party sellers can counteract and prevent poor ratings or even account blocking if they use the FBA or SFP program to ship their products. Participation in the FBA program - as stated by Amazon itself - also has a direct positive impact on Buy Box placement.<sup>642</sup> Accordingly, the use of FBA has an even stronger influence on the visibility of product offers than the use of the Prime label under the SFP.

- (466) In addition, Amazon incentivizes third-party sellers with respect to shipping products that are not shipped under FBA to participate in the Buy Shipping Program (hereinafter "Buy Shipping"), where the shipping service is purchased from the delivery service provider through Amazon and the shipping label is obtained from Amazon. Thus, participation in the SFP program requires that Buy Shipping is used for at least 98% of the products shipped by the third-party seller in SFP. Further, Amazon evaluates seller performance on shipping quality based on, among other things, the rate of valid tracking numbers that third-party sellers must digitally provide to Amazon for shipments in the MFN (including SFP). If the rate of valid tracking numbers is below 95%, this may result in suspension of the seller's account unless the third-party seller chooses to ship the affected products in FBA. Since the Buy Shipping program automates tracking, program participation protects sellers from these (far-reaching) penalties in the event of problems uploading tracking numbers.
- (467) To the extent that third-party sellers use FBA to ship their products, Amazon organizes the shipment of the products and contracts the carriers. Therefore, Amazon can bundle the demand of the third-party sellers for shipping services together with its own demand as a retailer and procure the corresponding services from shipping service providers, who are thus faced with only one - very strong - buyer for a large part of the shipments triggered by

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<sup>639</sup> [Not translated. Please see the German version.]

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transactions via the Amazon marketplace.<sup>643</sup> Direct contractual relationships with the various third-party sellers, in which contractual terms and conditions adapted to the bilateral relationship could also be agreed, are therefore no longer possible for a significant proportion of Amazon shipments. Amazon, on the other hand, can achieve volume-related price advantages due to the bundling of shipment volumes in the negotiations with the shipping services, which also benefit its own retail.

- (468) To the extent that third-party sellers use SFP to ship their products, they may only use certain delivery service providers that are approved by Amazon to that extent. To be approved as a delivery service provider, certain quality requirements must be met. These include geographic network coverage, delivery speed, and terms and level of pickup service. The main criterion is the ability to offer next-day delivery. Specifically, the following Prime performance metrics must be met: [...] <sup>644</sup> [...] <sup>645</sup>
- (469) In addition, due to the requirement that 98% of their shipments in SFP must be sourced through Amazon from the delivery service provider, third-party sellers must regularly use Buy Shipping as part of SFP. <sup>646</sup> In addition, third-party sellers who ship non-prime merchandise in MFN also use Buy Shipping due to the requirement to upload tracking numbers. This allows sellers to outsource the technical process and avoid penalties in the event of any issues. In the Buy Shipping program, although the engagement of the delivery service provider is formally done by the third-party seller. However, Amazon is mandatorily interposed as an intermediary for obtaining the shipping label, i.e., direct contact between the delivery service provider and the Seller is limited to that extent.
- (470) In addition, in order to receive the respective shipping orders delivery service providers must not only pay a referral fee to Amazon, [...]. <sup>647</sup> This IT integration of delivery service providers allows third-party sellers to automatically purchase shipping labels and Amazon to monitor the performance of each delivery service provider. This is because information on the status of collections, shipments and deliveries is also transmitted automatically. <sup>648</sup> In addition to specific information on the range of services offered by the respective shipping service provider to third-party sellers, Amazon thus also receives, in particular, extensive information on the reachability of the end customers who are recipients of the shipments.

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**bb) Supply markets for (contract) logistics services**

- (471) Furthermore, it follows from Amazon's position as a gatekeeper that it has the possibility to influence the procurement of further logistics services by the third-party sellers operating on the Amazon marketplace. This possibility arises on the one hand from the importance of the allocation of the Buy Box in order to be economically successful with the sale of a product on the marketplace, and on the other hand from the incentives described above to use FBA in order to have a chance to win the Buy Box. This is because under the FBA program, Amazon not only handles shipping for the third-party sellers, but also other (contract) logistics services such as warehousing and packaging of goods. Also, the storage and packaging of the third-party sellers' goods - as well as the shipping - is done together with the goods that Amazon offers on its e-commerce platform as a retailer, and Amazon benefits from synergy effects due to large volumes or quantities.
- (472) In view of this, Amazon is also able to shape the conditions for the use of storage and packaging services by third-party sellers in FBA to its advantage, even if this is associated with disadvantages for the third-party sellers. This is illustrated by the so-called "Central Europe Program" introduced by Amazon "to expand the logistics network" that applies to all FBA sellers on the German Amazon marketplace.<sup>649</sup> Third-party sellers participating in this program send their FBA inventory to an address in Germany. Amazon then manages distribution to logistics centres in Germany, Poland and the Czech Republic at its discretion.<sup>650</sup> Orders placed through Amazon's German marketplace are generally warehoused at logistics centres in Poland and the Czech Republic, as Amazon says this is more cost-effective.
- (473) Thus, there are no additional fees for participating third-party sellers<sup>651</sup> using the program.<sup>652</sup> However, these sellers will have to accept additional work and associated costs in order to comply with their obligations under VAT law and to avoid back payments or penalty payments by the respective tax authorities. In particular, they must register for VAT in all three countries and submit regular reports (including declarations of intra-Community transfers in the event of a transfer to Poland or the Czech Republic).<sup>653</sup>
- (474) However, if sellers decide - for VAT or other reasons - not to participate in the Central

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<sup>649</sup> [...]

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Europe Program and instead (continue to) have their goods stored in Amazon logistics centres in Germany, they must pay an additional fee of €0.25 for each shipment of a product from this stock in Germany.<sup>654</sup> This additional fee reduces the margin of third-party sellers in case they cannot adjust their prices accordingly in order not to lose the chance to win the Buy Box.

- (475) Whether the Central Europe Program as a whole - as claimed by Amazon<sup>655</sup> - leads to predominant efficiencies due to an improved distribution of goods and faster delivery times for customers in Southern and Eastern Germany as well as in Eastern Europe and would therefore not be objectionable as a practice under antitrust law, is not decisive for the determination of rule-making power as explained (see para. (428)). In this case, it is much more important that Amazon is in a position to shape the market conditions due to its gatekeeper position and also uses this possibility - as the above example shows. In this respect, it should be noted that since the introduction of the Central Europe Program, third-party sellers must either incur VAT obligations in Poland and the Czech Republic for the FBA shipment of their products to end customers in Germany or they pay increased shipping fees, which - depending on the product - can lead to their product offerings no longer qualifying for the Buy Box due to pricing. Amazon, on the other hand, will now be able to also use the new logistics centres in Poland for its marketplace operations there following the launch of its Polish marketplace in March 2021.<sup>656</sup>

**d) Sales markets in the Internet of Things business**

- (476) Amazon's business activities in the "Internet of Things" or "Smart Home" business, and in particular the offering of the Alexa voice assistant, are also of considerable importance (in particular in the long term) for the business success of third parties in this area or may have a relevant influence in this respect.
- (477) Voice assistants are software programs that are activated and operated by the user via voice control. They are connected to the internet and serve as a platform for voice applications. For example, in connection with a loudspeaker or smart TV, the playback of music, videos and radio can be controlled via voice assistants, information can be searched on the internet or purchases can be made on websites. On the other hand, they serve as a user interface for IoT devices by allowing them to be controlled via voice assistants.

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- (478) With Alexa, Amazon is one of the three leading providers of voice assistants in the EU.<sup>657</sup> In Germany, in the fourth quarter of 2020 an average of about [...] devices were used in conjunction with Alexa at least once a month in Germany the fourth quarter of 2020. The number of "monthly active users" of Alexa in Germany was around [...] customers; Amazon assumes a household coverage of a good [...]. In the process, just under [...] so-called actions were carried out with Alexa.<sup>658</sup> There are over 100,000 voice applications available via Alexa, and Alexa is compatible with over 140,000 smart home products.<sup>659</sup>
- (479) In general, it can be observed that the already great importance of voice assistants<sup>660</sup> is likely to increase further with the growing IoT segment.<sup>661</sup> According to estimates, the (global) number of voice assistants in use will double in the next few years - from 4.2 billion in 2020 to 8.4 billion in 2024.<sup>662</sup> In Germany, one in three households already owned a smart speaker or intelligent loudspeaker in 2021, the use of which is accompanied by a voice assistant.<sup>663</sup>
- (480) Companies operating in the Internet of Things business state that access, visibility and good performance on the leading technology platforms (i.e., voice assistants and mobile device operating systems from Amazon, Apple and Google) are "essential" to their business success and customer access.<sup>664</sup> Also, consumer surveys suggest that compatibility with voice assistants influences smart home device purchase decisions.<sup>665</sup> Voice assistants thus have a decisive role in the IoT area (and in view of the likely growth, especially in the future).<sup>666</sup>
- (481) In doing so, they can specify the technical and content framework that other companies must fulfil in order to ensure the compatibility of their products with voice assistants and thereby reach consumers.<sup>667</sup> This includes, for example, basic certification processes or quality requirements<sup>668</sup> and guidelines<sup>669</sup> or the provision of various data and information<sup>670</sup>. Very specific regulations can also be made in this regard, e.g., Amazon prohibits voice application

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providers from using general search engines<sup>671</sup> or requires voice application providers not to provide access to third-party music or radio services via the voice application without prior consent from Amazon.<sup>672</sup> Also, Alexa may not be connected to devices primarily for use in vehicles without prior consent.<sup>673</sup>

(482) Furthermore, it is in principle possible for voice assistant providers to influence the contact of voice applications and/or device providers with customers as well as access to customer-related data.<sup>674</sup> At the same time, it is inherent in voice assistants that they can only offer a customer a limited number of choices at the moment of request. Often, a service is preset in this case and can only be changed manually by the consumer, e.g., in the Alexa app. While the automatic preselection of some services can be changed (e.g., Spotify as the default music service instead of Amazon Music<sup>675</sup>), this is not possible for other functions<sup>676</sup>. This creates rule-setting power for voice assistant providers, who can decisively influence the consumer's selection through their default settings, criteria and algorithms. Contrary to Amazon's view<sup>677</sup>, the ability to change a pre-installed setting is usually not sufficient to significantly limit rule-making power. The benefit of pre-installation has been determined by the European Commission in the case of search engines on mobile devices, for example.<sup>678</sup> Amazon has also affirmed the benefit of pre-installations for this case.<sup>679</sup> However, similar effects in the area of pre-installations for voice assistants can be expected, for example, due to default effects on the consumer side.<sup>680</sup> It should also be noted that the undertaking's own services are usually preinstalled on voice assistants; in the case of Alexa, for example, these are Amazon Music or shopping via the Amazon marketplace (Alexa Shopping).<sup>681</sup>

(483) Apart from that, the same applies with regard to the power of intermediation and rule-making for other devices or services of Amazon, such as the widespread streaming platform Fire TV or the Amazon Appstore. In these cases, too, there is a risk that Amazon can also control the access of content developers and app developers to customers who use such devices from

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Amazon and thus act as a rule maker. For example, Amazon can independently and unilaterally set the app requirements and the placement criteria of the offers on the interface of the Fire TV and thus the possibilities of its business customers to access their customers, and consequently also their economic success. One example of such possibilities are app-specific speed dial buttons integrated into the Fire TV remote control.<sup>682</sup>

#### 4. Access to data relevant for competition (Section 19a(1) sentence 2 no. 4 GWB)

- (484) Furthermore, Amazon has excellent access to competitively relevant data within the meaning of Section 19a(1) sentence 2 no. 4 GWB, which in the present case also contributes to Amazon's paramount significance for competition across markets.
- (485) The access to competitively relevant data pursuant to Section 19a(1) sentence 2 no. 4 GWB can be of considerable relevance to the question of whether an undertaking has paramount significance for competition across markets.<sup>683</sup>
- (486) Access to competitively relevant data plays a special role in the digital economy as a resource.<sup>684</sup> In particular, data is of great importance for the formation and reinforcement of digital ecosystems. The term data is to be understood broadly in this context and ultimately encompasses any information. Many digital business models are based on personal data, i.e., information relating to an identified or identifiable natural person. In addition, however, non-personal data can also have considerable relevance.
- (487) In accordance with the consideration of data beyond individual markets as indicated in Section 19a(1) GWB, the term - unlike in Section 18(3a) no. 4 GWB, which has the same wording - is not to be understood in market-related terms, but rather access to data relevant for competition is to be examined across markets. For the classification as a factor of paramount significance for competition across markets, it is significant that data typically is a "shareable input", i.e., it can be used across products and services.<sup>685</sup> If data can be used across different products and services, it can be a "staple" for connecting these products and services into a cross-market system.<sup>686</sup> The generation and commercial processing of data can be the aspect that binds together quite different business segments and can establish overarching positions of power.<sup>687</sup>

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- (488) The possibility of using data across markets may impact competition in various ways: If it is possible to combine data generated by the use of different products and services, this may provide additional information for the development of new products and services that would not be available to the same extent or quality if the different data sets were analysed separately.<sup>688</sup> Processing data from different sources can make them particularly valuable from a competition perspective, for example because existing data can be validated and cross-references can be made.<sup>689</sup> For example, user data from different services can be combined to create more differentiated user profiles. This can provide (better) insight into the particular needs and preferences of users in very different contexts and can be used both to improve existing products and services (e.g., optimized adaptation to user needs through greater personalization) and to develop new products and services.<sup>690</sup> This effect is reinforced by the use of machine *learning* methods, *which* added in particular high value when applied to large or high-quality data sets.<sup>691</sup> Overall, this can facilitate the development of new markets.<sup>692</sup>
- (489) However, it can also lead to users making extensive use of the expanded options for routing between different services within the ecosystem and thus leaving the ecosystem less and less frequently. This can support the self-reinforcing effect of network effects and raise barriers to entry.<sup>693</sup> Access to data – in particular detailed insights into user behaviour - can also enable companies to identify which potential competitors pose a threat and effectively fend off advancing competition by blocking, buying up or strategically growing.<sup>694</sup> At the same time, particularly in connection with "double roles" resulting from an integration of different business areas within the ecosystem, there may be a risk that data collected in one business area, e.g., covering transactions of third companies, may be used elsewhere in competition (possibly with the same third parties) for the undertaking's own benefit.<sup>695</sup>
- (490) Cross-market access to data can also be used to optimize targeted advertising, which can be an important form of financing. For example, in the case of user overlaps between different services, the corresponding user data can be combined and the extensive user profiles thus obtained can be used for targeted advertising. This so-called targeting can be continuously

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refined and in turn generate new data about the user.<sup>696</sup>

(491) Data is regularly available for completely different and for new uses. In principle, data can be used flexibly and experimentally in ever new areas. Of outstanding importance is the broadest possible access to data in the growing number of markets or business areas in which artificial intelligence and machine learning in particular are becoming key technologies.<sup>697</sup> Such "capabilities" can also contribute to a systemic, cross-market position of power.

(492) In the present case, Amazon obtains access to a wide range of data in the course of its business activities (see a)). This data is also relevant to competition within the meaning of Section 19a(1) sentence 2 no. 4 GWB (see b)).

**a) Data collected and processed by Amazon**

(493) Amazon has access to (often non-public) data in various ways. In particular, Amazon collects data of its customers and business partners ("user data", see aa)). Furthermore, Amazon collects, among other things, data about products offered on the e-commerce platform (see bb)) and further data from or about third-party companies (see cc)). Amazon finally combines the data across services and sources and derives further data from it (see dd)).

**aa) User data**

(494) Amazon collects data in particular from persons or companies that use its services. As users, in Amazon's e-commerce business, this concerns in particular private and business customers who purchase goods or other offerings on the respective e-commerce platform or website, as well as Amazon's so-called selling partners, i.e., vendors and third-party sellers.

(495) What data or personal information is collected by Amazon can be found in the Amazon.de data protection declaration<sup>698</sup>, the privacy notice applicable to the German offer portal amazon.de which is stored there. The Amazon.de privacy notice forms the basis for the use of the website and applies - also according to Amazon's own statements - to personal information of private customers, business customers and sales partners (vendors and third-party sellers) of Amazon who use products and services under amazon.de, unless expressly regulated otherwise.<sup>699</sup> With regard to access to competition-relevant data, this group of persons is hereinafter uniformly referred to as "users". The user data collected by Amazon

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is personal data within the meaning of Article 4 no. 1 GDPR<sup>700</sup>, insofar as it relates to an identified or identifiable natural person.

- (496) The privacy notice applies uniformly to all products and services available via amazon.de, i.e., it covers all data collection and processing by the e-commerce platform operated under amazon.de, by devices, products, services, brick-and-mortar stores and online shops as well as applications. Products or services in this context include digital content, physical products (goods) and other services, including subscription services (Prime Video, Amazon Music, etc.), available via amazon.de.<sup>701</sup>
- (497) The user data collected by Amazon can be divided according to the categorization in the privacy notice into (1) information that users themselves transmit, (2) information that is automatically generated when using Amazon services and (3) data about users that Amazon receives from third parties.
- (498) The lists of collected user data, as they are contained in the Amazon.de privacy notice and on which the following statements are based, are – *expressis verbis* - only examples. In response to a corresponding request from the Bundeskartellamt for further groups of data in the three categories and the associated request for completion to final lists, Amazon has stated that the lists of examples cover all current use cases, but also reserves the right to add further examples.<sup>702</sup>
- (499) Incidentally, it can be assumed that Amazon also collects data from users of the other country-specific offer portals to a similar extent as in connection with amazon.de. The privacy notice for AWS websites<sup>703</sup> also contains comparable lists of collected data in the three categories presented below for the Amazon.de privacy notice, whereby the lists are partially congruent.

#### **(1) Data transmitted by the user itself**

- (500) According to the Amazon.de privacy notice, users initially provide data themselves,<sup>704</sup> when they register with amazon.de, for example by opening a customer account, and update the data later if necessary. Such stored data includes name and e-mail address and optionally address and telephone number, payment information, age or addresses and telephone numbers of contacts. Comparable data is provided by users when they create and maintain

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other accounts, such as in particular (in the case of third-party sellers) a seller account, but also a Kindle Direct Publishing (KDP) account, a developer account, or "any other account" that Amazon makes available to third parties that allows them to "develop or offer software, goods, or services to Amazon customers."

- (501) Data submitted by users themselves also includes data from searches and orders, location information, IP addresses, device log files and configurations (including, where applicable Wi-Fi credentials<sup>705</sup>), interactions with the Alexa voice service collected in the form of voice recordings, configurations on and interactions with Amazon devices or services, communications with Amazon, downloads, streams or uploads of images, videos or other files to Prime Photos, Amazon Drive or other Amazon services, playlists, watchlists, wish lists, gift registries, created customer reviews or use of the notification service for products not yet released. Amazon also collects information and documents "regarding identity and standing," corporate and financial information, information regarding credit history, and VAT numbers.

**(2) Data generated automatically upon the use of Amazon's services**

- (502) According to the Amazon.com privacy notice, Amazon further collects and analyses the following data in particular that is automatically stored by Amazon:<sup>706</sup> the user's purchase and content use history, the full Uniform Resource Locators (URL) clickstream to, through and from the website amazon.de<sup>707</sup>, user device IP addresses, logins, email addresses, passwords, information about computers, devices, and connections<sup>708</sup>, the location of the user's device or computer, information about content interactions<sup>709</sup>, device metrics<sup>710</sup>, Amazon service metrics<sup>711</sup>, versions and time zone settings, phone numbers users have used to call customer service, and images or videos when users shop on the Amazon marketplace and use Amazon services. Further, Amazon uses device identifiers, cookies, and similar technologies on devices, apps, and the Amazon websites to collect browsing, use, and other information.

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**(3) Data transmitted by third parties**

(503) Finally, according to the privacy notice, Amazon receives information "from other sources," i.e., third parties.<sup>712</sup> This includes updated order and delivery address information of parcel delivery services and other transport companies, account information, purchase and payment behaviour, page view information or other information about user interactions with third parties/third-party providers with whom Amazon jointly (co-branded) offers or for which Amazon provides technical, fulfilment, payment, advertising or other services,<sup>713</sup> information about user interactions with products and services of Amazon subsidiaries, search results and links, including paid listings, information about internet-connected devices and services that users have connected to Alexa, and information from credit reporting agencies regarding users' credit history.

**bb) Data about products offered on amazon.de**

(504) Amazon has a variety of data available about products offered on amazon.de. In addition to public information - such as offer prices, product descriptions and rankings and customer reviews<sup>714</sup>, product features, taxes, manufacturers' recommended retail prices and prices of competitors outside the Amazon marketplace - Amazon has access, in particular in connection with the e-commerce platform and related services, to non-public data such as Glance Views (page views of the respective product detail pages on amazon.de), sales figures (e.g., gross merchandise value), sales quantities (units), cost components of products (so-called costs of goods sold<sup>715</sup>, variable operating costs, fixed costs of logistics centres, marketing subsidies and costs in connection with the return of goods and customer service) and reorder status.<sup>716</sup>

**cc) Further data from or via third-party companies**

(505) In addition to the information sources listed under aa) and bb), which result directly from the operation of the e-commerce platform or the website, Amazon also obtains data to a considerable extent in other ways.

(506) Thus, Amazon receives further data in particular in connection with its Alexa voice assistant if third-party devices want to use and integrate it for this purpose. Third-party providers may integrate the Alexa service on devices (hardware) offered by them to enable control of these

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devices via the voice service (Internet of Things ("IoT")). In addition, the service can be integrated on mobile devices (e.g., smartphones or tablets) for IoT control. When integrating Alexa voice control into third-party devices, Amazon requires manufacturers to collect certain information. This is information about the device type, configuration of components such as communication, type of audio triggers or alignment support, and the Alexa software version used. In addition, Amazon may request additional metrics (measurement values) such as latency (audio delay) and render time<sup>717</sup> as well as screen resolution for the implementation of certain features or functions. In addition, Amazon may collect general information about the operation of the respective device, such as whether the device is turned on and has an internet connection when the user is not actively interacting with Alexa. As soon as a user links a device to the Alexa service, Amazon receives information about the type, functions and operating status of the device.<sup>718</sup>

- (507) As part of the logistics services provided to Amazon Retail and third-party sellers, Amazon receives shipment information from delivery service providers through a data interface (API), such as the parcel's destination, the parcel's scheduled delivery date, full tracking history, estimated delivery date, location information, a description of the delivery, and possibly pickup information.<sup>719</sup> Delivery service providers that participate in Amazon's Buy Shipping program disclose to Amazon, among other things, the description of the shipping methods offered, including the duration of transportation, the rates and other charges incurred for transportation services, the terms of transportation, and information about package insurance.<sup>720</sup>
- (508) Furthermore, Amazon receives pseudonymized information<sup>721</sup> about customers from advertisers. The "Advertiser Audiences" program enables advertisers to place pixels<sup>722</sup> on their websites in order to provide Amazon with target group information in pseudonymized form, which Amazon includes in its systems for interest-based advertising.<sup>723</sup>
- (509) Amazon also obtains data about AWS users and offerings through the operation of AWS. This data includes metrics about AWS offerings, such as usage of offerings, occurrence of technical errors, diagnostic reports, user preference settings, backup information, API calls,

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and other logs<sup>724</sup>. In addition, automatically collected data includes content that users have viewed or searched for, page interaction information (scrolling, clicks, and mouse-overs), and other content interaction, such as downloads or streams of content.<sup>725</sup>

**dd) Data derived from data aggregation and data analysis**

- (510) The described (raw) data is not only collected by Amazon, but also aggregated and analysed. [...]
- (511) Amazon calculates or analyzes a variety of key figures that are calculated from the data obtained. [...] <sup>726</sup>
- (512) Product-related metrics [...] are tracked.<sup>727</sup> For example, Amazon Music metrics include [...] <sup>728</sup>
- (513) In addition, Amazon works with econometric models, such as the [...] <sup>729</sup> [...] <sup>730</sup> [...]
- (514) Furthermore, Amazon aggregates in particular [...] for recommendation functions (see below para. (552) ff.).
- (515) Finally, Amazon uses acquired data in a variety of ML tools to support business operations in different areas and derives further information from it, in particular for business decisions. [...]

**b) Competitive relevance of the data**

- (516) The data to which Amazon has access is also of considerable competitive relevance.
- (517) When considering the competitive relevance of data, it must be examined to what extent access to the data in question has an influence on the competitive position of the data owner and can provide the data owner with competitive advantages that are able to secure or even strengthen its competitive position or position of power. This is to be determined by way of an overall consideration of all circumstances and regularly depends on the type and scope of the available data and its significance for the business activities of the undertaking in

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question.<sup>731</sup>

(518) In the present case, the competitive relevance of the data collected and processed by Amazon results from the fact that they are available in large volume and high quality (see aa)) and that they are also of particular importance for Amazon's business model or business activity from a competitive perspective (see bb)).

aa) **Data on a large scale and of high quality**

(519) Various parameters are significant to the question of the competitive relevance of available data. The quantity of data, the number of data sources and the range of data types play an important role, as does the quality, which is reflected in particular in the accuracy or truth content of the data.<sup>732</sup> Correspondingly extensive and high-quality data are regularly an essential prerequisite for data-based competitive advantages. Data that is not meaningful, incoherent or erroneous is of little use, even in combination with a mature data model. The competitive advantage, however, is enhanced if authentic data from different sources can be linked, aggregated and made usable across services, especially if comparable data sources are not available to competitors to a similar extent and in the same way.

(520) Amazon has access to a large amount of data, which is also fed from many different data sources, covers a variety of data types and is also of high quality in terms of accuracy and truthfulness.

(521) The size of the data volume to which Amazon has access can initially be measured by the number of users, the number of active third-party sellers and the number of products offered on amazon.de.

(522) Amazon can collect data from and about a large number of users. This can already be measured by the number of users registered with Amazon: In the second quarter of 2021, around [...] Amazon accounts existed on the customer side worldwide. Amazon also has a large number of users in Germany: The number of Amazon user accounts on amazon.de was just under [...] in the second quarter of 2021, and the number of Prime memberships was just under [...].<sup>733</sup> This means that a considerable proportion of households in Germany probably have a Prime user account.<sup>734</sup> Amazon itself estimates the share of all households

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in Germany that have a paid Prime account at around [...].<sup>735</sup>

- (523) A considerable number of these users are active on a regular basis. For example, the average number of monthly active users on amazon.de in the first half of 2021 was around [...], that of Prime shipping around [...], that of Prime Video around [...], and that of Prime Music just over [...]. The average number of monthly active users worldwide was around [...] in the first half of 2021, that of Prime Shipping approx. [...], that of Prime Video approx. [...] and that of Prime Music approx. [...].<sup>736</sup> Compared to the other marketplaces surveyed in these proceedings, Amazon thus has by far the highest number of monthly active users in Germany. The monthly active users on the German marketplace of eBay as the following competitor corresponded to [30-40] % of Amazon's monthly active users in 2020. By contrast, the other competitors' monthly active users on their German marketplaces or e-commerce platforms corresponded in one case to [10-20] % and in all others to even less than 10 % of the monthly active users on Amazon's German e-commerce platform.<sup>737</sup>
- (524) Furthermore, around [more than 100,000] active third-party sellers were registered on the German Amazon marketplace (under the domain amazon.de) in the fourth quarter of 2020.<sup>738</sup> By contrast, fewer than 100,000 sellers were active on the eBay marketplace, while the other larger competitors - in terms of their trade volume - Otto, Zalando, Kaufland and Galeria Karstadt Kaufhof each had fewer than 10,000 active third-party sellers on their marketplaces.<sup>739</sup>
- (525) Finally, a large number of products offered on the e-commerce platform ensures a high volume of data. For example, as of 31 December 2020, a good [...] items were listed on amazon.de in terms of the goods on offer alone. Of these, just under [...] items were (also) offered by Amazon Retail and approx. an additional [...] items were offered only by third-party sellers.<sup>740</sup> By contrast, the number of items listed on the German eBay marketplace as the next competitor is only around [20-30] % of the number on Amazon.<sup>741</sup>
- (526) Amazon also has access to a variety of data types and sources. This is based on the fact that Amazon exchanges data with various data sources for business reasons and collects a variety of different data, in particular on the basis of data protection declarations (see in detail above under para. (494) ff., (504) ff.). Due to its broad range of services and products on the user

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side, which can be accessed via the customer account and, in some cases, bundled in the Prime subscription, Amazon is also able to collect and combine data about individual users across services. This enables Amazon, for example, to link data to cross-service user profiles.

- (527) Data aggregation increases the competitive value of user data, as the combination of user data across services and devices allows, among other things, the validation of data and, on its basis, the value-added identification of cross-references as well as patterns.<sup>742</sup>
- (528) For example, Amazon can take into account customers' interactions with other Amazon services, such as [...], when creating lifestyle and interest-based audiences for advertisers.<sup>743</sup> Similarly, the software tools used to create personalized product recommendations on the e-commerce platform [...].<sup>744</sup>
- (529) Finally, the data collected is particularly truthful because it predominantly relates to the actual (purchasing) behaviour of users and thus reveals (actual) preferences of users. By using integrated services such as Prime Video, Prime Reading, or Amazon Music, users also reveal their taste in music, books, and movies beyond (merchandise) purchases on the commerce platform. Furthermore, search, page view and order history, for example, can map not only the interests but also the decision-making processes of users. Habits can also be revealed via information such as location details, addresses and device metrics. Where the data is not about user behavior but arises from direct user input - such as payment information or addresses - it should be noted that users have a particular interest in providing accurate information. This is because services such as the delivery of orders or the processing of payments can only be successfully provided by Amazon if the information provided is true.
- (530) Overall, Amazon is thus able to collect, link and aggregate authentic or truthful and thus high-quality data of various types from various sources and in large quantities and to make the data usable across services.
- (531) This prominent position with regard to access to data in comparison with the immediate competitive environment is, moreover, not relativized by the fact that individual companies may also have access to data of a similar scope and quality.<sup>745</sup> In contrast to a market-related analysis (based on individual market dominance) pursuant to Section 18(3) no. 3 or (3a) no. 4 GWB, in which data access is relevant if competitors on the relevant market do not have

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comparable data access, the existence of comparably outstanding data potential of individual companies in a cross-market analysis - as indicated here - does not relativize the competitive relevance of data access, nor does it preclude the determination of a paramount significance for competition across markets with regard to several undertakings. Rather, the superior cross-market access to data in itself relevant for the designation pursuant to Section 19a(1) GWB.

**bb) Competitive significance for Amazon's business model /business activity**

- (532) Access to large volumes of high-quality data is of great importance for Amazon's business model and operations. This is in particular because of the resulting opportunities for the continuous improvement and expansion of Amazon services, for recommendation systems and for the personalization of Amazon services.
- (533) Amazon itself emphasizes<sup>746</sup> that it is of paramount importance for the undertaking that customers have positive experiences in contact with Amazon, so that knowledge about and reaction to (individual) customer preferences and the optimization of offers shall be constantly advanced. According to the Amazon.de privacy notice, Amazon processes the personal information of users in order to operate, provide and improve the Amazon services. This includes troubleshooting and improving Amazon services, recommendations and personalization of services (recommending features, products, and services, identifying user preferences, and personalizing user experiences with Amazon services), and interest-based ads for features, products, and services.<sup>747</sup> Also in its program guidelines for third-party sellers on Seller Central, Amazon states, "*We also use aggregated data to identify categories and products with high customer demand over a given time period, to operate and understand the health of our business, to develop new tools and services for customers and sellers, and to otherwise make strategic decisions about where to invest resources.*"<sup>748</sup>
- (534) Due to its access to large volume and high quality data, Amazon is in particular able both to improve existing services and products for an existing need or to develop new services and products and to identify a new need and to launch services or products geared to such a new need on the market (see in detail (1)). In addition, Amazon is able to effectively personalize its services (see in detail (2)). Contributing to these capabilities of Amazon is in particular the fact that Amazon can collect data across services, combine them with each other and also use them outside their original purpose, i.e., in other fields of activity. Through its cross-

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service data use, Amazon has the ability to exploit data-driven indirect network effects for the improvement or new development of a product or service. These also facilitate and encourage the expansion of Amazon's operations into additional markets and potentially their encirclement by the Amazon ecosystem. Cross-service use is possible because of the special property of data as a special "shareable input" that is not exhausted by multiple uses, which is characteristic of data-driven business models.<sup>749</sup>

- (535) The competitive significance of the excellent data access for Amazon's business activities is increased by the fact that, due to Amazon's conglomerate structure and its activities in numerous business areas, the data access is cross-service in a way that is not available to other e-commerce companies in the same way. This is because these companies regularly do not have a comparable business setup in terms of their diverse, interconnected business activities. Furthermore, as marketplace operators, they also do not have a comparable user base via which additional data can be collected through affiliated services. As a result, competitors regularly find it very difficult to generate the necessary data and data volumes, so data-driven indirect network effects cannot be triggered and exploited to the same extent.
- (536) In addition to the fact that Amazon's own data access is superior in terms of quantity and quality, competitive advantages over other companies can also result from the fact that Amazon's data access is fed by business activities on various interconnected markets and the fact that Amazon often acts in hybrid roles, for example as an intermediary and as a provider of services and products (see also para. (343)). For example, on the e-commerce platform operated under amazon.de, Amazon Retail encounters the third-party sellers represented on the Amazon marketplace as competitors. At the same time, however, Amazon as marketplace operator has access in principle to competitively sensitive data such as units sold or shipped, sales or shipping information of the third-party sellers. If used accordingly, this data could form the basis for Amazon Retail's own sales decisions, in particular its product range and pricing strategy. Furthermore, Amazon acts as a manufacturer and supplier of private brand products. In this case, information about product returns, customer ratings and suppliers of third-party sellers basically opens up the possibility for Amazon to optimize its own-brand assortment. Device metrics and error logs on third-party hardware on which Amazon services such as Prime Video or Alexa are used, could be used to develop or improve its own devices. As an intermediary for logistics services, Amazon gains insights into competitively sensitive data, such as shipping rates under the SFP. This information, if used appropriately, could be relevant to Amazon as it expands its own logistics services.

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<sup>749</sup> [Not translated. Please see the German version.]



**(1) In particular: Data as the basis for continuous improvement and expansion of services**

- (537) The economic value of improving existing services lies, among other things, in strengthening customer satisfaction and loyalty, which means that content is perceived as more relevant, user attention is retained for longer, and customer churn can be avoided. Increased customer loyalty can also lead to increased sales, in particular for complementary products.<sup>750</sup> Improved services, such as more accurate demand forecasting, can also lead to significant cost savings through more efficient warehousing, logistics and automated ordering systems, which reduce storage and transportation costs. In addition, the competitive factors of availability and delivery time, which are important in e-commerce, can be improved.<sup>751</sup>
- (538) Data-driven services can be improved and developed more effectively the more high-quality data is available. If the evaluation of user data leads to innovations and improvements in products and services, positive feedback loops can be created<sup>752</sup>. A basic distinction can be made between user feedback loops and monetization feedback loops. User feedback loops arise when the improvement of products and services through the use of user data increases their attractiveness, which on the one hand increases the use of the products and services and on the other hand can attract new users. This can grow the data pool as a basis for further product improvement and innovation. The term monetization feedback loops describes the case if the reinvestment of revenue generated by users such as business customers (e.g., advertisers) helps to improve the services and products and attract further users.<sup>753</sup>
- (539) Economies of scope arise when data generated from the use of a service reduces the marginal cost of innovation in other markets, for example by identifying market gaps. In particular, data generated when a service or product is used can be used to improve or redevelop a seemingly unrelated service or product. This is sometimes referred to in the literature as a "data-driven indirect network effect". Corresponding economies of scope are also possible in particular because data are not "consumed" by use, but can be used as often as desired in the development and improvement of different products.<sup>754</sup>
- (540) In terms of the e-commerce platform, improving existing services means, for example, optimizing the range of goods on offer by adjusting Amazon Retail's product portfolio accordingly. This includes the identification of supply gaps in connection with the

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introduction of new products, the discontinuation of unprofitable products, and the development of private brands<sup>755</sup>.

- (541) The identification of supply gaps [...].<sup>756</sup>
- (542) The decision whether to add a product to the Amazon Retail offering [...].<sup>757</sup>
- (543) Non-profitable products offered by Amazon Retail are identified using the [...].<sup>758</sup>
- (544) Optimized pricing on the part of Amazon Retail also contributes to improving the e-commerce platform, because optimized prices can increase both customer satisfaction and the profitability of the e-commerce platform. [...].<sup>759</sup>
- (545) Finally, according to Amazon, helping to improve Amazon's marketplace offering to third-party sellers is that Amazon provides third-party sellers with various data-driven tools and reporting capabilities. In Seller Central, for example, sellers have access to information and tools for managing their offers, inventories and orders, for communicating with customers, to information on the performance of their products, on Glance Views and the number of user sessions, as well as to personalized recommendations on product inventory, product range, fulfilment, pricing and advertising in the so-called Amazon Selling Coach. Furthermore, Amazon provides various programming interfaces outside of Seller Central, on the basis of which sellers can develop their own tools, and automatic notifications. In addition, [...] are also shared with third-party sellers - to support the tailoring of the product offering.<sup>760</sup> This is another expression of Amazon's superior access to data, as Amazon allows third-party sellers to view selected data and provides selected, partially aggregated data, but has sole access to the entirety of the data.
- (546) In relation to digital offerings, data-driven demand forecasts can also support the decision to add new content; for example, Amazon uses a software-based demand model in relation to Prime Video.<sup>761</sup> [...] <sup>762</sup> In addition, user data collected when using the services also provides feedback on the product offering; for example, Amazon can record how quickly users finish

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<sup>762</sup> [...]

reading books purchased on Kindle.<sup>763</sup>

- (547) Data is also of particular importance for Amazon's Alexa voice assistant. According to its own information, Amazon uses queries to Alexa to train the speech recognition systems through (supervised)<sup>764</sup> machine learning. The more Alexa is trained with realistic queries, the better it can respond to speech habits, dialects, accents, vocabulary and background noise.<sup>765</sup>
- (548) The range of logistics services could be optimized on the basis of data collected via data interfaces, such as shipment information or the price structure of delivery service providers, which is transmitted as part of the SFP. In addition, Amazon already filed a patent for "Anticipatory Shipping" in 2013, which aims to deliver products to local areas even before customers have ordered the products.<sup>766</sup>
- (549) Targeted advertising can also be optimized through the use of data and benefits from economies of scope. On the one hand, Amazon can use this within the group and across services to reach new and existing customers of an offer via a different channel and thus encourage them to use the offer (e.g., advertising e-mails for Amazon Prime to new Fire TV customers or advertising for Prime Video on the Amazon e-commerce platform for Prime customers who have never streamed Prime Video). Second, Amazon can offer both contextual and interest-based advertising options to external advertisers<sup>767</sup>. For context-based advertising that is optimized for the contextual environment, location, and device used by the customer Amazon uses device-related information (such as browser or device type, operating system, geolocation).<sup>768</sup> For interest-based advertising, Amazon uses user data to create target groups. Advertisers can in turn choose from these pre-built target groups. In order to understand the interests of users and thereby form relevant target groups, Amazon uses information about searches for products or services on amazon.de, products and services purchased via amazon.de, products displayed on amazon.de detail pages, information about the configuration and use of settings on a device, general location information (country, region), content of Amazon services downloaded, streamed or viewed, and account information.<sup>769</sup>

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- (550) In this context, target groups tend to become more valuable the more data can be collected and the more data can be combined from different sources. In this context, Amazon is able to take into account customer interactions with other Amazon services, such as Prime Video, Amazon Music, IMDb, and Twitch.<sup>770</sup> In turn, the effectiveness and value of advertising can be measured by data such as click-through rate, the ratio of clicks on an ad to the total number of ads displayed, or conversion rate, the ratio of website visits to conversions (transactions, page views, purchases), etc., and can be better determined the more data there is on advertising activities. In the context of advertising, it must be taken into account that directly collected data, as is often available to Amazon, becomes more valuable the more difficult it becomes to collect data via tracking and cookies, for example through opt-out options or restrictions due to data protection regulations.<sup>771</sup>
- (551) In addition to improving existing services, data also serves to expand the portfolio of services and products. Market entry into other, existing and new, markets is facilitated by economies of scale and scope resulting from the availability of a mature IT infrastructure, existing technical expertise, experience with data analyses, comprehensive access to user profiles and the associated knowledge of consumer preferences.

**(2) In particular: Data as the basis of recommendation systems and the personalization of services**

- (552) User profiles and insights into user behaviour and preferences make it possible to individualize products and services and to display product and purchase recommendations. If recommendation systems and personalization measures increase the benefit, they also increase switching costs for the user, at least if user profiles cannot be easily transferred. This leads to so-called lock-in effects.<sup>772</sup> In addition, recommendations that are perceived as relevant can increase customer satisfaction and loyalty, which counteracts churn. Personalized advertising for Amazon Group's own products or services can also be used for this purpose in a targeted manner, e.g., [...] <sup>773</sup> Finally, well-positioned recommendation systems are also likely to have a direct impact on sales and revenue.<sup>774</sup>
- (553) In general, product recommendations can be generated in particular based on product ratings and observed user behaviour. In this case, a user's decision to call up a product detail page

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already contains information about the user's preferences.<sup>775</sup> In addition, data from other business areas can be used to derive more general patterns of user behaviour and preferences and to identify commonalities between different users.<sup>776</sup>

- (554) Recommendation systems require a minimum amount of data on users and products to generate relevant results. The more granular the data set available, the more relevant the recommendations generated and the higher the user satisfaction. Additional data about a user or a product exerts a positive externality on other users, as their recommendations also become more precise as a result. Consequently, there are data-driven network effects and user feedback loops can arise.
- (555) Amazon's recommendation features are created statically (i.e., not individualized), contextually, or with extensive evaluation of individual customer interests. Amazon uses software tools to do this, [...] <sup>777</sup>
- (556) Examples of static recommendation features on Amazon's marketplace include lists such as "Best Sellers", "Movers & Shakers", a list that maps Amazon's biggest sales ranking winners within the last 24 hours, "Most Wished For," a list of items most frequently added to wish lists, and "Most Gifted," a list of items most frequently ordered as gift. For Prime Video, Prime Music, and Amazon Kindle services, lists of bestsellers and "Top 10 Content" or "Top Charts" are also created. [...] <sup>778</sup> Contextual recommendation features such as "Customers who bought this item also bought..." or "Other customers also bought" use information such as location, including country information, customer behaviour information, and customer order history. Interest-based personal recommendations for products on the Amazon e-commerce platform are displayed in lists such as "get yourself a little something", "You may be low on...", "Inspired by your search history", or "Inspired by your shopping trends." Such interest-based recommendation and personalization features use information such as membership status, subscribed Prime Video channels and items, "liking" an artist, brand, music track, video, wish list content. <sup>779</sup> In addition, information about purchases, content downloaded, streamed or viewed, page views or device configurations, viewing behaviour on Prime Video, and information such as subscription purchases on Amazon Music are used

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<sup>779</sup> [Not translated. Please see the German version.]

to display recommendations and personalize the interface of services.<sup>780</sup>

(557) Also in this case, Amazon benefits from economies of scope, since software tools for recommendations on the Amazon e-commerce platform take into account not only the order and search history of users on the platform, but also information about content from individual Amazon services that are downloaded, streamed or viewed.<sup>781</sup>

**5. Financial strength and access to other resources (Section 19a(1) sentence 2 no. 2 GWB)**

(558) Finally, Amazon has considerable financial strength as well as excellent access to other resources within the meaning of Section 19a(1) sentence 2 no. 2 GWB.

(559) Taking into account the specific purpose of Section 19a of the GWB, Section 19a(1) sentence 2 no. 2 GWB focuses on the extent to which an undertaking has financial strength or other resources that can be used across markets and result in a competitive advantage, i.e. the extent to which the use of financial strength or other resources is possible in individual cases and suitable for contributing to the expansion and/or safeguarding of an ecosystem and thus (as a reinforcing element) to its systemic importance. Ultimately, the factors "financial strength" and "access to other resources" are intended to capture all the capabilities available to an undertaking.

(560) These factors are also taken into account because of the self-reinforcing effect associated with their use that threatens competition: On the one hand, the large financial strength of large digital undertakings results from the multiple possible uses of certain resources which in particular lower the costs of the undertaking's entry into markets. This enables increasingly better access to resources and ultimately an increase in financial strength. On the other hand, the barriers to market entry for competitors, who have yet to acquire the relevant resources, continue to rise, at least in relative terms, so that a competitive advantage that can no longer be made up can develop.

(561) In the context of digital business models, the often high scalability of these business models as well as the low marginal costs<sup>782</sup> associated with an established market position can generate financial resources on a large scale. Such an advantage creates the opportunity to buy-off innovative competition through high investments or high-priced acquisitions.

(562) Against this background, the mere presence of large digital undertakings in certain business

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<sup>780</sup> [Not translated. Please see the German version.]

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areas can be sufficient to weaken access to financial resources for other undertakings, creating so-called "kill zones"<sup>783</sup> in which no one wants to invest. This can increase the barriers to market entry for third parties and can lead to a reduction in the innovation dynamic, which is increasingly limited to defensive innovations by the norm addressee to protect its business model and, where applicable, to (merely) complementary offerings by third parties.<sup>784</sup>

(563) Against this background, with a view to Section 19a(1) sentence 2 no. 2 GWB, Amazon has considerable financial strength (see a)) as well as excellent access to other resources (see b)) in the aforementioned sense.

**a) Financial strength**

(564) The concept of financial strength basically encompasses the entirety of an undertaking's financial resources and opportunities, in particular its equity and debt financing options as well as its access to the capital market.<sup>785</sup> The financial strength of an undertaking can be measured on the basis of various parameters. Not only, but also in the case of digital undertakings, other key performance indicators in addition to the generated revenue and their development - which may be the most likely parameter to be publicly available,<sup>786</sup> but which are only one basis for financial strength - play a role.<sup>787</sup>

(565) In the case of Amazon, the considerable financial strength of the group can be measured not only on the basis of the generated revenue (see aa) below), but also on the basis of the generated profits and the (operating and free) cash flow (see bb) below) as well as the stock market value (see cc) below). These KPIs open up far-reaching opportunities for Amazon to raise equity and debt financing. Overall, Amazon is one of the strongest revenue-generating, most profitable and most valuable companies in the world. In addition, the extraordinary increase in KPIs in recent years must also be taken into account, which illustrates Amazon's growth and expansion opportunities.

(566) Due to the fact that Amazon is active in many different business areas, the undertaking is also in a position to internally compensate for different possible economic developments (even losses) in individual business areas and to continue to grow consistently as a result (see dd) below). Finally, Amazon's extraordinary financial strength is also reflected in the

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fact that the undertaking was able to make significant acquisitions (see ee) below).

aa) **Revenue**

- (567) The absolute amount of an undertaking's revenue and its development are, in particular in combination, an indication of its financial strength within the meaning of Section 19a(1) sentence 2 no. 2 GWB. With regard to Amazon, a particular financial strength of the undertaking can already be determined on the basis of the worldwide group revenue and the constant and significant increases in revenue.
- (568) Amazon was the third largest undertaking in the world by revenue in 2020, with global revenue of approximately USD 386 billion, behind Walmart and Chinese state-owned enterprise State Grid (see Figure 19).

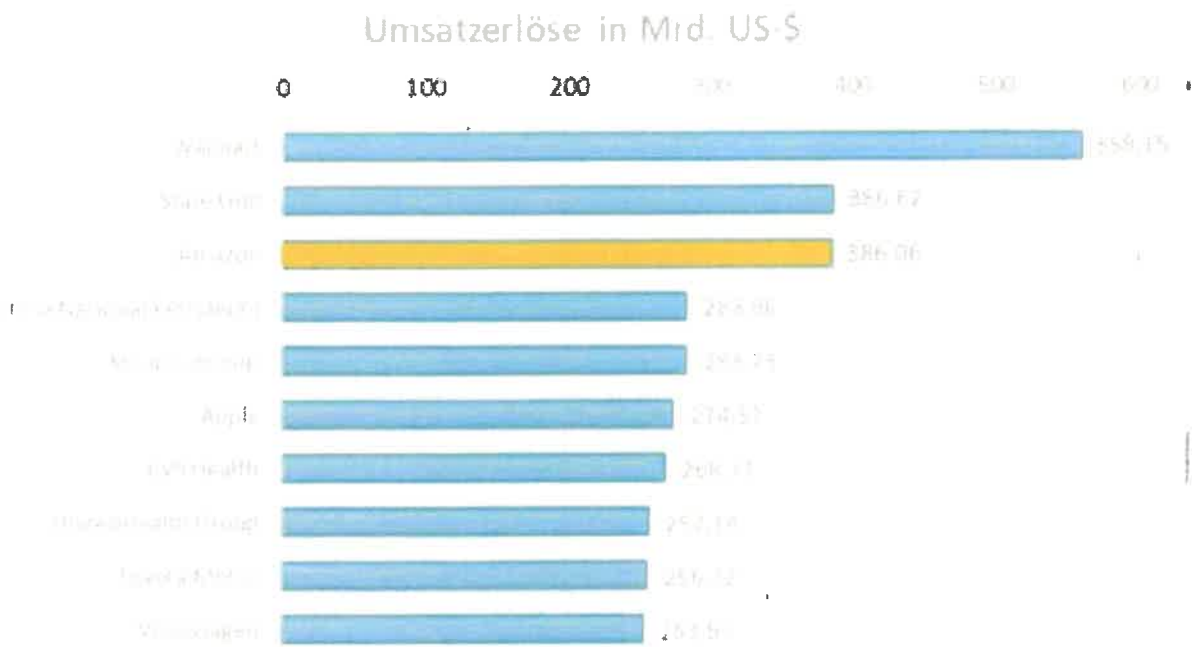


Figure 19: Comparison of the world's ten largest companies by revenue in fiscal 2020/21 (mostly calendar year 2020), see Fortune, Fortune Global 500 List 2021, <https://fortune.com/global500/2021/search/> retrieved on 27 January 2022.

- (569) In 2021, Amazon generated USD 469.8 billion in revenue, an increase of 22% or USD 83.8 billion year-over-year,<sup>788</sup> and this is notwithstanding the fact that Covid-related online retail may have been, and may still be, subject to certain special revenue-related effects in 2020

<sup>788</sup> [Not translated. Please see the German version.]



and 2021, both positive (e.g., increases in online sales at the expense of brick-and-mortar retail) and negative (e.g., supply chain disruption).<sup>789</sup>

(570) Thus, Amazon has been able to maintain its constantly high revenue growth. Figure 20 shows Amazon's revenue development over the last ten years (since 2012). During this period, the group was able to increase its revenue by around 670%. Even with reaching ever higher revenue, Amazon continued to achieve high growth rates and was able to at least maintain its average revenue growth of mostly above 20% (2012-2016: average revenue growth of about 23%; 2017-2021: about 28%).

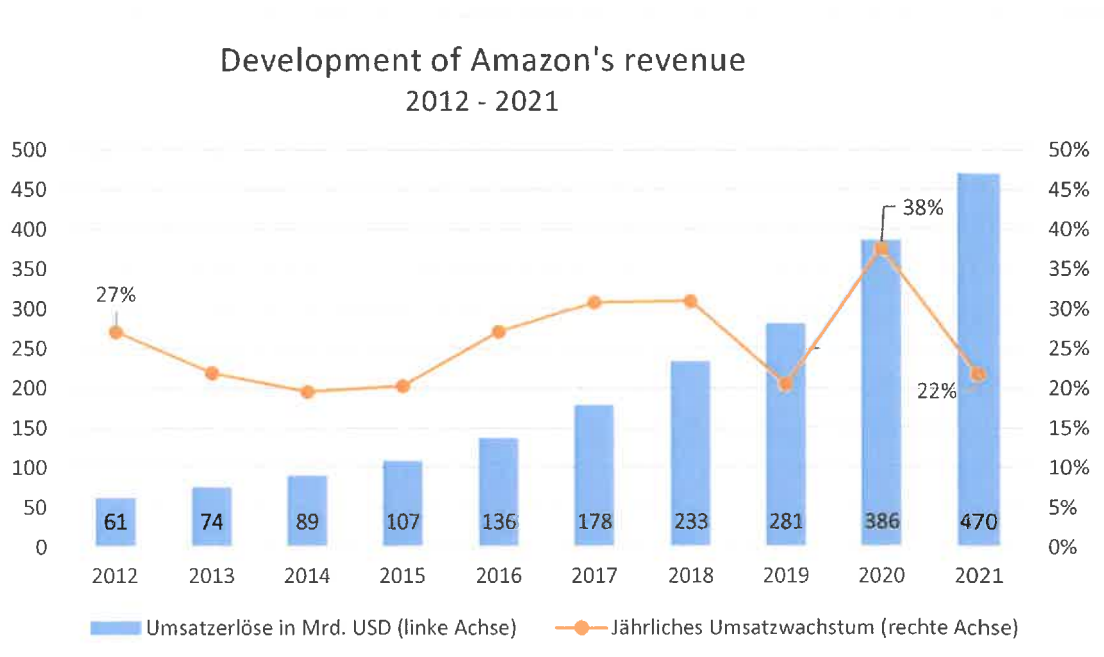


Figure 20: Revenue in USD billion (left axis) and Amazon's annual revenue growth (right axis), worldwide in 2012-2021, own calculation and presentation based on: Amazon.com, Inc, Form 10-K for fiscal years 2015 (p. 17), 2020 (p. 18), and 2021 (p. 23).

(571) In terms of revenue, Germany represents the second most important market for Amazon worldwide (USD 37.3 billion in 2021, approx. 8% of total revenue), albeit with a clear gap to the Amazon's home market in the United States of America (USD 314.0 billion, approx. 67%).<sup>790</sup> The development of net revenue in Germany has also been very positive in recent years (see Figure 21), but has been somewhat slower than the overall development. In Germany, for example, the generated revenue increased by a total of 327% in the period 2012-2021, with average growth of around 22% in the last five years from 2017 to 2021.

<sup>789</sup> [Not translated. Please see the German version.]

<sup>790</sup> [Not translated. Please see the German version.]

### Entwicklung der Umsatzerlöse von Amazon in Deutschland 2012 - 2021



Figure 21: Revenue in USD billion (left axis) and annual revenue growth of Amazon (right axis), in Germany in the years 2012-2021, own calculation and presentation based on: Amazon.com, Inc, Form 10-K for fiscal years 2014 (p. 70), 2017 (p. 70), 2020 (p. 66) as well as 2021 (p. 66).

#### bb) Profits and cash flow

- (572) Other relevant indicators of an undertaking's financial strength are the level of profit and its development<sup>791</sup> as well as the undertaking's cash flow.<sup>792</sup> The explanatory memorandum to Section 19a of the GWB amendment also refers to these KPIs, which can be taken into account when assessing the financial strength of an undertaking as part of the examination of its potential paramount significance for competition across markets.<sup>793</sup>
- (573) In order to measure Amazon's profit situation, the annual result is to be considered here. The annual result or net income is the (positive) sum of the income and expenditures of an undertaking in a financial year. In addition to the income from revenue and expenditures from the cost of goods sold and other costs necessary for the operating business, income and expenditures from the financial business and other non-operating income and expenses such as taxes are equally included.
- (574) Another KPI that reflects the financial strength of an undertaking is the cash flow, which

<sup>791</sup> [Not translated. Please see the German version.]

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represents the flow of actual funds moving within the undertaking. A distinction is made here between the operating cash flow, the cash flow from investment activities (investing cash flow) and the cash flow from financing activities (financing cash flow).

- (575) Here, we will discuss the operating cash flow and another cash flow KPI, the free cash flow. The operating cash flow reflects the cash generated from the ordinary business activities of an undertaking. It is therefore an important KPI for determining the business success of an undertaking (in its ordinary business activities). At the same time, the operating cash flow is an indicator of an undertaking's liquidity - a long-term positive operating cash flow means that cash is generated consistently from the undertaking's own business activities which can be used for further investments (ability to finance growth internally).
- (576) Free cash flow is calculated by deducting capital expenditures for property, plant and equipment from the operating cash flow. The ratio describes the "free cash" generated by an undertaking in a financial year, which can be used, for example, to repurchase shares, repay loans and credits, pay dividends or acquire companies. It therefore also reflects the extent to which an undertaking can or could offset external claims from providers of equity and debt capital. Free cash flow thus represents an indicator of an undertaking's creditworthiness and ability to obtain external financing. Amazon, too, places its financial focus "on long-term, sustainable growth in *free cash flows*".<sup>794</sup>
- (577) Looking at the annual net profit, table 36 shows that the profit achieved by Amazon in the last completed financial year is considerable. In 2020, Amazon ranked 16th in the global comparison of undertakings in terms of profits.<sup>795</sup> In addition, Amazon has recorded high profit growth in recent years. For example, Amazon's annual profit increased from USD 3.0 billion in 2017 to USD 33.4 billion in 2021, an increase of +1013%.<sup>796</sup>
- (578) Amazon's operating cash flow and free cash flow have also been consistently high in recent years and have also shown strong growth. For example, in the years 2017 to 2020, an aggregate operating cash flow of USD 154 billion and a free cash flow - depending on the calculation method - of USD 41 to 85 billion were generated, with average annual growth rates of 55% (operating cash flow) to 62% (free cash flow I).
- (579) One exception, however, is the year 2021, in which the operating cash flow fell sharply and a negative free cash flow was achieved. However, this was due in particular to high

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<sup>794</sup> [Not translated. Please see the German version.]

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investment requirements as a result of increased demand, for example in the logistics business.<sup>797</sup> In 2021, investments in property, plant and equipment ("purchases in property and equipment") increased to USD 61 billion (+USD 21 billion compared with 2020, +52%).<sup>798</sup> This is intended, among other things, to counter current issues such as the lack of workers, increased labour costs, supply chain problems, and increased freight and shipping costs. By its own admission, Amazon is taking a long-term perspective, according to which the (high) investments to be made in the short term would be worthwhile in the long term (for customers and partners).<sup>799</sup>

In billion USD	2017	2018	2019	2020	2021
Net income	3.0	10.1	11.6	21.3	33.4
Operating cash flow	18.4	30.7	38.5	66.1	46.3
Free cash flow I	8.3	19.4	25.8	31.0	-9.1
Free cash flow II <sup>800</sup>	-1.5	8.4	12.5	21.4	-14.3

Table 36: Amazon's net income and free cash flows in 2017 through 2021, see Amazon.com, Inc. form 10-K for fiscal years 2018 (pp. 28-29), 2020 (pp. 18, 30-31), and 2021 (pp. 28-29, 36).

(580) The picture that emerges is thus one of very profitable business operations, with which Amazon - particularly in recent years - is able to generate high profits and a high level of liquidity. These funds can in turn be used to make high investments in its own business operations, as in 2021, or, as in previous years and increasingly since 2017, to purchase other companies (see para. (591) ff. below).

### cc) Market capitalization

(581) Finally, a particularly meaningful indicator of an undertaking's financial strength and thus also its power is its stock market value, which also reflects the individual financial KPIs as well as their future development as forecast by market participants. The market capitalization or stock market value of a (listed) undertaking describes the total value of all shares of this undertaking that are in circulation. The market capitalization thus reflects the valuation of an undertaking and the expectation of capital markets concerning its long-term profit and development potential. A higher market capitalization has a direct positive effect on the reputation of the undertaking as a valuable, recognized undertaking worthy of investment. This can, for example, result in advantages for the undertaking's own access to the capital

<sup>797</sup> [Not translated. Please see the German version.]

<sup>798</sup> [Not translated. Please see the German version.]

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markets and inexpensive financing opportunities.

- (582) With a market capitalization of USD 1.721 trillion (as of 27 December 2021), Amazon is the fifth most valuable undertaking in the world. The world's ten most valuable undertakings by market capitalization are listed in Figure 22.

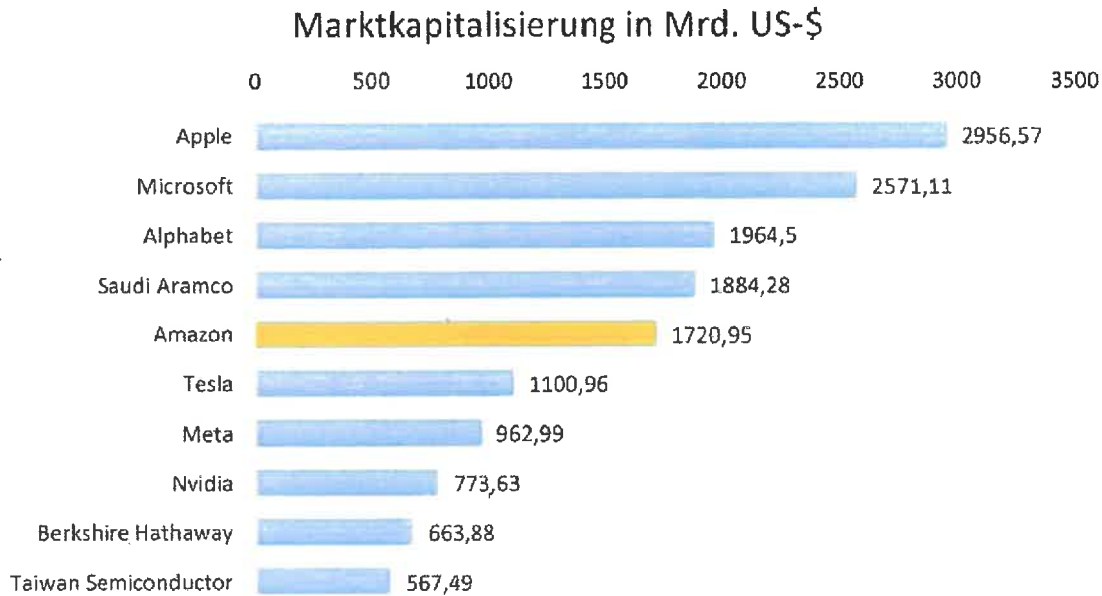


Figure 22: Comparison of the world's ten most valuable companies by market capitalization, as of 27 December 2021, see Ernst & Young AG, Market Capitalization 2021, p. 2.<sup>801</sup>

- (583) Furthermore, Amazon's stock market value has developed very positively in recent years. Within the last seven years, it has increased by approximately 443% from approximately EUR 317 million on December 31, 2015, and has thus grown many times over the stock market indices such as the US leading indices S&P 500 and NASDAQ 100 (both of which have also benefited proportionately from Amazon's value included therein) or the German lead-index DAX.

Stock market value in USD billion	12/31/2015	12/27/2021	Growth
Amazon	316.83	1,720.95	+443%
<b>Points on the stock market indices</b>			
S&P 500	2,043.94	4,791.91	+134%
NASDAQ 100	4,593.27	16,567.50	+261%
DAX	10,743.01	15,835.25	+47%

Table 37: The development of Amazon's stock market value and various leading indices compared between 2015 and 2021, see Ernst & Young AG, Market Capitalization 2015-2017 and Ernst & Young AG, Market Capitalization 2021. The data on the indices were downloaded on 27 January 2022 from the websites: <https://www.soalobal>.

<sup>801</sup> [Not translated. Please see the German version.]

[com/spdii/en/indices/equity/so-500/#overview](https://www.spglobal.com/spdii/en/indices/equity/so-500/#overview), <https://www.nasdaq.com/market-activity/index/ndx/historical> and <https://www.boerse-frankfurt.de/index/dax/kurshistorie/historische-kurse-und-umsaetze>.

Entwicklung der Marktkapitalisierung Amazons und ausgewählter Aktienindizes 2015-2021

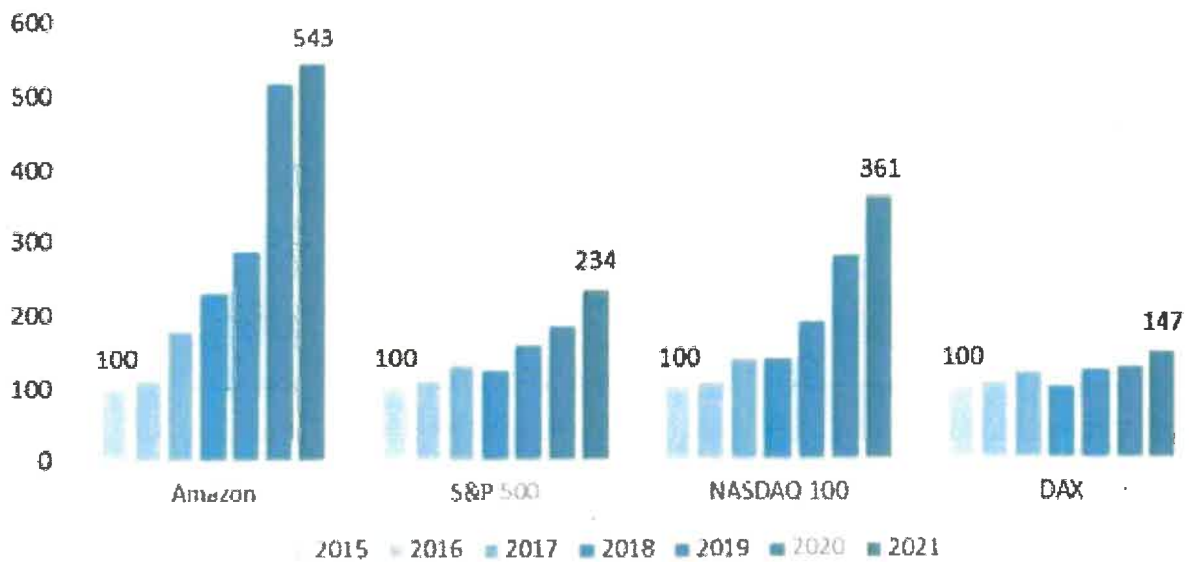


Figure 23: Development of Amazon's market capitalization and selected stock indices 2015-2021, each as of the last stock exchange e-commerce day of the year, only 2021 on 12/27 - index value of 100 at year-end 2015, see Ernst & Young AG, Market Capitalization 2015-2017 and Ernst & Young AG, Market Capitalization 2021. index data downloaded on Jan. 27, 2022 from the websites: <https://www.sDQlobal.com/spdii/en/indices/equity/so-500#overview>, <https://www.nasdaq.com/market-activity/index/ndx/historical> as well as <https://www.boerse-frankfurt.de/index/dax/kurshistorie/historische-kurse-und-umsaetze>.

(584) Even if the stock market value is naturally subject to short-term fluctuations, the in the long-term perspective continuously increasing stock market value reflects to a particular extent the (positive) expectations of investors in the undertaking's development and success. In the case of Amazon, there is also the fact that the undertaking has not paid any dividends to its shareholders to date, so that effects from investors' dividend expectations are not likely to be significant.

dd) **Stability through growth in different business areas**

(585) The undertaking's economic development also appears very robust in the face of potential (temporary) economic fluctuations in the various business areas. This is because Amazon's economic growth is attributable to different business activities.

(586) As can be seen in Table 38, revenue has risen sharply over the last five years in all business

segments (with the exception of "Physical Stores"<sup>802</sup>) for which Amazon reports revenue separately in its annual reports. This also shows that Amazon's business activities, expressed in terms of net sales of the respective business segments, are shifting somewhat. For example, Amazon's retail activity<sup>803</sup> was still responsible for about 61% of all Amazon's revenue in 2017, but in 2021 this share was only 51%. The importance of other business areas such as third-party seller services<sup>804</sup>, AWS and the advertising business<sup>805</sup>, on the other hand, has increased.

Net Sales		2017	2018	2019	2020	2021
Online Stores	in billion USD	108.4	123.0	141.2	197.3	221.1
	Share of total sales	61%	53%	50%	51%	47%
Physical Stores	in billion USD	5.8	17.2	17.2	16.2	17.1
	Share of total sales	3%	7%	6%	4%	4%
Third-party Seller Services	in billion USD	31.9	42.7	53.8	80.5	103.4
	Share of total sales	18%	18%	19%	21%	22%
Subscription Services	in billion USD	9.7	14.2	19.2	25.2	31.8
	Share of total sales	5%	6%	7%	7%	7%
AWS	in billion USD	17.5	25.7	35.0	45.4	62.2
	Share of total sales	10%	11%	12%	12%	13%
Advertising Business	in billion USD	-	-	12.6	19.8	31.2
	Share of total sales	-	-	5%	5%	7%
Other (until 2018 incl. advertising business)	in billion USD	4.7	10.1	1.5	1.7	2.2
	Share of total sales	3%	4%	1%	0%	0%

Table 38: Amazon.com, Inc. net revenue by "similar business group" for 2017 through 2021. Bundeskartellamt calculation and presentation based on information in: Amazon.com, Inc. form 10-K for fiscal years 2018 (p. 67), 2020 (p. 66), and 2021 (p.65).

- (587) This can also be seen in the average annual growth rates. For example, revenue from "online stores" increased by an average of 20% over the last five years, while Third-party Seller services, subscription services, and AWS increased by an average of 35-39%. Amazon's advertising business (incl. "Others") even recorded average growth rates of almost 64%.<sup>806</sup>
- (588) When looking at the operating results (operating income) by business unit (segment) in Table 40, it can also be seen that Amazon has the ability to also finance business units long-term that initially record losses, for example, due to increased costs for an expansion of the business activity<sup>807</sup>. In its annual reports, in addition to the AWS division, Amazon reports on the two geographic business segments, "North America" (United States of America, - Canada, Mexico) and "International" for the remaining business activities (essentially based

<sup>802</sup> [Not translated. Please see the German version.]  
<sup>803</sup> [Not translated. Please see the German version.]  
<sup>804</sup> [Not translated. Please see the German version.]  
<sup>805</sup> [Not translated. Please see the German version.]  
<sup>806</sup> [Not translated. Please see the German version.]  
<sup>807</sup> [Not translated. Please see the German version.]

on Amazon's e-commerce platform).

- (589) For example, after initial operating losses (totalling approximately USD 354 million from 1998 to 2002), the International business unit recorded smaller annual gains of no more than USD 900 million only temporarily (totalling approximately USD 4.6 billion from 2003 to 2013). Since 2014, with the exception of a slightly positive operating result in 2020, this division has consistently made operating losses that now total approximately USD 9.4 billion from 2014 to 2021. However, such losses were offset by gains in other business areas. Of particular note here is Amazon's highly profitable cloud computing business (AWS), which has (compared to its revenue) generated a disproportionate share of Amazon's positive operating profit (see Table 39) since Amazon began listing it separately in Amazon's annual reports. In 2021, AWS generated only about 13% of Amazon's total revenue, but was responsible for 74% of its *operating* profit. Even in terms of total net income<sup>808</sup>, AWS still accounted for 56%.

Net revenue in USD billion	2017	2018	2019	2020	2021
North America	106.1	141.4	170.8	236.3	279.8
International	54.3	65.9	74.7	104.4	127.8
AWS	17.5	25.7	35.0	45.4	62.2

Table 39: Amazon.com, Inc. net sales by business segment for 2017 through 2021. Bundeskartellamt presentation based on information in: Amazon.com, Inc, Form-10-K for fiscal years 2018 (p. 23), 2020 (p. 25), and 2021 (p. 23).

Operating profit in USD billion	2017	2018	2019	2020	2021
North America	2.8	7.3	7.0	8.7	7.3
International	-3.1	-2.1	-1.7	0.7	-0.9
AWS	4.3	7.3	9.2	13.5	18.5

Table 40: Amazon.com, Inc. operating results by business segment for 2017 through 2021. Bundeskartellamt presentation based on information in: Amazon.com, Inc, Form-10-K for fiscal years 2018 (p. 24), 2020 (p. 25), and 2021 (p. 24).

#### ee) Corporate acquisitions

- (590) The fact that Amazon not only has particular financial strength, but also uses this to a considerable extent to secure or improve its competitive position is demonstrated, among other things, by the corporate acquisitions that the undertaking has made in recent years. Acquisitions are an essential instrument for expanding an undertaking's business activities - including into new markets - and thus gaining a certain market position on the markets

<sup>808</sup> [Not translated. Please see the German version.]



concerned or expanding/securing its position overall.

- (591) Since 1998, Amazon has acquired more than 100 companies<sup>809</sup> at sometimes substantial purchase prices, including several corporate acquisitions with purchase prices in the triple-digit millions or billions of dollars, including the acquisition of Whole Foods with a purchase price of USD 13.7 billion in 2017 (see below).
- (592) In this context, Amazon's acquisition spend has increased significantly since 2017, which at least correlates with the increase in cash flow and profit generation (see para. (577) ff.). [...].<sup>810</sup> In its annual reports, Amazon even states net expenditures for company acquisitions for the years 2017 to 2021 in the amount of USD 23 billion.<sup>811</sup> In the previous ten years, 2007 to 2016, this spend totalled "only" USD 4.6 billion.<sup>812</sup>
- (593) As Amazon's former CEO Jeff Bezos explained in a 2020 U.S. House of Representatives interview, Amazon's corporate acquisitions are "sometimes" about technology and know-how - but the most common reason is to buy "market position," ultimately an expansion of either its existing market position or the expansion of its operations into new markets, made possible by the undertaking's financial strength. This has - according to internal emails - been the reason for the acquisition of Ring, for example.<sup>813</sup>
- (594) This approach is reflected in Amazon's acquisitions in recent years. Table 41 shows a selection of Amazon's largest acquisitions and categorizes them by business segment. It can be seen that Amazon made some acquisitions to strengthen or expand its retail and marketplace business - albeit in some cases with a regional focus (e.g. the USA), but not necessarily without beneficial effects for the retail and marketplace business in other regions as well. In the area of digital content and devices, Amazon has acquired several companies in the past and used their business activities as a basis for new activities or to expand its existing activities or offerings (e.g. LoveFilm and most recently Metro Goldwyn Mayer (MGM) as a basis for Prime Video or e.g. Audible, Twitch, Blink, Ring, Wondery), and thus Amazon was able to expand its market position quickly and effectively into new markets. Some company acquisitions are also a recognizable response to fringe competition, possibly to secure Amazon's market position (e.g., the acquisition of the company Selz).<sup>814</sup> In recent years, in particular, there has also been a stronger push for acquisitions in areas such as cloud

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<sup>809</sup> [Not translated. Please see the German version.]

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<sup>811</sup> [Not translated. Please see the German version.]

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<sup>813</sup> [Not translated. Please see the German version.]

<sup>814</sup> [Not translated. Please see the German version.]

computing, software, robotics, etc.

Company	Business activity	Purchase price (in USD million)	Year
<u>Retail and marketplace business</u>			
Junglee	Database technology for online retail	180	1998
Accept.com	Technology for online retail	189	1999
Zappos	US online retailer	1,134	2009
Quidsi	US online retailer	500	2011
Souq	Online trading platform in the Middle East and North Africa	580	2017
Whole Foods	Food retailers in the USA	13,550	2017
PillPack	Online pharmacy	1,000	2018
<u>Digital content and devices</u>			
IMDb	Digital video database	<55	1998
Audible	Digital platform for audio books	approx. 300	2008
LoveFilm	Online video store	285(GBP 178 million)	2011
Twitch	Live streaming service	970	2014
Blink	Security cameras	78	2017
Ring	Security devices, including video doorbells	1,100	2018
Wondery	Podcast Studio	275	2021
MGM	Film Studio	>6.100	2022
<u>Cloud computing, software, artificial intelligence, Robotics etc.</u>			
Kiva Systems	Robotics	775	2012
Annapurna Labs	Cloud Computing	350	2015
Elemental Technologies	Video Software	325	2015
Cloud Endure	Cloud Computing	152	2019
Zoox	Autonomous driving	1,300	2020

Table 41: Selected acquisitions by Amazon since 1998, own presentation based on: (1) for Junglee as well as Accept.com: Amazon.com, Inc., Form 10-K for fiscal year 1999, p. 22 f. (2) for IMDb: Amazon.com, Inc, Form 8-K dated 28 April 1998, filed with SEC, Exhibit Number 99.2 (3) for Audible: Reuters, Amazon to buy Audible for \$30 million, 31 January 2008, <https://www.reuters.com/article/us-audible-amazon-idUSN3129158120080131>, retrieved 27 January 2022, (4) for MGM: Amazon.com, Inc, Form 10-Q for first quarter 2022, p. 9; (5) for all other information: Amazon's response of 18 June 2021 to the information injunction of 18 May 2021, Exhibit 2. The conversion of the purchase price for LoveFilm was based on the European Central Bank's reference EUR/USD exchange rate for 2011 (1 EUR = 1.1392 USD).

**b) Other resources**

(595) Amazon also has excellent access to other resources.

(596) In addition to financial strength and thus access to financial resources, Section 19a(1) sentence 2 no. 2 GWB also covers access to other resources. This includes, in particular, access to users (user base) with the number of users as a key parameter.<sup>815</sup> However, the term "resources" is to be understood broadly (see para. (559) above) and covers all "capabilities", though access to competition-relevant data pursuant to Section 19a(1)

<sup>815</sup> [Not translated. Please see the German version.]

sentence 2 no. 4 GWB is considered separately here (see already B.III.4).

(597) In the present case, it is evident above all from the user figures (see aa)), the personnel resources available to the undertaking (see bb)), the research and development capacities (see cc)) and the importance of the Amazon brand (see dd)) that Amazon also has excellent access to other resources.

**aa) Users**

(598) Access to a large number of users can be particularly important in the area of digital business models - beyond data mining (see explanations in B.III.4). This is because an undertaking with a large and/or active user base can roll out extensions to existing offerings and the offering of new services to a large audience from the outset and quickly achieve substantial reach, making it easier to expand business activities (see the explanations in B.III.2). Accordingly, user numbers in particular may be relevant when assessing access to other resources pursuant to Section 19a(1) sentence 2 no. 2 GWB, as the explanatory memorandum to the Act expressly points out.<sup>816</sup>

(599) The number of active user accounts<sup>817</sup> as well as the number of monthly active users<sup>818</sup> of Amazon e-commerce platforms and other selected services are listed in Table 42. As of December 31, 2020, Amazon had approximately [...] active Amazon accounts (user accounts) worldwide. On amazon.de, there were approximately [...] active Amazon accounts; of these, approximately [...] accounts were located outside of Germany. In view of just under 40.5 million households in Germany<sup>819</sup> and around [...] active amazon.de accounts in Germany, it can be assumed that Amazon has significant population penetration in Germany. In addition, Amazon recorded around [...] active Prime accounts on the amazon.de marketplace. Amazon itself estimated as early as Q1 2020 that around [...] of all households in Germany have a paid Prime subscription.<sup>820</sup>

(600) On average, there were almost [...] monthly active users on all Amazon websites worldwide in 2020, including [...] monthly active users on amazon.de. The Prime shipping service on amazon.com was used by [...] monthly users (Prime Video: [...] users; Prime Music: [...] users).

(601) Amazon's growth in terms of its user base is also extraordinary. The active customer base

<sup>816</sup> [Not translated. Please see the German version.]

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(monthly active users and here in particular the users of the Prime services) continues to grow - notwithstanding the already very high penetration.

Amazon user numbers	Germany			Worldwide		
	2018	2019	2020	2018	2019	2020
Active Amazon accounts	[...]	[...]	[...]	[...]	[...]	[...]
...thereof Prime accounts	[...]	[...]	[...]	[...]		
Monthly active users of:						
...Amazon Marketplace	[...]	[...]	[...]	[...]	[...]	[...]
...Prime Shipping	[...]	[...]	[...]	[...]	[...]	[...]
...Prime Video	[...]	[...]	[...]	[...]	[...]	[...]
...Prime Music	[...]	[...]	[...]	[...]	[...]	[...]

Table 42: Amazon user figures in Germany and worldwide from 2018 to 2020. The cut-off date of December 31 applies to the account data; an annual average was calculated for of May 18, 2021, paras. 57-61, 7579, and Exhibit 2, spreadsheets 4 and 5.

(602) Amazon is already actively using the opportunities offered by the large number of users and the large number of points of contact with the end customer to address end customers across services and to win them over for various offers of the overall group, for example through the Prime program, bundled offers or internal advertising measures (see para. (363) ff.).

bb) **Personnel resources**

(603) Amazon has very good access to people-based expertise<sup>821</sup> and human resources<sup>822</sup> overall.

(604) In terms of access to human resources in general, Amazon is one of the largest employers in the world, with 1.6 million employees as of December 31, 2021.<sup>823</sup> It is estimated that Amazon is the second largest (semi-)private employer in the world.<sup>824</sup> In the U.S., approximately one in 153 workers is employed by Amazon.<sup>825</sup> As recently as 2015, Amazon had "only" 230,800 employees worldwide.<sup>826</sup> The employee growth thus corresponds to an increase by 5.5 times within five years. This shows that the undertaking is continuously able to meet the growing demand for employees even in personnel-intensive areas.

(605) At the same time, Amazon is perceived by employees as a very attractive employee. Amazon is very successful in various rankings in this regard, for example, the undertaking ranked 4th

<sup>821</sup> [Not translated. Please see the German version.]

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in *Forbes World's Best Employers 2021*<sup>827</sup> or 1st in *Most Popular Jobs and Companies for US College Grads 2018* by LinkedIn.<sup>828</sup> To this end, the undertaking maintains programs such as *Amazon Scholars*<sup>829</sup>, to target and recruit highly skilled workers, in this case for research and development. These activities in the human resources area appear to have a positive impact on Amazon's business activities, which can be seen, for example, in the undertaking's ability to innovate (see cc) below). Particularly in view of the global competition for highly qualified and skilled workers ("War for Talents") and the importance of know-how in the innovation-driven digital economy, Amazon's excellent access to qualified personnel is an important resource.

cc) **Research and development**

(606) For innovation-driven economic sectors such as the digital economy, it is characteristic that research capacities already have considerable competitive significance independent of specific markets. At the same time, large digital companies in particular, with their access to large databases and their know-how, especially in the area of data processing and analytics (including artificial intelligence and machine learning), have essential, broadly deployable capabilities that can enable them to innovate in different markets in parallel and create competitive advantages there. This ability to innovate, together with the scaling opportunities in the digital economy, can lead all the way to so-called (radical) disruptive innovations which replace traditional business models, products and markets by new business models, products and markets.<sup>830</sup> Accordingly, corporate success can also be guaranteed by research and development, in that innovations secure the undertaking's own competitive position and enable the expansion of business activities into new, promising business areas.

(607) A numerical approximation of Amazon's R&D activities, for example based on capital expenditures, is characterized by large uncertainties. Amazon explains that it is not possible for the undertaking to specify its investment in research and development, in part because Amazon encourages "the simultaneous exploration, design, development and maintenance of new and existing products and services" and a breakdown would be imprecise and "inconsistent with Amazon's approach to innovation." Moreover, employees "typically work concurrently on both projects that could be defined in substance as research and development and on more routine, ongoing product enhancements and product improvements." For

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<sup>827</sup> [Not translated. Please see the German version.]

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example, Amazon only reported costs in "Technology and Content," which includes - investment in research and development, but also includes many other expenses, such as those related to the "design and maintenance of the Amazon Store" or "infrastructure costs." In 2020, these totalled just under EUR [...].<sup>831</sup> [...]<sup>832</sup>

- (608) Amazon is active in a wide variety of research areas. [...] <sup>833</sup> Via "Science at Amazon" (according to Amazon, the corresponding website is supposed to provide insights into the undertaking's scientific research and its "customer-obsessed scientific innovation"<sup>834</sup>), more than 550 publications are available for the year 2021 alone.<sup>835</sup> The low figures from previous years, which are increasing over time, provide for an increasing trend in the activities of "Science at Amazon". Amazon can also draw on a great deal of scientific expertise, for example, through various programs for cooperation with research institutions as well as researchers, which only strengthen Amazon's innovation opportunities.<sup>836</sup> As of February 2022, there were 2,475 job postings on the website (including 2,378 full-time positions), 66 of which were for positions in Germany (including 61 full-time positions).<sup>837</sup>
- (609) At the same time, Amazon has been listed in various rankings for years as one of the most innovative companies in the world, which requires corresponding innovation capabilities and significant investments in research and development or research, design, development and maintenance of products and services. For example, in a 2018 survey, the business magazine Forbes listed Amazon as the fifth most innovative undertaking in the world.<sup>838</sup> In a ranking by the Boston Consulting Group, whose assessment is based, among other things, on surveys of business decision-makers, Amazon has for years been listed among the top 10 most innovative companies in the world.<sup>839</sup>

dd) **Brand value**

- (610) Another resource that Amazon can draw on is the awareness and reputation of the Amazon brand. This is because high brand awareness, customer loyalty to a brand or high perceived brand quality can lead, among other things, to improved advertising opportunities, to higher

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<sup>831</sup> [Not translated. Please see the German version.]

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<sup>838</sup> [Not translated. Please see the German version.]

<sup>839</sup> [Not translated. Please see the German version.]

revenue and a higher number of transactions as well as to the opportunity to set higher prices and fees. This thus represents a financial value for the undertaking, which is described as brand equity.<sup>840</sup>

- (611) Amazon is estimated to be one of the most valuable brands in the world. For example, according to market research firm Kantar, Amazon's brand value will be USD 684 billion in 2021, making it the world leader (for years).<sup>841</sup> Although estimates of brand value and rankings to that effect fluctuate, Amazon is consistently ranked among the world's leading brands.<sup>842</sup> Amazon is also ranked as a leader in other rankings that reflect perceptions of the undertaking.<sup>843</sup>

**c) Competitive significance of resources**

- (612) Particularly measured by its financial strength, but also by its other resources, Amazon is one of the leading companies in the world. It can be assumed that Amazon is superior to most of its competitors in the various markets in this respect. For example, if we look at the aggregated profits of eBay, Otto and Zalando, which are three of Amazon's biggest competitors in the online marketplace business in Germany, the combined (global) annual net profit of these three companies in 2020 comprised just under EUR 6.2 billion; Amazon's profit in the same year was three times as large (EUR 18.6 billion).<sup>844</sup> Only Alibaba, which operates the online marketplace de.aliexpress.com in Germany, appears to be similarly financially strong as Amazon and, for example, generated an annual net profit of just under EUR 19.1 billion in the 2020 financial year.<sup>845</sup> However, it should be noted that the focus of Alibaba's business activities is clearly on the Chinese market.<sup>846</sup>
- (613) Amazon has further leeway and can use this for competitive advantages where a competitive position can be promoted with financial resources in particular. For example, it hardly seems possible for a competitor in Germany to make investments in Germany on a similar scale as Amazon did, for example, to build up its logistics business in Germany ([...]).<sup>847</sup> In addition, as already mentioned, Amazon was able to expand its existing market positions or to commence business activities in previously unoccupied markets by way of acquisitions.

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<sup>840</sup> [Not translated. Please see the German version.]

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<sup>842</sup> [Not translated. Please see the German version.]

<sup>843</sup> [Not translated. Please see the German version.]

<sup>844</sup> [Not translated. Please see the German version.]

<sup>845</sup> [Not translated. Please see the German version.]

<sup>846</sup> [Not translated. Please see the German version.]

<sup>847</sup> [Not translated. Please see the German version.]

Overall, Amazon can use its financial resources in a variety of ways, including cross-subsidization, to secure and strengthen the market positions it has achieved or to expand its business activities into new markets.

- (614) This also applies to the other resources available to Amazon. For example, Amazon can draw on its own innovation activities and related investments in the area of research and development to strengthen its marketplace business or its logistics business.<sup>848</sup> Even the positive recognition value of the Amazon brand has a direct influence on the business success of the group. The products of Amazon's subsidiary Ring, which offers smart home products such as video cameras or doorbells, illustrate this effect. According to internal documents from 2020, sales figures for Ring products were below expectations at the time, which was attributed to "low brand awareness" and "negative brand sentiment". As a result, the words "An Amazon Company" were added to Ring's logo and sales improved markedly.<sup>849</sup>

## 6. Overall assessment

- (615) Based on an overall assessment of all the relevant circumstances in this specific case, it must be concluded that Amazon is of paramount significance for competition across markets within the meaning of Section 19a(1) of the GWB.
- (616) Based on the above findings concerning the criteria to be taken into account under Section 19a(1) sentence 2 no. 1 to no. 5 GWB for the paramount significance of an - undertaking for competition across markets in particular, it can be seen that Amazon has the characteristics of an undertaking that the legislator intended to cover with the special concept of abuse control pursuant to Section 19a GWB. These are companies that frequently - although not necessarily - hold a dominant position on individual platform or network markets and also have the resources and the strategic positioning that enable them to exert considerable influence on the business activities of third parties or to expand their own business activities into ever new markets and sectors.<sup>850</sup> As a result, they have a position of power with the corresponding competitive potential, which gives them behavioural leeway across markets which is not adequately controlled by competition.
- (617) Accordingly, contrary to Amazon's opinion, the determination of a paramount significance for competition across markets in the overall assessment does not involve a market-related

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<sup>848</sup> [Not translated. Please see the German version.]

<sup>849</sup> [Not translated. Please see the German version.]

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examination of all areas of activity of the undertaking in question, such as the multiple determination of individual dominant or at any rate strong market positions on a number or variety of markets<sup>851</sup> or a market-related consideration of the respective competitive conditions or market conditions<sup>852</sup> or as to whether and how many markets on which the company in question is active are contestable.<sup>853</sup> Nor can it depend on a "countervailing power of other ecosystems"<sup>854</sup> in individual markets. Rather, the legislator assumed that - several ecosystems can possess the norm addressee property in parallel.<sup>855</sup> In the context of the designation pursuant to Section 19a(1) GWB, it is also irrelevant whether certain business activities of the company and thus its presence on individual markets also have a pro-competitive effect.<sup>856</sup> The risks to competition posed by an ecosystem covered by Section 19a(1) GWB outweigh the possibility of pro-competitive effects. Section 19a(1) of the GWB therefore aims to cover a specific corporate set-up that is fundamentally associated with particular potential dangers, the realization of which requires early intervention in specific cases to ensure that markets and positions of power remain contestable - especially in the case of dynamic and rapidly changing market activity in the digital economy.<sup>857</sup>

- (618) Essentially summarized, Amazon's superior significance for competition across markets is firstly based on the undertaking's key position in e-commerce, which is essentially based on the strong competitive position of its respective country-specific e-commerce platforms. Due to the high number of third-party sellers operating there as well as its own retail offerings, Amazon's e-commerce platforms have a broad range of offerings to consumers, who can not only cover most of their needs for physical consumer goods there, but can also obtain digital media offerings via Amazon and do so - as is clear, among other things, from Amazon's large and loyal user base.<sup>858</sup> Based on this, Amazon holds a dominant position as a provider of online marketplace services in Germany. At the same time, the undertaking also occupies many other business areas closely related to e-commerce platforms. Amazon thus represents a highly integrated ecosystem in terms of e-commerce with a broad portfolio of business activities, including, for example, logistics and IT services, the operation of online marketplaces, online retailing and online advertising services, as well as digital offerings to consumers such as streaming services.

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- (619) This diversification, which no competitor offers in comparable breadth and depth from a single source, enables Amazon to keep its various user groups in its own ecosystem, so that they no longer use competitors' offerings or only do so to a limited extent. At the same time, Amazon, with its German and possibly also with other of its country-specific e-commerce platforms, now occupies a central strategic position in various areas, particularly in online retail, and, therefore, in this sense has opportunities to influence the business activities and business success of other companies as a "gatekeeper" - in particular also those which compete with Amazon. The opportunities for exercising influence are reinforced by the hybrid structure of its country-specific e-commerce platforms, since Amazon is not only the operator of the online marketplace, but also sells products as a retailer via the e-commerce platform and is therefore in competition with the third-party sellers offering products on Amazon's online marketplace. In addition, there are considerable resources such as the available data, but also the financial strength of the undertaking. Taken as a whole, these factors give Amazon considerable advantages over its competitors on the various markets and give Amazon the leeway to behave in ways which in many cases are not (or cannot be) adequately controlled by competition. In addition, Amazon is active in some business areas in a hybrid role and (also) confronts its competitors as a strong market opponent, so that conversely, Amazon can additionally restrict its competitors' behavioural latitude.
- (620) The starting point of Amazon's business activities and the core of its importance are its hybrid e-commerce platforms. The enormous breadth of offerings and the high attractiveness of Amazon's ecosystem from the consumer's point of view result not only from the physical and digital goods that Amazon itself offers for sale, but are supplemented by the range of goods offered by third-party sellers on the Amazon marketplace. Amazon has a considerable lead over its competitors in Germany in terms of the number of active third-party sellers and the range of products offered on the e-commerce platform. In addition, under the same internet presence as the country-specific e-commerce platforms, Amazon offers consumers services in many other markets, e.g., in the areas of video streaming, music streaming, or Internet of Things, via its country-specific offer portals, which further increases the range of offers across markets within its ecosystem. With the Prime program - designed by Amazon as a customer loyalty program - and its Prime benefits, Amazon is further linking the offerings of the e-commerce platform with its other digital offerings and is thereby creating an ecosystem with which its competitors cannot keep up (or only do so with great difficulty) because most of them are active exclusively in the marketplace business and in (online) retail and for whom it would not be possible to build up a comparable ecosystem of their own.
- (621) A decisive factor is that Amazon, with the breadth and attractiveness of its e-commerce

platform and ecosystem, has an exceptionally broad base of registered users, a substantial proportion of whom regularly use Amazon's offerings.<sup>859</sup> In addition, members of the Prime program on average make even greater use of both the offerings on the e-commerce platform and the digital offerings and spend more money in the ecosystem, cover their needs there and are "more deeply anchored in the ecosystem" overall than users without Prime membership. Amazon is also clearly superior to competing e-commerce platforms in Germany in terms of the size of the consumer user group.

- (622) The outstanding success of Amazon's e-commerce platforms in Germany and other territories is also illustrated by the continuously rising revenue of both Amazon's online retail business and its marketplace business, particularly in Germany, but also worldwide. It is estimated that around [50-60%] of the total revenue volume in German online retail is handled via Amazon's e-commerce platform.<sup>860</sup>
- (623) Accordingly, Amazon was found to have a dominant position on the national market for the provision of online marketplace services for professional sellers. This dominant position of Amazon is characterized in particular by a high market share and correspondingly large gaps between its share and the shares of competing marketplace operators in an otherwise largely fragmented market. This dominant position is also secured by the very high number of consumers using the platform compared with Amazon' competitors and the positive indirect network effects - typical of business models in the digital industry - which trigger a self-reinforcing effect due to Amazon's considerable market share lead. Thus, there is much to suggest that the undertaking has an immense, possibly even already uncatchable competitive advantage. Together with further factors that drive market power and intervene in Amazon's favour - in particular high barriers to market entry, the lack of alternative options (markets) and the importance for access to sales markets as well as the lack of innovation competition - as well as advantages due to the available data and financial strength, Amazon's market position on the relevant market is thus very difficult to attack.
- (624) In addition, Amazon has repeatedly also taken up or is taking up business activities closely related to (online) retail and its marketplace operations and has thus increasingly expanded or is further expanding its activities into new markets and sectors. These business activities include - at the upstream and downstream levels - in particular the manufacture of goods and the production of digital content, which Amazon sells as private label products, and logistics services, which Amazon requires for its own online retail business, but also offers to its

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<sup>859</sup> [Not translated. Please see the German version.]

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third-party sellers by enabling third-party sellers on its marketplace to make further (optional) use of Amazon's own logistics with the FBA program in addition to the actual intermediary service. As a result, the entire processing of the sellers' sales is carried out by Amazon. This offer is accepted to a significant extent by third-party sellers. On the one hand, it simplifies their online sales (even further) and, on the other, their product offerings qualify for the Prime label when they use the FBA program which makes them more attractive to Prime customers and results in higher sales figures.

- (625) However, both aspects can also lead to an (additional) increase in the third-party sellers' dependence on Amazon. By this means, Amazon can provide strong economic incentives to third-party sellers to use its optional shipping services and thus quickly expand its business activities into new business areas (here: logistics) based on its very strong position in the online marketplace business. The same applies incidentally to other business areas, e.g., the fast-growing area of online advertising, where Amazon offers third-party sellers higher visibility on its marketplace through optionally bookable advertising services and thus monetizes advertising space on the marketplace. This also includes the AWS business with its cloud computing offerings, which is ultimately built on IT services developed internally within the group for the e-commerce business and continues to form Amazon's IT infrastructure.
- (626) Insofar as Amazon itself uses the associated activities in the e-commerce environment within the Amazon group, the undertaking is - depending on the business segment - increasingly or to a substantial extent independent of suppliers and can increase its profit margin by covering several steps of a value chain, which can result in particular in financing, cross-subsidization and pricing leeway. Insofar as Amazon offers business activities on the market and at the same time uses these itself, economies of scale and scope can be achieved which are not available to the less integrated competitors with whom Amazon competes in the respective business areas.
- (627) In addition, due to its diversified ecosystem, Amazon is also able to tie the key user groups to this ecosystem and keep them there, thus making it more difficult for competitors to gain access to these user groups. This possibility makes the ecosystem and the associated market positions difficult for competitors to attack and, ultimately, secures them.
- (628) Thus, Amazon has (and uses) the possibilities to tie the third-party sellers to the Amazon marketplace by integrating them into its own business structure, so that they can only be won over by competing marketplaces with difficulty. In order to be successful on the marketplace, sellers often see themselves compelled to make use of further services from Amazon; these

include, for example, advertising or logistics services. This ties these third-party sellers even more strongly to the Amazon marketplace, so that their barriers to switching to competing marketplaces that do not offer such services can (further) increase. This is especially true for the logistics offering. With participation in the FBA program, third-party sellers can ensure the required delivery speed, and their offers qualify for the Prime label, so that they can reach the large and growing group of Prime customers more easily. In the course of this, there will be extensive integration with Amazon logistics (e.g., many sellers will want to avoid duplicate inventory management) and the bundling of demand bundling via Amazon (i.e., the seller does not have direct contact with the shipping service provider anymore).

- (629) In addition, the broad positioning on the supply side, which (increasingly) covers all consumer needs, opens up a variety of possibilities for Amazon to tie consumers to its offerings in various ways and to keep them in the ecosystem and, in particular, to induce them to increasingly cover their consumption needs on Amazon's offer portal so that they are no longer accessible to competitors (or only to a limited extent) due to this lock-in effect. This includes first of all the opportunities arising from the fact that virtually all Amazon offers to consumers are accessible via the respective country-specific website and a uniform log-in. This is accompanied by opportunities to direct consumers from one offer to other offers and, thereby, to arouse their interest in these other offers as well as stimulate a uniform coverage of consumers' needs within the ecosystem. It is possible for Amazon to draw attention to other offers, for example, through advertising measures on the website, through references to alternative offers (e.g. eBook instead of book) on the product detail pages or also through the bundling of different offers. Amazon can also benefit from its cross-market access to data, for example with regard to detailed information about user preferences.
- (630) The Prime customer loyalty program is particularly successful in encouraging users to increase consumption in the ecosystem with the help of the various Prime benefits (first and foremost Prime shipping). This consumption is then no longer accessible to other providers with their offerings. The pull (or lock-in) effect of the broad consumer offering continues to increase with the diversity of the offerings and the links between them. The resulting ever deeper anchoring of consumers in the ecosystem, who are made more and more aware of Amazon's own offerings and are encouraged to use them, makes it increasingly difficult for competing providers to reach consumers, and Amazon's powerful position in competition becomes increasingly difficult to attack.
- (631) The economies of scale in terms of the size of offerings, the size of the user groups and the business diversification that Amazon enjoys relative to most competitors in the various

business areas, together with the opportunities to integrate especially third-party sellers and consumers into the ecosystem, result in dependencies that cannot be easily resolved. They create or further reinforce a power imbalance. Due to the strong integration of consumers into its ecosystem via a broad range of services covering all consumption needs as well as the bundling of services in the Prime subscription, Amazon has a considerable significance for access to these consumers, in particular for third-parties, and in this respect assumes a position as gatekeeper. As such, Amazon is in a position to shape if and how other companies have access to sales and supply markets, some of which are even competitors of Amazon, and to influence their business activities in a variety of ways - in some cases considerably - by setting rules or through other control mechanisms.

- (632) This applies in particular to sellers, who are often dependent on a sales opportunity via the Amazon marketplace in order to be able to reach customers. Amazon can influence and shape this sales activity to its advantage in particular through the use of general terms and conditions and by defining the criteria for an offer being displayed in the "Buy Box". Furthermore, due to the large number of consumers who shop on the Amazon e-commerce platform, (brand) manufacturers are increasingly dependent on being able to control and steer the presentation of their brands and products on the marketplace. However, the incentives set by Amazon in this respect and the corresponding provisions in the general terms and conditions are designed in such a way that manufacturers generally only have such control and steering options if they also supply Amazon as a retailer with their products. Amazon can also influence the business activities of shipping service providers and third-party sellers in the logistics business, since the use of FBA is very important for the sales success of third-party sellers due to the associated qualification of offers for the Prime label. As Amazon bundles the third-party sellers' demand for shipping services with its own demand as a retailer, direct business relationships of shipping service providers with third-party sellers are excluded for a large number of shipments triggered via the Amazon marketplace.
- (633) In addition, Amazon has considerable resources. On the one hand, in addition to a high number of users, Amazon has significant financial strength, which is reflected in the typical key performance indicators<sup>861</sup> and forms the financial basis for financing possible competitive forays. This shows in particular that Amazon is able to absorb losses in individual business units over longer periods of time by making profits in other areas and - as recently required by disrupted supply chains due to the Covid pandemic - to make

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<sup>861</sup> [Not translated. Please see the German version.]

considerable investments at short notice.

- (634) Another important factor is the access to data as a resource, which is often central to competitive advantages, especially in the case of digital undertakings. In the present case, access to data is characterized by the fact that the various user groups of Amazon are very large, so that Amazon receives a considerable volume of data for this reason alone. In addition, the data results from many different data sources, covers a variety of data types and is also of high quality in terms of accuracy and truthfulness. Such comprehensive and high-quality data, which is unlikely to be available in the same manner to competing marketplace operators, in particular as they usually have smaller user bases and their business activities do not (or not to the same extent) regularly extend across several markets, is particularly valuable for Amazon's business activities. In particular, it enables Amazon to apply data analytics and estimation models in many respects that provide it with excellent insights into authentic and actual behaviour and revealed preferences of its users. This opens up the opportunities to improve offerings (e.g., through personalization options) or to close portfolio gaps as well as to improve the basis for its business decisions. The use of data across services enables Amazon to exploit data-driven network effects for the improvement or new development of products or services, which competitors do not benefit from due to a lack of or poorer access to corresponding data and data volumes.
- (635) Finally, it must be taken into account that Amazon often assumes hybrid roles in its ecosystem, so that competitors of Amazon often cannot act completely independently. This applies in particular, but not only, with regard to the relationship between Amazon and third-party sellers. First of all, with its German online marketplace, Amazon offers third-party sellers a sales opportunity on the amazon.de e-commerce platform, but at the same time competes as a retailer with those same third-party sellers for the same customers on the platform. Even though Amazon benefits from the presence of third-party sellers, in particular because their offers lead to an increased range of offers on the e-commerce platform and thus make it more attractive for the consumer as well as provide for higher commission and sales revenues, the hybrid role of Amazon as marketplace operator and competitor of third-party sellers at the retail level creates tension. This tension in principle opens up the possibility for Amazon to shape its e-commerce platform to the advantage of its retail activities after weighing its interests as a marketplace operator and as a retailer. This possibility to shape the platform alone represents a potential threat to competition, at least in Germany (due to Amazon's dominant position on the market for the provision of online marketplace services and its gatekeeper function for retailers' access to customers) and irrespective of the specific current design of the German Amazon marketplace.

(636) In summary, Amazon covers a range of services in e-commerce across all markets in a breadth and depth that is otherwise not offered from a single source by any of Amazon's competitors. Amazon has the ability to advertise its respective services, to direct the users of one of its services to other services of its own, and to penetrate new markets by expanding and supplementing services across markets or market levels. The accompanying network effects, data advantages, and self-reinforcing effects develop considerable pull effects on the part of consumers, who as a result and not least due to the Prime customer loyalty program, which is very advantageous for them, have less and less incentives to leave Amazon's ecosystem. They are increasingly difficult to access for competing providers - especially for other e-commerce platforms. The same is true for third-party sellers, many of whom rely on Amazon's online marketplace, which is dominant in Germany or at least has significant market power. Amazon sets the rules for the third-party sellers' use of its marketplace, but at the same time, competes with the sellers as a retailer on the platform and can (and does) thus influence the third-party sellers' business activities. With regard to other business activities which are contractually and/or technically closely interwoven with the e-commerce platform, Amazon in some cases competes with companies which at the same time either use Amazon's services or for which Amazon is an important customer, so that here too certain dependencies exist. Thus, when all relevant circumstances are considered together, Amazon has a position of economic power across markets, which gives it behavioural leeway across markets that is not sufficiently controlled by competition. The potential danger resulting from this specific situation, the ability to further consolidate or expand its own position of power without sufficient competitive control, or to use it to its own advantage in some other way, may make it necessary to intervene quickly with measures pursuant to Section 19a(2) GWB in order to effectively prevent damage to competition that cannot be remedied or is difficult to remedy.

### **C. Time limitation**

(637) Pursuant to Section 19a(1) sentence 3 of the GWB, the validity of the decision to designate an undertaking as norm addressee pursuant to Section 19a of the GWB is to be limited to five years from the date on which it becomes final.

### **D. Discretion**

(638) The designation of the status of Amazon as norm addressee pursuant to Section 19a GWB is at the discretion of the Bundeskartellamt, Section 19a(1) sentence 1 GWB. In the present case, the Bundeskartellamt can make such a determination with regard to Amazon without



exceeding the bounds of its discretion.

- (639) A finding under Section 19a(1) sentence 1 GWB is a legal prerequisite for issuing orders under Section 19a(2) GWB. The special abuse control pursuant to Section 19a (2) GWB can, if necessary, eliminate specific competitive threats posed by the norm addressee.
- (640) According to the legislative materials, the provisions of Section 19a(2) of the GWB are particularly intended to counteract the concentration and expansion tendencies of the norm's addressees, which are not based on competition on the merits. This is because the latter are particularly capable of expanding their position of power across market boundaries or securing their unassailability.<sup>862</sup> The prohibition options regulated in Section 19a(2) GWB therefore aim to limit positions of economic power, serve to keep markets open and protect competitive process opportunities.<sup>863</sup> The legislator assumes that the restrictions of competition addressed by Section 19a(2) GWB have an increased potential to harm - competition precisely when they are initiated by norm addressees pursuant to Section 19a (1) GWB.<sup>864</sup>
- (641) In its basic approach, Section 19a of the GWB does not pursue any objectives other than those of general abuse control in general;<sup>865</sup> the provision goes beyond this, however, in that it breaks away from the consideration of specific markets<sup>866</sup> , focuses on the special risk situations resulting from cross-market positions of power and extends abuse control to markets that are not (yet) dominated.<sup>867</sup>
- (642) There are concrete indications that the actions and threats described in Section 19a(2) of the GWB may be relevant for Amazon. In the past, Amazon's conduct has already given rise to proceedings on suspicion of abuse of a dominant position due to the general terms and conditions used by Amazon vis-à-vis third-party sellers.<sup>868</sup> The Bundeskartellamt is also currently investigating possible abusive practices (brandgating and price control mechanisms) by Amazon in two proceedings.<sup>869</sup>
- (643) Against this background, the determination of an overriding significance of Amazon for competition across markets pursuant to Section 19a(1) GWB, the prerequisite for imposing special conduct obligations on Amazon pursuant to Section 19a(2) GWB, is suitable for

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countering the threats to competition addressed by the standard.

- (644) Since the determination of the norm addressee status pursuant to Section 19a(1) GWB also has a constitutive effect (unlike in other cases of abuse control) and is therefore a mandatory prerequisite for the imposition of the special duties of conduct possible under Section 19a(2) GWB, it is also necessary in order to be able to avert competitive threats which may emanate from Amazon with the aid of the special remedial possibilities of Section 19a(2) GWB. A milder, equally suitable means is not evident in the present case.
- (645) Insofar as certain conduct on the part of Amazon can be stopped by means of orders pursuant to Section 19a(2) GWB, orders pursuant to Sections 19, 20 GWB or Articles 101, 102 TFEU with similar regulatory content could possibly also be considered. However, an intervention under the latter provisions is not a milder remedy than an intervention under Section 19a(2) GWB. A fortiori, the present injunction is significantly milder than a possible injunction under the latter provisions, as it does not initially make any stipulations regarding Amazon's conduct, but is limited to a mere determination of the norm addressee status under Section 19a(1) GWB. The designation of the norm addressee status also does not involve any stigmatization or even discrimination,<sup>870</sup> like the determination of market dominance in itself, it means that the company is subject to antitrust abuse control due to its prominent position in competition; (mis)conduct in violation of antitrust law is thus not determined.
- (646) In addition, general abuse control under Section 19 GWB and Article 102 TFEU (or under Section 20 GWB) does not address the cross-market effects and threats associated with Amazon's special position of economic power. By directing its focus on the (uncontrolled) scope of conduct related to a specific (dominated) market, it cannot take the entire ecosystem into account. Nor can it easily be used - unlike Section 19a GWB<sup>871</sup> - to address restrictive practices in markets that are not yet dominated. In view of the dynamism with which Amazon is able to develop its ecosystem in a wide variety of directions in view of its resources and other set-up, the more effective, more targeted and faster approach made possible by Section 19a(2) GWB through its special regulatory technique characterized by regulatory examples is required.<sup>872</sup>
- (647) The issuance of the declaratory order pursuant to Section 19a(1) GWB against Amazon is also appropriate; the intended purpose is not disproportionate to the severity of the interference associated with the order. It is true that the declaratory order represents an

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<sup>870</sup> [Not translated. Please see the German version.]

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onerous administrative act for Amazon, as the determination is the prerequisite for a possible imposition of behavioural obligations. However, the determination itself is not yet associated with any direct duties of conduct. The undertaking is exclusively placed under official abuse control. However, no prohibitions of conduct that can be pursued under civil law can result from the fact that the undertaking is a norm addressee. As a result, the direct impact is minimal.

- (648) In addition, the binding determination of the norm addressee status is limited to a period of five years after the entry into force of the final decision (Section 19a(1) sentence 3 GWB).
- (649) Furthermore, the competitive situation is not expected to change significantly to the disadvantage of Amazon's power position during this period. Amazon has continuously expanded its business model since the beginning of its operations and has grown noticeably in recent years in terms of its user numbers and all key financial indicators such as revenue, profit and cash flow. The Covid pandemic has not impacted this growth; on the contrary, it has helped it along. Events that could significantly impact Amazon's operations over the next five years are not currently apparent. On the contrary, the consistent expansion and safeguarding of Amazon's ecosystem as presented even rather speaks for a further aggravation of the competitive problems. In any case, the time limit of the declaratory decision leads to a mandatory review of the norm addressee status after five years, which enables the appropriate consideration of any changes in the competitive situation up to that point. If the competitive situation changes in the long term before then, it is also possible to rescind or revoke the decision.
- (650) Contrary to the opinion of Amazon<sup>873</sup>, no other restrictions on the designation - such as the exception of certain business areas<sup>874</sup> - are provided for by law beyond a time limit for the designation pursuant to Section 19a(1) sentence 3 GWB and can therefore also not be the subject of an exercise of discretion. In particular, already according to the clear purpose of Section 19a(1) GWB, a designation can only relate to a specific undertaking as a whole - it is a matter of designating a norm addressee - and cannot be limited to individual business areas of the undertaking. The determination of the norm addressee status pursuant to Section 19a(1) GWB vis-à-vis Amazon also corresponds to a dutiful exercise of the discretion granted. Amazon's cross-market position of economic power, as described above, gives rise to particular risks in digital markets, which are to be addressed by Section 19a GWB. There is no evidence to suggest that Amazon should not be subject to special abuse control by the

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<sup>873</sup> [Not translated. Please see the German version.]

<sup>874</sup> [Not translated. Please see the German version.]

Bundeskartellamt under Section 19a(2) GWB by way of a finding under Section 19a(1) GWB.

- (651) In the exercise of its discretion, the Bundeskartellamt addresses the decision to Amazon.com, Inc. and to Amazon Deutschland Services GmbH. Amazon.com, Inc. is the parent company of the Amazon Group and thus a suitable addressee of the determination of norm addressee status pursuant to Section 19a(1) GWB, which encompasses the entire group. In addition, it can exert influence on all subsidiaries and work towards compliance with the obligations associated with the norm addressee status. Since Section 19a GWB is a national provision which has direct effects for the Amazon group in Germany, the German subsidiary in question, which in particular has the support of commercial administration for Amazon.com, Inc. and its subsidiaries as its corporate object and thus a central function for the group in Germany, is particularly affected by the decision, so that it proves expedient to also address the notice to the German subsidiary, i.e. Amazon Deutschland Services GmbH.

**E. Fees**

- (652) The fee decision is based on Section 62(1) sentence 1 and sentence 2 no. 2 GWB. Pursuant to Section 62(2) sentence 1 GWB, the amount of the fee is determined by the personnel and material expenses of the Bundeskartellamt and the economic importance of the proceeding. Pursuant to Section 62(2) sentence 2 no. 2 GWB, the fee rates may not exceed EUR 25,000 in the case of Section 19a GWB. If the personnel or material expenditure of the cartel authority is exceptionally high in an individual case, taking into account the economic value of the action subject to the fee, the fee may be increased to twice the amount pursuant to Section 62(2) sentence 3 GWB. Pursuant to Section 62(2) sentence 4 GWB, the calculated fee may be reduced to one tenth for reasons of equity.
- (653) The subject matter of the proceeding is the determination of Amazon's overriding significance for competition across markets, which results in particular from the key position that Amazon occupies in the area of online retailing. On the one hand, Amazon itself offers consumers a wide range of physical and digital products. On the other hand, Amazon is the dominant provider of online marketplace services in Germany and thus occupies a central strategic position, especially vis-à-vis online retailers and shipping service providers. Amazon is also active to a significant extent in many other areas such as logistics, IT infrastructure, online advertising or the Internet of Things and has considerable financial and other resources and access to very valuable competition-relevant data. In view of these circumstances and the fact that the country-specific trading platforms or the online - marketplaces integrated therein and thus the activity on markets within the meaning of Section 18(3a) GWB form the core or starting point of Amazon's business activities, the economic significance of the proceeding must be qualified as significantly above average.
- (654) In order to ensure an appropriate level of substantiation of the finding, comprehensive investigations had to be carried out, which resulted in personnel and material expenses that were significantly above average. In particular, given the extraordinary breadth and significance of Amazon's business activities, wide-ranging and in-depth investigations had to be carried out. This included written and telephone surveys of companies in various - business areas, i.e., operators of online marketplaces and shipping service providers, as well as an IT-supported online survey of online retailers operating on Amazon's marketplace, and also multiple, comprehensive written surveys of Amazon itself. In addition, research had to be conducted in many other business sectors, e.g., in the area of cloud computing, Internet of Things, video and music streaming, and online advertising, and sources such as internal and public annual reports, sector inquiries, studies, or media reports had to be evaluated. The

associated administrative expense justifies in the present case, taking into account the significantly above-average economic importance of the procedure, [...].

- (655) Pursuant to Section 62(6) sentence 1 no. 2 alt. 2 GWB in conjunction with Section 62(1) sentence 2 no. 2 GWB, the parties against whom the order of the cartel authority has been issued. Pursuant to Section 62(6) sentence 3 GWB, they are jointly and severally liable.
- (656) The fee is due upon notification of this decision and is to be transferred within one month after notification to the account of the

**Federal Treasury - Trier office**

**Deutsche Bundesbank, Saarbrücken Branch IBAN:**

**DE81 5900 0000 0059 0010 20**

**BIC: MARKDEF 1590**

Please indicate the following cash reference number as the purpose of payment:

[...]

- (657) Please note that your payment cannot be processed without the cash reference number.
- (658) If the fee has not been paid by the end of one month after the date of service, a late payment surcharge of one percent of the amount in arrears shall be levied for each month of arrears or part thereof. Bank charges are generally incurred for transfers from abroad. In such cases it must be ensured that the Bundeskartellamt's account is credited with the full fee.

**F. Information on the right to appeal**

The decision is eligible for appeal. The appeal must be filed with the Bundeskartellamt, Bonn, within a period of one month beginning with the formal service of the decision. However, it is sufficient if it is received by the court of appeal, the German Federal Court of Justice, Karlsruhe, within this period.

The appeal must be substantiated. The statement of the grounds of appeal must be filed with the Bundeskartellamt or the court of appeal. The time limit for filing the statements of grounds of appeal is two months. It commences with the formal service of the contested decision and may be extended on application by the chairperson of the court of appeal. The statement of the grounds of appeal must contain a statement of the extent to which the decision is contested and its amendment or revocation is requested, and state the facts and evidence – including any new facts and evidence – on which the appeal is based.

The parties must be represented by a lawyer for the filing and substantiation of the appeal.

Dr. Engelsing

Dr. Buhl

Ohlerich

[...]