



Case summary

6 July 2022

Amazon.com, Inc.	Paramount significance for competition across markets formally determined
Sector:	Main focus: digital economy
File number:	B2 – 55/21
Date of decision:	5 July 2022

In its decision of 5 July 2022 the Bundeskartellamt determined pursuant to Section 19a(1) of the German Competition Act (GWB) that Amazon.com, Inc. including its affiliated companies within the meaning of Section 36(2) GWB (in the following: Amazon) is of paramount significance for competition across markets. The validity of this decision is limited to five years from the date on which it becomes final.

Background

In January 2021, the 10th amendment to the German Competition Act (GWB Digitalisation Act) entered into force. A key new provision (Section 19a GWB) enables the Bundeskartellamt to intervene earlier and more effectively, in particular against the practices of large digital companies.

The main purpose of Section 19a GWB is to capture special positions of market power and their possible anti-competitive effects on and threats to competition in the area of “digital ecosystems” in which individual companies may have a so-called gatekeeper function. Large digital companies which offer a wide variety of products and services can hold an economic position of power across markets which is difficult for competitors to challenge and gives rise to a scope of action that allows the relevant company to further consolidate, expand or otherwise use this position to its own advantage without sufficient control by competition. Such positions of power and their expansion are enhanced by the dynamics of the digital and internet economy, which especially on markets within the meaning of Section 18(3a) GWB lead to accelerated and increased concentration and bring about conglomerate or vertically integrated business structures in which cross-market systems of products and services, which often are scalable and – through the bundling of the data collected, for example – connected in various ways, can be operated and expanded; for all of the above, see the explanatory memorandum to the 10th amendment to the GWB, Bundestag printed paper 19/23492, p. 73.

Based on the new provision under Section 19a GWB the Bundeskartellamt can in a two-step approach prohibit companies which are of paramount significance for competition across markets from engaging in anti-competitive practices. The first step is to establish the relevant company's status as addressee of Section 19a(1) GWB.

Amazon's paramount significance for competition across markets

According to the Bundeskartellamt's investigations, Amazon is of paramount significance for competition across markets because, when all relevant circumstances in the individual case are considered overall, the company has a position of economic power across markets with the corresponding competitive potential which gives rise to a scope of action across markets that is not sufficiently controlled by competition.

Amazon is, through its activities as sales platform operator on country-specific domains such as amazon.de in particular, active to a significant extent on multi-sided markets ("platform markets") within the meaning of Section 18(3a) GWB, whereby Section 19a GWB is generally applicable.

The finding that Amazon is of paramount significance for competition across markets is based on an overall assessment of all relevant facts, taking particular account of the factors set out in Section 19a(1) sentence 2 nos 1 to 5 GWB. In the Bundeskartellamt's view, Amazon is dominant on the German market for the provision of online marketplace services for commercial sellers (no 1), active on a number of different markets which are related vertically or otherwise (no 3), and, owing to its activity in particular as the operator of a hybrid sales platform as well as its activities in the logistics sector and the area of the Internet of Things, it is of significant relevance for third-party access to supply and sales markets (no 5). In addition, Amazon has excellent access to data relevant for competition (no 4) and significant financial strength (no 2).

Amazon's paramount significance for competition across markets stems primarily from the company's key position in the e-commerce sector, which is in large part based on the strong competitive position of its respective country-specific sales platforms. These platforms generally have a hybrid structure in which Amazon, on the one hand, functions as a retailer itself and sells (physical and digital) goods to end customers (Amazon Retail/Amazon's own retail business) and, on the other hand, operates an online marketplace on which it allows online retailers (so-called third-party sellers) to offer their goods to end customers. From the end customers' perspective, the great appeal of Amazon's ecosystem lies in the enormous range of products and services offered, stemming from the large number of third-party sellers active on Amazon's marketplace, from Amazon's own retail business as well as from the diverse services offered on other markets, e.g. in the areas of video and music streaming or the Internet of Things. The

outstanding success of Amazon's sales platform in Germany and other countries is reflected in the size of its user base and the company's continuously increasing turnover both in Amazon's online retail business and its marketplace business, especially in Germany but also worldwide.

Accordingly, the Bundeskartellamt was able to determine that Amazon has a dominant position on the German market for the provision of online marketplace services for commercial sellers. Amazon's dominant position is characterised in particular by a high market share and correspondingly high market share leads over competing marketplace operators on an otherwise largely fragmented market. The company's position is furthermore secured by the – in comparison to Amazon's competitors – large number of consumers using the website and the positive indirect network effects typical of business models in the digital sector. Due to Amazon's significant market share lead, these network effects trigger feedback loop effects, which together with other factors of market power suggest that the company's competitive lead is immense, possibly even already unassailable.

At the same time, Amazon has repeatedly entered into business areas which are linked to the (online) retail business and marketplace operation and continues to do so, thereby increasingly expanding its activities into new markets and sectors. Amazon therefore constitutes an ecosystem which is highly integrated with regard to the e-commerce business and features a broad portfolio of business activities including, e.g., logistics and IT services, the operation of online marketplaces, activities as online retailer, online advertising services as well as the provision of digital services, such as streaming services, to consumers. Due to this extensive portfolio of products and services which on their own no other competitors are able to provide in a similar breadth and depth, Amazon is able to retain its various user groups in its own ecosystem so that they no longer use services offered by competitors, or do so only to a limited extent. In this way, Amazon has the possibility, of which it makes use, to tie the user group of third-party sellers to the Amazon marketplace by integrating its services into their business structure, making it difficult for competing marketplaces to win them over. In order to be successful on the marketplace, many sellers deem it necessary to use further Amazon services, such as advertising or logistics services, for example. This strengthens the third-party sellers' ties to Amazon's marketplace, whereby barriers for sellers to switch to competing marketplaces which do not offer such services may increase (further). This especially applies to the logistics services offered. By participating in the so-called Fulfilment by Amazon programme (FBA programme), which allows third-party sellers to use Amazon's own logistics, third-party sellers can, for one, (further) simplify their own online distribution; for another, their product range becomes eligible for the Prime label by joining the FBA programme, making sellers more attractive to Prime customers and ultimately allowing them to achieve higher sales numbers. In this

way, Amazon is able to quickly expand its activities into new areas of business (e.g. logistics) based on its very strong position in the online marketplace business.

In addition, the wide product range offered by the supply side, which (increasingly) covers all consumer needs, and the linkage between its offers provides Amazon with multiple possibilities to tie the user group of consumers to its services in various ways and to retain them in the ecosystem. In this way, Amazon is able to drive customers in particular to increasingly use Amazon's sales platform to cover their needs so that they are no longer open to other competitors, or only to a limited extent, due to this pull effect. The customer retention programme Prime particularly succeeds in encouraging users to consume even more in the ecosystem by offering various Prime advantages (mainly Prime shipping), making their consumer needs no longer accessible to other businesses and their offers. As far as Amazon procures the e-commerce related activities internally from group members, the company is, depending on the business area, increasingly or to a substantial extent independent of suppliers. When covering several stages of a value chain, Amazon thus may have opportunities to increase its profit margin, which may in particular create scope for financing, cross-subsidisation and price setting. As far as Amazon offers business activities on the market and at the same time uses them itself, the company can achieve economies of scope and economies of scale which cannot be achieved in the same way by less integrated competitors with which Amazon competes in the respective business areas.

At the same time, with its German and possibly also other country-specific sales platforms, Amazon has a central strategic position in various areas, especially in e-commerce. Due to the consumers' strong integration into its ecosystem based on the broad range of products and services covering all consumer needs and the bundling of services in the Prime customer subscription, Amazon is of considerable relevance especially for third-party companies wishing to access these consumers, and therefore functions as a "gatekeeper". As such, Amazon is in a position to shape whether and how other companies (sometimes even competitors) can access sales and supply markets and to (sometimes considerably) influence their business activities by setting rules or applying other steering mechanisms in manifold ways. This applies particularly to retailers and (brand) manufacturers whose distribution is influenced and structured by the terms of service set by Amazon. Amazon's strong incentives for third-party sellers to use the FBA programme allow the company to influence the business activities of shipping providers and third-party sellers in the logistics sector. By bundling the third-party sellers' demand for shipping services with its own demand as a retailer, direct business relations between shipping providers and third-party sellers are ruled out for a large number of shipments. Amazon's possibilities to influence the business activities and the business success of other companies are enhanced by the hybrid structure of its country-

specific sales platforms since Amazon not only operates the online marketplace but also uses the sales platform itself as a retailer to sell products to consumers and thus competes with the third-party sellers offering their goods on its online marketplace.

Another important factor is access to data as resources, which especially in the case of large digital companies is often central to gaining a competitive edge. Amazon has access to extensive and high-quality data across services, which competing marketplace operators in particular are unlikely to have in the same form. These data allow Amazon in particular to apply data analyses and estimation models in a number of ways, which gives the company excellent insights into authentic, actual behaviour and the displayed preferences of its users, opening up associated potentials for improving its services (e.g. through personalisation options), filling gaps in its product portfolio and improving the basis for business decisions.

Moreover, Amazon has other considerable resources at its disposal. In addition to high user numbers, Amazon's financial strength is significant, which is reflected in the typical indicators, such as turnover, profit, cash flow or market capitalisation, and provides the basis for financing possible competitive moves.

In summary, Amazon covers a range of e-commerce services across markets in a breadth and depth which on their own no other competitors of Amazon offer. Amazon has the ability to cross-promote its services, direct users using one service to its other services, and enter new markets by offering service extensions and additions across markets or market levels. The network effects, data advantages and feedback loop effects associated with this may exert a considerable pull on consumers who then, not least due to the very attractive customer retention programme Prime, have fewer and fewer incentives to leave Amazon's ecosystem, thus making it increasingly difficult for competitors, especially other sales platforms, to reach such customers. This also applies to third-party sellers, many of which rely on Amazon's online marketplace which, in the Bundeskartellamt's view, has a dominant position in Germany. Amazon sets the rules for third-party sellers to use its marketplace while at the same time competing with third-party sellers as a retailer on the sales platform. This allows the company to influence third-party sellers' business activities by adjusting various parameters. Amazon makes use of this possibility. With regard to other business activities which are closely intertwined with the sales platform in contractual and/or technical terms or which are (also) offered on its website, Amazon is partly in competition with companies which at the same time use Amazon's services or for which Amazon is an important customer, resulting in certain dependencies.

When assessing all the facts relevant in this case, Amazon has a position of economic power across markets which gives rise to a scope of action across markets that is not sufficiently controlled by competition. The particular risk potential associated with this scenario of a company being able to further

consolidate, expand or otherwise use its position to its own advantage without sufficient control by competition may make it necessary to intervene quickly with the measures set out in Section 19a(2) GWB to effectively prevent damage to competition which cannot be remedied or is difficult to remedy.

The proceeding

The Bundeskartellamt initiated the proceeding to determine Amazon's paramount significance for competition across markets within the meaning of Section 19a(1) GWB on 18 May 2021. In its decision of 5 July 2022 the Bundeskartellamt determined that Amazon is of paramount significance for competition across markets.

Amazon.com, Inc.

Amazon.com, Inc., Seattle, USA, is the Amazon group's US parent company, which together with its subsidiaries in the USA, Germany and many other countries focuses on e-commerce and related activities as well as on cloud computing. Amazon is publicly listed with the majority of shares being held in free float. The largest shareholders are Jeffrey P. Bezos, Vanguard Group Inc. and Blackrock Inc.

Amazon's business activities can be divided into three strands: E-commerce, brick-and-mortar retail and Amazon Web Services (AWS).

E-commerce comprises online trade, including the provision of digital contents (e.g. e-books, music, films, series) and online-based media services and devices, as well as other services, especially the provision of online marketplaces and associated services, such as logistics services, advertising services or the handling of payments, also on third-party websites. Most services are offered on country-specific sales platforms or websites (e.g. amazon.de for Germany) on which Amazon is, on the one hand, active as a retailer and, on the other hand, provides an online marketplace on which third-party sellers offer their goods to end customers.

Brick-and-mortar retail includes in particular the food retailer Whole Foods Market, which is almost exclusively active in the USA.

AWS is seen as the leading provider of cloud computing services worldwide.

In 2021, Amazon's worldwide revenues amounted to approximately 469.8 billion US dollars (or approximately 397.2 billion euros) of which around 37.3 billion US dollars (or approximately 31.6 billion euros) were generated in Germany. This is the second-largest share in sales after the company's (by far leading) US home market.