



EUROPEAN COMMISSION
Competition DG

***CASE AT.40462 - Amazon Marketplace
and AT.40703 – Amazon Buy Box***

(Only the English text is authentic)

ANTITRUST PROCEDURE
Council Regulation (EC) No 1/2003

Article 9 Regulation (EC) 1/2003

Date: 20/12/2022

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EUROPEAN
COMMISSION

Brussels, 20.12.2022
C(2022) 9442 final

COMMISSION DECISION

of 20.12.2022

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union (TFEU) and Article 54 of the EEA Agreement**

Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box

(Text with EEA relevance)

(Only the English text is authentic)

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COMMISSION DECISION

of 20.12.2022

relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement

Cases AT.40462 – Amazon Marketplace and AT.40703 – Amazon Buy Box

(Text with EEA relevance)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) and Article 24(1) thereof,

Having regard to the Commission Decision of 17 July 2019 to initiate proceedings in case AT.40462 – *Amazon Marketplace* and to the Commission decision of 10 November 2020 to initiate proceedings in case AT.40703 – *Amazon Buy Box*,

Having expressed concerns in a Statement of Objections of 10 November 2020 in case AT.40462 – *Amazon Marketplace* and in a Preliminary Assessment of 15 June 2022 in case AT.40703 – *Amazon Buy Box*,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

1. INTRODUCTION

- (1) This Decision is addressed to Amazon.com, Inc., Amazon Services Europe S.à.r.l. (“ASE”), Amazon EU S.à.r.l.(“AEU”) and Amazon Europe Core S.à.r.l.(“AEC”), (together referred to as “Amazon”) and concerns the following two separate

¹ OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, TFEU. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

investigations under Article 102 of the Treaty on the Functioning of the European Union (“TFEU”):

- the business practices of Amazon investigated by the Commission under case AT.40462 – *Amazon Marketplace*, relating to the use of non-publicly available data regarding third-party sellers’ listings and transactions, by Amazon, for the purposes of its retail operations (the “Data-use Conduct”);
 - the business practices of Amazon investigated by the Commission under case AT.40703 – *Amazon Buy Box*, relating to (i) the conditions and criteria that govern the selection of the offer that features in the “Buy Box” (the “Buy Box-related Conduct”), and to (ii) the conditions and criteria that govern the eligibility of third-party sellers to Prime and of their offers to the Prime label (the “Prime-related Conduct”).
- (2) The Data-use Conduct, the Buy Box-related Conduct and the Prime-related Conduct together are hereinafter referred to as the “Conducts”.
- (3) The Conducts relate to Amazon’s e-commerce activities. In that respect, Amazon has a “dual role”. On the one hand, it operates an online marketplace, that is to say a multi-sided platform which enables online transactions between two groups of users, namely consumers and third-party sellers. On the other hand, Amazon acts as an online retailer, which sells products directly to consumers on Amazon’s own website that hosts also the online marketplace. Amazon’s “single store” business model thus combines its marketplace where third-party sellers list and sell their products and Amazon’s own retail operations.
- (4) Amazon’s Data-use Conduct consists in the access to and use of non-publicly available data relating to third-party sellers’ listings and transactions, that Amazon obtains in the context of its marketplace services, for the purposes of Amazon’s own retail operations in competition with those sellers.
- (5) Amazon’s Buy Box-related Conduct and the Prime-related Conduct consist in:
- Amazon applying conditions and criteria that *favour* offers of Amazon’s own retail services, both in the selection of the offer that prominently features in the Buy Box and in the selection of sellers and offers eligible for Prime and to the Prime label, resulting in an artificial competitive advantage for Amazon’s own retail operations; and
 - Amazon applying conditions and criteria in the selection of the offer that prominently features in the Buy Box and in the selection of sellers and offers eligible for Prime and to the Prime label, that provide third-party sellers using Amazon’s fulfilment services with an artificial competitive advantage compared to other third-party sellers.
- (6) In the Statement of Objections of 10 November 2020 in case AT.40462 – *Amazon Marketplace* (“SO”), the Commission came to the preliminary conclusion that Amazon holds a dominant position on the national markets for the provision of marketplace services in Germany and France and that the Data-use Conduct constitutes an infringement of Article 102 TFEU and of Article 54 of the Agreement on the European Economic Area (“EEA Agreement”) in those national markets.
- (7) In the Preliminary Assessment of 15 June 2022 (“Preliminary Assessment”) in case AT.40703 – *Amazon Buy Box*, the Commission came to the preliminary conclusion that Amazon holds a dominant position on the national markets for the provision of

marketplace services, at least in Germany, France and Spain, and that the Buy Box-related Conduct and the Prime-related Conduct are likely to infringe Article 102 TFEU and Article 54 of the EEA Agreement in at least Germany, France and Spain.

- (8) While Amazon disagrees with the preliminary conclusions of the Commission in the SO in case AT.40462 – *Amazon Marketplace* and its Preliminary Assessment in case AT.40703 – *Amazon Buy Box*, it nevertheless has offered commitments pursuant to Article 9(1) of Regulation No 1/2003 to address the preliminary concerns expressed by the Commission. This Decision finds that Amazon’s commitments remove these preliminary concerns. Furthermore, this Decision makes those commitments binding on Amazon.

2. THE PARTIES TO THE INVESTIGATIONS COVERED BY THIS DECISION

- (9) Amazon.com, Inc. is a multinational company based in Seattle, United States. It started as an online retail company in 1994 and expanded into e-commerce platforms, where both Amazon’s retail division and independent third-party sellers offer products for sale to consumers. Beyond e-commerce, Amazon has extended its activities into, amongst others, video and music streaming, publishing, cloud computing and artificial intelligence.
- (10) Amazon has localised e-commerce websites in North and South America (United States, Canada, Mexico, Brazil), Asia (China, India, Japan, Singapore, Turkey, United Arab Emirates), Australia, and eight e-commerce websites in Europe: amazon.co.uk, amazon.de, amazon.fr, amazon.it, amazon.es, amazon.nl, amazon.se, and amazon.pl.
- (11) ASE, AEU, AEC and their local subsidiaries are fully owned subsidiaries of Amazon.com, Inc.
- (12) ASE, based in Luxembourg, is the legal entity that operates Amazon’s eight European websites and provides marketplace services to third-party sellers (also referred to as “Amazon Marketplace”).
- (13) AEU, also based in Luxembourg, is responsible for the direct retail of physical goods by Amazon (also referred to as “Amazon Retail”).
- (14) AEC, mother company of ASE and AEU and also based in Luxembourg, has been operating the automated tools, databases and data infrastructures underlying the operation of Amazon’s European business operations since June 2014.

3. PROCEDURAL STEPS UNDER REGULATION NO 1/2003

- (15) On 17 July 2019, the Commission initiated proceedings in case AT.40462 – *Amazon Marketplace*² pursuant to Article 2(1) of Council Regulation No 773/2004³.
- (16) Prior to and after initiating proceedings in case AT.40462 – *Amazon Marketplace*, the Commission sent various requests for information (“RFIs”) pursuant to Article 18(2)

² Decision C(2019)5386 to initiate proceedings in case AT.40462 Amazon – Marketplace adopted on 17 July 2019.

³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p.18-24), p. 5.

of Regulation No 1/2003 to Amazon, to retailers and manufacturers⁴, to marketplace operators⁵ and to third-party solution providers⁶.

- (17) On 10 November 2020, the Commission sent the SO to Amazon in case AT.40462 – *Amazon Marketplace* and on the same date it initiated proceedings⁷ in case AT.40703 – *Amazon Buy Box* with a view to adopting a decision under Chapter III of Regulation No 1/2003.
- (18) Amazon did not request an oral hearing and submitted its response to the SO on 31 March 2021. Subsequent RFIs under both cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box* were addressed to Amazon, to marketplace operators⁸, to social media operators⁹ and to third-party solution providers¹⁰.
- (19) In case AT.40703 – *Amazon Buy Box*, on 15 June 2022, the Commission adopted a Preliminary Assessment pursuant to Article 9(1) of Regulation No 1/2003 which set out the Commission’s preliminary competition concerns in relation to the Buy Box-related Conduct and to the Prime-related Conduct. This Preliminary Assessment was notified to Amazon by letter of 16 June 2022.
- (20) On 8 July 2022, Amazon submitted commitments (the “Initial Commitments”) to the Commission in order to meet the preliminary concerns set out in the SO and the Preliminary Assessment.
- (21) On 20 July 2022, a notice was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation No 1/2003 (the “Article 27(4) Notice”), summarising the cases AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box* as well as the Initial Commitments, and inviting interested third parties to send their observations on the Initial Commitments by 9 September 2022.
- (22) On 20 September 2022 the Commission informed Amazon of the observations received from interested third parties following the publication of the notice. On 22 November 2022, Amazon submitted an amended proposal for commitments.

4. PRELIMINARY ASSESSMENT

- (23) This Section is based on the Commission’s preliminary concerns as set out in the SO and the Preliminary Assessment respectively, which the Commission continues to have at the time of adoption of the present Decision.

4.1. Characteristics of Amazon’s e-commerce platforms, relevant to both investigations

- (24) Amazon uses one specific website in each of the European countries where it operates an online marketplace, for facilitating sales of third party sellers and for its own retail

⁴ RFI to German retailers sent on 18 September 2018; RFI to French retailers sent on 4 October 2018; RFI to German manufacturers sent on 16 November 2018; RFI to German suppliers sent on 29 November 2019; RFI to French manufacturers sent on 15 November 2018.

⁵ RFI to German marketplace operators sent on 21 November 2018; RFI to French marketplace operators sent on 22 November 2018.

⁶ RFI to trackers (that is providers who base their advisory services to retailers amongst others on the tracking of Amazon’s websites) sent on 28 June 2018.

⁷ Decision C(2020)7692 final to initiate proceedings in case AT.40703 Amazon – Buy Box, adopted on 10 November 2020.

⁸ RFI to marketplace operators of 13 November 2020 of 21 October 2021 and of 28 October 2021.

⁹ RFI (2021/070730) to [marketplace operator] of 5 July 2021.

¹⁰ RFI (2021/063401) to [e-commerce company] of 17 June 2021.

sales. Amazon Retail and third party sellers are often actual or potential competitors at the retail level, for the sale of the same products on the Amazon websites.

- (25) For the purposes of this Decision, Amazon's websites, which combine the marketplace and Amazon's own retail offering, are referred to either as the Amazon "websites" or as the Amazon "e-commerce platforms".
- (26) Amazon generates revenues from the fees/commissions paid by third party sellers for the various services offered to them on its marketplace and from its own retail sales to end customers.

4.1.1. Marketplace services offered to third party sellers – Fulfilment by Amazon

- (27) Amazon Marketplace offers third party sellers, besides "default" services that are provided to all third party sellers such as enabling sales through the platform and related payment services, optional services such as Amazon's fulfilment services, complaints handling and advertisement solutions. Third party sellers can make use of those optional services in exchange for additional payment.
- (28) Amazon's fulfilment services allow sellers to use Amazon's logistics centres and services to store, package and ship their products to consumers (called "Fulfilment by Amazon" or "FBA").
- (29) Third party sellers that use FBA services ("FBA sellers") do not need to register all of their products for FBA. However, the share of products that FBA sellers register for FBA services has been continuously increasing. In 2020, [redacted] of all of FBA sellers' products on average were fulfilled by Amazon.
- (30) Third party sellers that do not use Amazon's FBA services to fulfil their sales are referred to in Amazon's internal documents as sellers using the "MFN" or "Merchant Fulfilled Network". Those third party sellers ("MFN sellers") stock and ship their own products, as opposed to Amazon Retail and FBA sellers (together referred to as the "Amazon Fulfilment Network" ("AFN" or "AFN sellers"), whose products are fully managed by Amazon, covering the transportation of goods from the manufacturer or warehouse to the consumer.

4.1.2. Services offered to consumers – the Prime programme

- (31) In addition to allowing consumers to buy products offered on its websites, Amazon also offers additional optional services to consumers.
- (32) In particular, Amazon developed the Amazon Prime membership programme, a paid subscription service that provides consumers access to a number of additional services such as faster delivery, access to music and video streaming services, gaming services and a number of other shopping benefits. The most attractive feature of Amazon's Prime programme is the free and fast (two-day/ same-day/ release day) delivery for a significant number of Prime eligible products.
- (33) The number of Prime users has been constantly increasing, with more than [10-20] million in Germany, [0-10] million in France and just under [0-10] million in Spain in 2020. [Amazon's assessment of consumer loyalty of Prime users].

4.1.3. Characteristics of listings and sales on Amazon's e-commerce platforms

- (34) A very broad range of products is listed and therefore purchasable on Amazon's European websites. However, only a relatively small proportion (less than [0-10]%) of

listed Amazon's unique product identifiers ("ASINs")¹¹ is actually sold. For example, out of more than 467 million ASINs listed on amazon.de in 2017, only 32.6 million ASINs were sold that year at least once, with the remaining 93% of ASINs generating zero sales. Similarly, out of more than 296 million ASINs listed on amazon.fr in 2017, only 13.9 million, i.e. 4.7% of the listed ASINs were sold at least once, and out of nearly 29 million ASINs listed on amazon.es in 2017, less than 0.6 million, i.e. 2.05% of the listed ASINs were sold at least once. Consequently, whilst Amazon's e-commerce platforms offer a broad choice of products to consumers, *the revenues from sales transactions are actually being generated by a small portion of ASINs.*

- (35) Similarly, while many sellers offer their products for sale on the Amazon e-commerce platforms, out of all the active professional third-party sellers (professional¹² sellers that had at least one sale on the platform), [70-80]% in Germany and [80-90]% in France generated each less than EUR [redacted] in value of sales via Amazon in 2018.

4.1.4. The "Buy Box"

- (36) Offers of Amazon Retail, FBA sellers and MFN sellers compete for sales on Amazon's e-commerce platforms. Sales on all of Amazon's European websites are driven, to a very large extent, by the system of the so-called "Buy Box".
- (37) The "Buy Box" is a privileged ranking position on the product detail page for a particular ASIN. That detail page is displayed when the consumer clicks on a particular product on the platform, for example by clicking on a product featured directly on the homepage of the Amazon website, by selecting from a list of products presented on Amazon's product category webpages, or in most cases by selecting one product from a list generated in response to a specific consumer search. In a separate box (the Buy Box), the product detail page prominently displays the offer of one particular seller for the product, selected by an algorithm (the "Featured Offer"). The consumer has an immediate possibility to put the Featured Offer in the shopping cart ("Add to Basket" button) or immediately buy it ("Buy Now" button). According to Amazon's explanations¹³, the single Featured Offer is meant to represent the overall best offer to the consumer, out of all competing offers.
- (38) The same product detail page also shows, in its right lower corner below the Buy Box, a link to other competing sellers' offers ("Other sellers on Amazon" or "New and used"). Until 2019, Amazon was displaying short references, in small boxes, to up to three competing offers in this "Other Sellers on Amazon" widget. Products from sellers competing with the Featured Offer could either be added to the shopping basket directly from this list of "Other sellers on Amazon" or, after clicking on the link to the full list of other available offers, via the so-called "Offer Listing Page". The Offer Listing Page provided the list of all available offers from different sellers for the same

¹¹ ASIN stands for Amazon Standard Identification Number and each ASIN is a unique identifier for each product in Amazon's internal system. Each product model, size or colour of a particular product corresponds to a different ASIN.

¹² On the Amazon e-commerce platforms, third-party sellers can be "individual sellers" if they intend to sell only a few items (fewer than 35 items a month) or "professional sellers" if they intend to sell more items on a regular basis (more than 35 items a month).

¹³ See for instance in Amazon's response to the Commission's RFI of 18 July 2019, but also in numerous references to "Amazon's customer-centric display of the single best offer" in other submissions, such as the submission of 12 December 2021.

product, including the Featured Offer. The product detail page on Amazon's European e-commerce platforms has been going through a number of changes over the last years.

- (39) In the course of 2020, the so-called "All Offers Display" ("AOD") started to replace the Offer Listing Page on Amazon's European websites. The Offer Listing Page was discontinued simultaneously worldwide on 19 February 2021¹⁴. The AOD is a pop-up window which expands on top of the Buy Box page with the list of all competing offers¹⁵.
- (40) Transactions on Amazon's e-commerce platforms may be initiated via one of the above options, but may also follow more complex consumer shopping journeys involving a combination of different steps (such as repeating orders or delayed purchases). Based on 2017-2019 sales data provided by Amazon for its German and French websites, sales made directly through the Featured Offer accounted for [70-80] to [80-90] % of the overall sales. In its publications to sellers, Amazon stated that "90%+ of sales [are] com[ing] from the Buy Box". This demonstrates that consumers are much more likely to buy the Featured Offer they are presented with, than any other offer on the Offer Listing Page or on the AOD.
- (41) Data provided by Amazon for its e-commerce platforms for June 2015 to 2018, on "Sales not through the Featured Offer", shows that only between [0-10] to [0-10]% of all sales materialised directly via links to competing offers, either via the "Other Sellers on Amazon" direct links, or via the Offer Listing Page. The rest of the sales not through the Featured Offer were concluded via more complex shopping journeys¹⁶.
- (42) In terms of *visibility* of the offers outside the Buy Box, the percentage of total customer visits to the page where the customer clicked on the link to the Offer Listing Page¹⁷ remained below [0-10]% in the period 2017-2019, on amazon.de, amazon.es and amazon.fr.
- (43) Amazon's data covering the period from 19 February to 30 April 2021 suggest that the introduction of the AOD did not result in a significant change in the visibility of competing offers outside the Buy Box or in the share of generated sales. The proportion of AOD visits ("glance views") was [0-10]% on amazon.de, [0-10]% on amazon.es and [0-10]% on amazon.fr.
- (44) The proportion of *purchases* through the AOD also remained low, generating [0-10]% of all the transactions on amazon.de and [0-10]% on amazon.fr and on amazon.es.
- (45) Not every product detail page has a Featured Offer displayed. There is no Featured Offer displayed in a number of scenarios, for example if no offer meets a set threshold or specific customer needs. In 2018, out of all consumer visits to product detail pages where both Amazon Retail and third-party offers were available, there was no Featured Offer displayed for [0-10]% of the visits on amazon.de or for [10-20]% of the visits on amazon.fr.
- (46) In the same year, out of all consumer visits to product detail pages where both Amazon Retail and third-party offers were available and a Featured Offer was displayed, the

¹⁴ With the exception of the recent Swedish and Polish marketplaces, where the AOD became visible to all customers by default from the Store launch date, i.e., 28 October 2020 and 2 March 2021 respectively.

¹⁵ When the consumer clicks on the "Other available offers" or similar links below the Buy Box, the consumer does not land on a new, separate page, but instead views the AOD pop-up window with the list of all competing offers.

¹⁶ Such as repeat orders or keeping items in the cart but purchasing later.

¹⁷ Out of all visits where more than one offer was available for the same ASIN.

Featured Offer was an offer by Amazon Retail in [80-90]% of the visits on amazon.de and [80-90] % of the visits on amazon.fr, while it was an offer by a third-party seller in [10-20]% of the visits on amazon.de and in [10-20]% of the visits on amazon.fr.

- (47) In sum, becoming the Featured Offer (i.e. winning the Buy Box) is essential for third-party sellers to be visible to consumers and to convert their offers into actual sales, as the vast majority of sales on Amazon's websites is realised via the Buy Box.
- (48) The selection of the Featured Offer displayed in the Buy Box is determined on the basis of a two-step process: (i) the "Buy Box qualification" process of determining eligible sellers, by eliminating third-party sellers that do not meet certain minimum criteria set by Amazon regarding their ability to satisfy consumer expectations; and (ii) the identification of the Featured Offer, which will be displayed to the consumer, from amongst the eligible offers of qualified sellers. The processes relating to the identification and display of the Featured Offer are carried out by the [Amazon algorithm]¹⁸ and are continuously being revised and enhanced by Amazon.

4.2. Relevant markets

- (49) The considerations concerning the relevant markets in this Section are equally applicable to both investigations covered by this Decision.

4.2.1. Principles

- (50) The concept of the relevant product market presupposes that there is a sufficient degree of interchangeability from the consumer's perspective between all the products or services forming part of the same market by reason of the products' or services' characteristics, their prices and their intended use.
- (51) An examination to that end cannot be limited solely to the objective characteristics of the relevant products and services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.
- (52) Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product¹⁹.
- (53) Supply-side substitutability may also be taken into account when defining markets, in those situations in which its effects are equivalent/comparable to those of demand substitution in terms of effectiveness and immediacy. Supply-side substitution may be particularly relevant for network industries.
- (54) The third source of competitive constraints, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry²⁰.

¹⁸ The [Amazon algorithm] is an algorithmic tool used by Amazon to identify the Featured Offer for a particular product. [Description of the functioning of the Amazon algorithm].

¹⁹ Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p. 5), paragraph 13.

²⁰ Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p. 5), paragraph 23.

- (55) According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, the prevailing conditions of competition are appreciably different in those areas²¹.

4.2.2. *Relevant product and geographic markets*

4.2.2.1. Seller versus consumer side of e-commerce platforms

- (56) In the SO and the Preliminary Assessment, the Commission preliminarily considered that e-commerce platforms serve (at least) two distinct customer groups. Hence, such platforms are two-sided platforms that act as intermediaries between buyers (consumers) and sellers, thereby facilitating online transactions for the purchasing of products offered on the platforms.
- (57) On the one hand, they offer to consumers the possibility to find sellers and their respective product offers, and allow them to purchase these products online directly on the website of the marketplace (“consumer side”). On the other hand, they offer a wide range of services to retailers to establish or facilitate their online retail sales activities in particular by allowing them to list and sell products directly on the marketplace website to a wide consumer base (“seller side”).
- (58) There are, therefore, two sets of customers with distinct demand for marketplace services. The alternatives available to each customer group are not necessarily the same. For instance, while established online retail stores may represent an alternative to marketplaces for consumers, they might not be an option for marketplace sellers that do not operate such own online retail stores.
- (59) Moreover, the services offered, the prices and the terms and conditions differ considerably between the two sides of the e-commerce platform.
- (60) When it comes to the seller side, besides the main service of matching sellers and consumers and enabling sales, marketplaces often propose to sellers a number of other marketplace services, such as, payment services, complaints handling, storage, packaging and delivery.
- (61) When a consumer purchases a specific item on a marketplace from a third-party seller, the consumer has two separate legal relationships: one with the third-party seller (the relationship being essentially that of a buyer and a seller); and one with the marketplace. Within the context of that second relationship, the marketplace may offer additional guarantees that protect consumers when they purchase items sold and fulfilled by third-party sellers²².
- (62) While sellers typically pay a (commission) fee to the marketplace operator for the provision of the marketplace services, marketplaces usually do not charge consumers for their services provided in the context of individual transactions with third-party sellers. Marketplace service providers typically have detailed terms and conditions for

²¹ See Commission Decisions in Case COMP/37451, *Deutsche Telekom AG*, paragraphs 92 and 93; and Case COMP/38233, *Wanadoo Interactive*, paragraph 205. See also Case C-27/76 *United Brands and United Brands Continentaal v Commission*, EU:C:1978:22, paragraph 44; Case C-322/81, *Michelin v Commission*, EU:C:1983:313, paragraph 26, Case C-247/86, *Alsattel v Novasam*, EU:C:1988:469, paragraph 15.

²² See for example A-to-Z Guarantee Germany: https://www.amazon.de/gp/help/customer/display/ref=hp_lpmp_aaz?nodeId=201889410 and France: <https://www.amazon.fr/gp/help/customer/display.html?nodeId=201889410>, accessed on 26 November 2019.

third-party sellers with fundamentally different obligations than the terms and conditions which they have for consumers that purchase goods on the marketplace.

- (63) Marketplace operators are typically not legally responsible for the transactions carried out on their platform; they do not own the products traded on the marketplace by third-party sellers, thus they do not bear the usual costs and risks that retailers typically do. Marketplaces do not determine the selling price of third-party sellers' products and do not enter into direct contractual purchasing agreements with consumers. On most e-commerce platforms, third-party sellers are in charge of the delivery and bear the responsibility for damaged products.
- (64) Given the above, in the SO and the Preliminary Assessment, the Commission came to the preliminary conclusion that there are separate product markets on a two-sided e-commerce platform, namely, the market for the provision of online marketplace services to third-party sellers and the market for the provision of online marketplace services to consumers.

4.2.2.2. The seller side: the relevant product market

- (65) In the SO and the Preliminary Assessment, the Commission examined to what extent there is substitutability between (i) selling on marketplaces versus selling via own webshops; (ii) selling on marketplaces versus selling on social media and price comparison websites; and (iii) selling on marketplaces versus selling via brick and mortar shops. Supply-side considerations were also analysed.
- (66) First, as regards possible substitution with selling via own webshops, an important determinant of the extent to which those may constrain marketplaces is the ability of retailers (and the associated costs) to attract consumers away from marketplaces to their webshops in response to changes in the relative costs of selling through the two channels. In that respect, factors such as the existence of certain particularly successful loyalty programmes (in particular Amazon Prime), the fact that a large part of consumers start their product search directly on marketplaces²³ as well as certain aspects of the consumer's purchasing behaviour (a single transaction consisting of purchasing multiple items) lead to an increasingly large audience group that may primarily be reached via marketplaces.
- (67) From the seller's perspective, audience-building and preserving commercial independence from marketplaces is a viable strategy only for a limited number of large retailers whereas typical marketplace sellers are small-revenue sellers who are unlikely to be able to build up an own viable online shop which substitutes the marketplace option²⁴.
- (68) The biggest advantages of selling on an established e-commerce platform, in comparison to selling via an individual webshop, are the immediate access to a large consumer audience and thus the generation of potentially higher traffic for retailers²⁵ and the fact that selling on marketplaces requires different and potentially less

²³ See Statista: "Leading online sources where consumers worldwide search for products as of April 2021, accessed on 19 November 2021 and "On what type of platform do you start your online shopping?" for France, accessed on 19 November 2021.

²⁴ See for example Annex 35 to Amazon's response to the Commission's RFI of 18 July 2019.

²⁵ See for example a study conducted by Amazon among sellers which shows that [factors taken into consideration by sellers when choosing which marketplace to sell on], see pp. 77 and 44 of Annex Q8-Sellers-7, "Brand awareness and perception study" to Amazon's response to the Commission's RFI of 17 January 2020.

(operational) effort and costs compared to selling via an own webshop. In addition, consumer retention rates of marketplaces are higher compared to webshops²⁶.

- (69) Given the different features of marketplaces and webshops, sellers tend to use marketplaces and webshops in a different, often complementary way, depending on their specific needs.
- (70) From the supply-side perspective of the seller's side of the market, the services provided by e-commerce platforms and by webshops require different functionalities²⁷. Since marketplaces act as an intermediary between third-party sellers and consumers, they require different contractual relationships with third-party sellers and consumers. Marketplaces also have to provide a bundle of services to retailers, such as multi-party payment systems²⁸.
- (71) Second, in line with the Commission's findings in the *Google Shopping* case²⁹, the selling via price comparison websites constitutes a separate market distinct from selling via e-commerce platforms.
- (72) Similarly to price comparison websites, social media in the EEA rather appear to be advertisement and marketing platforms than a standalone sales channel as evidenced by the absence of (or the presence of hardly any) direct sales on the largest social media platforms in the EEA. Actual sales transactions are typically concluded outside these platforms³⁰. Thus, in the SO and the Preliminary Assessment, the Commission came to the preliminary conclusion that e-commerce platforms and social media channels are - from the perspective of retailers - not substitutable sales channels.
- (73) Third, retailers intending to reach consumers also have the possibility of setting up a brick and mortar shop (or network of shops). From the perspective of retailers, selling on e-commerce platforms has a number of features and characteristics that fundamentally distinguish it from selling in an offline environment. The structure of the initial investment costs and of the operating costs as well as the profitability time-span considerations are fundamentally different³¹. Also, as underlined in several past Commission and national competition authorities' decisions, online and offline channels have a fundamentally different geographic reach³². The market investigation carried out in this case also suggested that retailers consider online and offline sales

²⁶ See for instance "Shopper-First Retailing" by Salesforce, accessed on 21 February 2020 and Publicis Sapient 2018, p. 6.

²⁷ See responses to Q43 of the Commission's RFI to German retailers of 21 November 2018.

²⁸ See responses to Q37 of the Commission's RFI to German and French marketplace operators of 21 and 22 November 2018.

²⁹ See Commission decision of 27 June 2017 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 - *Google Search (Shopping)*, paragraph 246) (summary published in OJ C 9, 12.1.2018, p. 11), which was upheld by the Court (see Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, paragraphs 491 and 494).

³⁰ [marketplace operator]'s response to the Commission's RFI of 5 July 2021.

³¹ See for instance, a survey conducted by Amazon among sellers in Germany and France where respectively [factors taken into consideration by sellers when choosing which marketplace to sell on], see pp. 77 and 44 of Annex Q8-Sellers-7, "Brand awareness and perception study" to Amazon's response to the Commission's RFI of 17 January 2020.

³² See case summary of Decision B2-106/18 of the Bundeskartellamt (Karstadt/Kaufhof) of 9 November 2018, p. 3. See also Commission decisions COMP/M.8710 - *JD/Sonae MC/Balaiko/JDSH/Sport zone* of 17 January 2018, paragraph 38; COMP/M.4590 - *REWE/Delvita* of 25 April 2007, paragraph 18; COMP/M.5047 - *REWE/ADEG* of 23 June 2008, paragraph 27, COMP/M.4096 - *Carrefour/Hyparho* of 4 March 2006, paragraph 9; and Case No COMP/M.7259 - *Carphone Warehouse/Dixons* of 25 June 2014, paragraph 30.

channels as different and use them complementarily³³. Thus, in the SO and the Preliminary Assessment, the Commission came to the preliminary conclusion that e-commerce platforms (and more generally online sales) and brick and mortar shops are – from the perspective of retailers – not substitutable sales channels.

4.2.2.3. The seller side: the relevant geographic scope of the market

- (74) According to the Commission’s findings in the SO and the Preliminary Assessment, the vast majority of marketplaces focus on consumers located in the same country where the marketplace operates. Amazon itself has country-focused marketplaces where the language of the website is the language of the Member State in which it operates. Also, the vast majority of visits on the European Amazon marketplaces are domestic. For example, data on desktop visits shows that [70-80]%, [80-90]% and [80-90]% of traffic on Amazon’s German, French and Spanish websites respectively, originates from the “home” Member State³⁴. The situation is very similar for other competing marketplaces targeting Germany, France and Spain³⁵ where the traffic is predominantly domestic.
- (75) The national focus of the clear majority of marketplaces can be explained, to a large extent, by language preferences, by different consumer needs and by targeted national advertisement.
- (76) In view of the above, in the SO and the Preliminary Assessment, the Commission preliminarily found that the country in which the third parties who are selling on a marketplace are established seems to have little relevance for the geographic focus of the marketplace. Whereas foreign third-party sellers may benefit from the services offered by the marketplace operators in a given Member State, they do so in order to offer their products to consumers in these countries. Should a would-be marketplace seller wish to reach German consumers, it would need to select one or more of the marketplaces geared towards German consumers. Similarly, a seller wishing to reach French or Spanish consumers would have to select among the marketplaces targeting French or Spanish consumers, respectively.
- (77) Therefore, in the SO and the Preliminary Assessment, the Commission came to the preliminary conclusion that, given that the conditions of competition differ between Member States, but are similar within each Member State, the market for marketplace services for retailers is national in scope. For reasons of efficiency, the first investigation (*Amazon Marketplace*) focused on assessing the competitive situation in Germany and France. In the second case (*Amazon Buy Box*), the geographic scope of the investigation was enlarged to cover Spain. The assessment of Amazon’s market power in these three Member States is without prejudice to the competitive situation pertaining in other Member States.

4.2.2.4. The consumer side

- (78) The SO and the Preliminary Assessment focused on Amazon’s market power vis-à-vis third-party sellers, which depends on the substitutability of e-commerce platforms with alternative distribution channels from the perspective of third-party sellers as opposed to consumers. Therefore, the question whether from the consumer perspective e-

³³ Response to Q5 and Q7 of the Commission’s RFI to German and French retailers of 21 and 22 November 2018, respectively.

³⁴ See Similar Web “Traffic share by country” data for the period July/August 2018 – July 2021.

³⁵ See Similar Web “Traffic share by country” data for the period July 2018 – July 2021 for French and German marketplaces and for the period October 2018 – October 2021 for Spanish marketplaces.

commerce platforms are part of the same relevant product market as online webshops of retailers was left open.

- (79) The potential constraints stemming from the consumer side that are relevant for the assessment of market power on the seller side have been taken into account in the SO and the Preliminary Assessment and are set out in recitals (88) to (91) and (94) of this Decision.

4.2.3. *Preliminary conclusion on relevant markets*

- (80) In light of the significant differences between the consumer and seller sides of e-commerce platforms, the asymmetric demand and supply-side characteristics of those two user groups, as well as the assessment of substitution between the alternatives available to retailers to reach consumers, in the SO and the Preliminary Assessment, the Commission reached the preliminary conclusion that the relevant markets for the purposes of analysing the Conducts are the markets for marketplace services for retailers to reach consumers located in individual Member States. For the reasons set out in recital (77), the Commission has focused its investigation on the relevant markets in Germany, France and Spain³⁶.

4.3. **Amazon's dominant position on the relevant markets**

- (81) The considerations concerning Amazon's dominant position are equally applicable to both investigations covered by this Decision.

4.3.1. *Principles*

- (82) The dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market(s) by affording it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers³⁷.
- (83) The existence of a dominant position derives in general from a combination of several factors which, taken separately, are not necessarily determinative³⁸.
- (84) One important factor is the existence of very large market shares, which are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position³⁹. An undertaking which holds a very large market share for some time, without smaller competitors being able to meet rapidly the demand from those who would like to break away from that undertaking, is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position⁴⁰. That is the case where an

³⁶ While the SO focussed on markets for marketplace services for retailers to reach consumers in Germany and France, the Preliminary Assessment also addressed the market for marketplace services to reach consumers in Spain.

³⁷ Case C-27/76, *United Brands and United Brands Continentaal v Commission*, EU:C:1978:22, paragraph 65; Case C-85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 38; Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, paragraph 229.

³⁸ Case C-27/76, *United Brands and United Brands Continentaal v Commission*, EU:C:1978:22, paragraph 66.

³⁹ Case C-85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 41; Case T-65/98, *Van den Bergh Foods v Commission*, EU:T:2003:281, paragraph 154.

⁴⁰ Case C-85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 41; Case T-139/98, *AAMS v Commission*, EU:T:2001:272, paragraph 51; Case T-65/98, *Van den Bergh Foods v Commission*,

undertaking has a market share of 50% or above⁴¹. The ratio between the market share held by an undertaking and that of its nearest rivals is also a highly significant indicator of possible dominance⁴².

- (85) Another important factor when assessing dominance is the existence of barriers to entry or expansion, preventing either potential competitors from having access to the market or actual competitors from expanding their activities on the market⁴³. Such barriers may result from a number of factors, including exceptionally large capital investments that competitors would have to match, network externalities that would entail additional cost for attracting new customers, economies of scale from which newcomers to the market cannot derive any immediate benefit, and the actual costs of entry incurred in penetrating the market⁴⁴.

4.3.2. *Amazon's dominance*

- (86) According to the Commission's estimates presented in the SO and the Preliminary Assessment, Amazon's market share has been almost constantly growing at the expense of its competitors and has reached 50% or more since at least 2016 and [60-70]% or more since at least 2019 in the markets for marketplace services for retailers to reach consumers located in Germany, France and Spain.
- (87) None of the competitors is comparable to Amazon in terms of size, profile and services offered.
- (88) In terms of the potential competitive constraints stemming from the consumer side of the two-sided market, in the SO and the Preliminary Assessment, the Commission has taken the view that that Amazon has access to a large consumer audience. With [80-90]% of online shoppers using Amazon in Germany⁴⁵, [80-90]% of online shoppers using Amazon in France⁴⁶ and [70-80]% of online shoppers using Amazon in Spain⁴⁷, Amazon is by far the most used online shop.
- (89) Moreover, Amazon has developed a strong retailer brand and high consumer trust, which are difficult to challenge for any existing competitor or market entrant⁴⁸.
- (90) Furthermore, the relevant markets are characterised by the existence of high barriers to entry and expansion. First, there exist strong indirect network effects that are crucial for continued growth of marketplaces: the broad consumer base attracts more third-party sellers; the more third-party sellers join the marketplace, the wider the product selection on the platform becomes, which again attracts consumers. Getting the

EU:T:2003:281, paragraph 154; Case T-336/07, *Telefónica SA v Commission*, EU:T:2012:172, paragraph 149.

⁴¹ Case C-62/86, *Akzo v Commission*, EU:C:1991:286, paragraph 60; Case T-340/03, *France Télécom SA v Commission*, EU:T:2007:22, paragraph 100; Case T-336/07, *Telefónica SA v Commission*, EU:T:2012:172, paragraph 150.

⁴² Case T-219/99, *British Airways v Commission*, EU:T:2003:343, paragraph 210.

⁴³ Case C-27/76, *United Brands and United Brands Continentaal v Commission*, EU:C:1978:22, paragraph 122, Case C-85/76, *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 48.

⁴⁴ Case C-27/76, *United Brands and United Brands Continentaal v Commission*, EU:C:1978:22, paragraphs 91 and 122.

⁴⁵ See Statista "Online shops Amazon in Germany Brand Report", accessed on 16 November 2021.

⁴⁶ See Statista "Online shops Amazon in France Brand Report", accessed on 16 November 2021.

⁴⁷ See Statista "Online shops Amazon in Spain Brand Report", accessed on 16 November 2021.

⁴⁸ See pp. 46, 47 and 48 for France, pp. 79, 80 and 81 for Germany, and pp. 57, 58 and 59 for Spain of Annex Q8-Sellers-7 "Brand awareness and perception study" to Amazon's response to the Commission's RFI of 17 January 2020.

positive feedback effects of a marketplace into motion is highly challenging for any new entrant or competitor because of the need to attract users on both sides of the e-commerce platform simultaneously.

- (91) Second, there is a significant proportion of consumers who start their shopping journey on Amazon's marketplace and are therefore much more difficult to reach through any other sales channel⁴⁹.
- (92) Third, Amazon ranks in the top five companies in the world in terms of market capitalisation (i.e. the total value of the companies' shares) and is by far the highest ranked amongst marketplace service providers⁵⁰, which allows it to sustain losses better than any other e-commerce platform.
- (93) Based on the above considerations and given the large number⁵¹ and the small size of many of the third-party sellers present on its e-commerce platforms⁵², in its SO and the Preliminary Assessment, the Commission came to the preliminary conclusion that Amazon is able to act to a large extent independently of third-party sellers. Moreover, while the availability of product selection is central to Amazon, on average there are a number of third-party sellers offering the same ASIN especially when it comes to higher demand, best-selling products. Therefore, in the SO and the Preliminary Assessment, the Commission preliminarily concluded that individual third-party sellers are unable to exert sufficient countervailing buyer power vis-à-vis Amazon.
- (94) Finally, the threat from consumers switching to alternative sales channels as a result of sellers' switching or increasing price of a product on Amazon's marketplace is limited by the fact that an important share of Amazon consumers purchase multiple items. In the case of composite shopping baskets, the consumers are likely to look for the same product from a different seller or a substitutable product on the same marketplace. Furthermore, Amazon Prime creates strong incentives for consumers to increase and focus their purchases on the Amazon marketplace. This is evidenced, on the one hand, by the growing number of Prime users ever since its introduction as well as the fact that the average spend of Prime users has been increasing with a faster rate year-on-year compared to the increase in the spending of non-Prime consumers on Amazon⁵³.

4.3.3. Preliminary conclusion on dominance

- (95) In light of the reasons outlined above, in the SO, the Commission took the preliminary view that Amazon has held a dominant position on the market for the provision of marketplace services for retailers to reach consumers located in Germany and France as from 1 January 2017. In the Preliminary Assessment, the Commission took the preliminary view that Amazon has held a dominant position on the market for the

⁴⁹ For example, a study by the consumer association of the federal State of North-Rhine-Westphalia (Verbraucher Zentrale NRW) in Germany found that two out of three consumers start their shopping journey on Amazon: "Händler bieten bei Amazon nicht immer günstigsten Preis", accessed on 11 March 2020.

⁵⁰ See the ranking by Statista "Top Companies in the World by Market Value", accessed on 6 March 2020.

⁵¹ See Annex 35 of Amazon's response to the Commission's RFI of 18 July 2018.

⁵² The vast majority of third-party sellers generate only modest sales on Amazon. Out of the active professional sellers (sellers that had at least one sale on the Amazon marketplace), [70-80]% in Germany and [80-90]% in France generated less than EUR [redacted] in value of sales in 2018. See Annex 35 to Amazon's response to the Commission's RFI of 18 July 2019.

⁵³ Tables Q10b.1 and Q10b.2 in Amazon's response to the Commission's RFI of 17 January 2020, and Annex Q27 to Amazon's response to the Commission's RFI of 6 July 2020.

provision of marketplace services for retailers to reach consumers located in Spain as from 1 January 2016 and those located in Germany and France as from 1 January 2017.

4.4. Conducts giving rise to concern

(96) In the SO, the Commission came to the preliminary conclusion that Amazon Retail's use of non-public third-party seller data for the purposes of its own retail operations is capable of distorting, and likely to distort, the competitive process on Amazon's e-commerce platforms by generating a structural competitive advantage for Amazon Retail, in breach of Article 102 TFEU.

(97) In the Preliminary Assessment, the Commission expressed preliminary concerns that the Buy Box-related Conduct and the Prime-related Conduct artificially favoured Amazon Retail and FBA sellers over MFN sellers and may constitute an abuse of Amazon's dominant position under Article 102 TFEU.

4.4.1. The Conduct subject to the investigation in case AT.40462 – Amazon Marketplace: the Data-use Conduct

4.4.1.1. The role of data within Amazon

(98) Amazon Retail's operations and internal decision-making mechanisms are largely automated: retail decisions are, to a large extent, no longer taken by individual employees, but by Amazon's automated systems that draw on large data-sets. Identifying selection gaps, taking the decision to enter or exit certain product markets, identifying potential suppliers to Amazon Retail, setting prices or managing inventories are typical examples of Amazon Retail decisions nearly exclusively done by dedicated algorithmic tools.

4.4.1.2. Amazon's contractual provisions on data use and its internal data policy

(99) Third-party sellers who wish to list their products on Amazon's e-commerce platforms in the EU, must enter into the Business Solutions Agreement ("BSA") with ASE⁵⁴. Although Amazon introduced some changes to the BSA since its introduction, the terms of the BSA remained largely unchanged. In particular, regarding data made available to Amazon by third-party sellers, third-party sellers grant ASE broad royalty-free usage rights, applicable to all affiliates of Amazon. Regarding transaction information generated on the Amazon e-commerce platform, the provisions grant Amazon exclusive ownership rights and do not contractually limit its ability to commercially make use of those data for any purpose. The agreements grant limited usage rights to third-party sellers.

4.4.1.3. Access to data by Amazon employees: Amazon's internal data policy applicable to employees

(100) Amazon has put in place an internal data policy to guide access, use and disclosure of certain third-party seller information by Amazon employees. [Redacted] main internal policy documents set out the principles for data usage within Amazon: [Amazon internal policy documents][⁵⁵]. Those are purely internal documents applicable to Amazon employees that are not communicated to third-party sellers.

(101) According to those documents, Amazon employees should access, use and disclose information that is considered confidential (either Amazon or third-party confidential information) only to the extent necessary to perform their job responsibilities, and

⁵⁴ See Amazon's response to Q11 of the Commission's RFI of 25 November 2016.

⁵⁵ [Redacted].

should disclose such information internally only to other employees who need to know such information to perform their job responsibilities.

- (102) [Description of Amazon's internal policies regarding the use of Seller data by Amazon employees]⁵⁶.
- (103) [Description of Amazon's internal policies regarding the use of Seller data by Amazon employees]^{57 58}.
- (104) [Description of Amazon's internal policies regarding the use of Seller data by Amazon employees].
- (105) Notwithstanding the above internal policy, every employee in Amazon's retail and marketplace business technically has access to the central data system containing individual seller-level information. Moreover, Amazon's submissions [Amazon's assessment of effectiveness of its internal policy].

4.4.1.4. Data access by Amazon Retail's automated systems

(a) General considerations

- (106) In the SO, the Commission set out how Amazon Retail's decision-making processes rely on software systems that collect all relevant data, including those relating to third-party sellers' listings and transactions on the Amazon e-commerce platform. The collected data are stored in various locations. Amazon's main data-infrastructures are centralised and serve algorithmic tools for both Amazon's marketplace and retail operations.
- (107) While Amazon Retail's automated systems and artificial intelligence applications build on individual third-party seller data, those will typically be aggregated, and the decision-making mechanisms will typically rely on such aggregated data. The aggregation of the raw data can however be of any level, depending on the business needs: product category-level aggregations, ASIN-level aggregations, daily or weekly aggregations, brand specific aggregations.
- (108) The real-time availability of individual/transaction- or ASIN-level data enables Amazon to generate the most relevant level and type of aggregation in accordance with its specific business needs.

(b) Types of data relied on by Amazon Retail

- (109) The SO also detailed how Amazon's marketplace and retail businesses have access to, and use, three different types of data from the Amazon e-commerce platform: (i) data that third-party sellers make directly available to Amazon, (ii) data that is generated from/based on third-party sellers' product listings and transactions on the Amazon e-commerce platform, and (iii) data otherwise generated on the Amazon e-commerce platform. This Decision concerns the first two types of data. It does not cover other types of data generated on the Amazon e-commerce platforms and that is not based on third-party sellers' data.
- (110) Data are typically available in Amazon's various data-centres, on a daily, weekly and monthly basis. They are grouped to identify relevant observations relating to different

⁵⁶ See for instance Amazon's response to Q11 and Q22 of the Commission's RFI of 31 March 2017.

⁵⁷ See Amazon's response to Q8 of the Commission's RFI of 31 March 2017.

⁵⁸ See Amazon's response to Q8 of the Commission's RFI of 31 March 2017.

business needs. In particular, observations are grouped together [description of manner in which observations are grouped].

- (111) Amazon created a number of aggregate listings, such as lists of “Best sellers”, or “Hot Releases” that it shares with third-party sellers. Amazon also makes certain data available to sellers, typically via its Marketplace Web Services. In addition, third-party service providers also scrape Amazon’s websites and offer sales optimisation services based on the data they can access. Data relating to third-party sellers’ listings and transactions, which are shared with third-party sellers, or otherwise accessible to those sellers, are not covered by the preliminary competition concerns set out in the SO. Instead, these preliminary concerns focus on the additional data relating to third-party sellers’ listings and transactions that are not available to and cannot be replicated by the third-party sellers, but are available to, and used by Amazon Retail for its own retail operations (the “data delta”).
- (112) As explained in the SO, the data delta covers all non-publicly available data of third-party sellers relating to their product listings and transactions, such as their individual sales and revenues data, their transaction prices, shipment data, performance data such as cancellations or refunds, activated guarantees, or the number of visits (“glance views”) to their product offers. The Commission preliminarily found that, contrary to Amazon Retail, which has full access to and uses such individual, real time data of all of its third-party sellers to calibrate its own retail decisions, sellers have access only to *their own* individual listings and sales data.

(c) Use-cases for data by Amazon Retail, in particular by its automated systems

- (113) The most typical “use cases”, as set out in the SO, where Amazon Retail, relies on non-publicly available data relating to third-party sellers’ product listings and transactions to calibrate its retail decisions, are indicated below.

Starting and ending the sale of a product

- (114) For its decisions to start and end the sale of a product, Amazon relies essentially on the following [redacted] automated tools: [Amazon tools]. Third-party seller listings and sales data, such as [description of data types and aggregation] flow directly into these automated tools and inform the operational decisions.
- (115) Such data provide precise offer and demand characteristics (including insights such as the [description of insights gained by Amazon on offer and demand characteristics] that typically contribute to optimising Amazon’s estimated future revenue and cost calculations, and to setting its internal “profitability thresholds” that directly affect its entry and exit decisions in all product categories.

Pricing

- (116) Amazon Retail’s automated pricing system uses numerous metrics to set retail prices, including parameters that relate to non-publicly available data based on third-party sellers’ listings and transactions, such as [description of metrics used by Amazon to set retail prices]. In defining this price, Amazon relies on information from its [redacted] algorithm that chooses the Featured Offer out of all eligible offers.
- (117) This is an [description of Amazon's pricing systems].
- (118) While third-party sellers’ pricing tools can also send requests to the [Amazon algorithm], Amazon Retail benefits from advantageous conditions of access to the [Amazon algorithm]’s API feeds and advantageous conditions for the use of such

information (such as repricing) as compared to third-party sellers, in particular for those products with the highest demand where price changes are most frequent.

Inventory planning and management

- (119) Amazon’s automated inventory planning and management system uses a variety of parameters and inputs to manage inventory levels for each product. These typically include data generated from third-party sellers’ listings and sales, such as [description of metrics used by Amazon to manage inventory levels]. Such data are typically relied on by Amazon to calibrate its ordered quantities and ensure optimal availability of its listings while avoiding overstock risks in general and in particular when launching new products.

The targeting of particular third-party sellers for Vendor selection

- (120) Based on numerous responses of third-party sellers and of brands/manufacturers to the Commission’s RFIs⁵⁹, the Commission expressed preliminary concerns in the SO that non-publicly available third-party seller transaction data flows from Amazon Marketplace to Amazon Retail, with a view to identifying third-party sellers on the marketplace or other suppliers (wholesalers or manufacturers of the products) that Amazon Retail’s Vendor Recruitment teams should approach to invite them to become direct suppliers to Amazon Retail (“Vendors”).

(d) Preliminary view on Amazon’s data-advantage

- (121) The Commission preliminarily found that Amazon Retail’s business operations access and rely directly on non-publicly available data, provided by or generated from third-party sellers’ listings and transactions on Amazon Marketplace.
- (122) In the SO, the Commission found that, in terms of *volume*, the data concerns all observable metrics generated from a total of more than [redacted] billion ASINs listed by third-party sellers on Amazon’s EU marketplaces each year. In terms of the *variety* of data, the non-public third-party seller data includes information about all observable metrics of third-party listings and sales, in all product categories available on Amazon Marketplace. Most importantly, the data Amazon Retail has access to and that feed into its automated systems, is very *granular*: it is based on and is aggregated from raw data relating to each individual third-party seller and each individual listing and transaction. In terms of *velocity*, Amazon’s access to third-party seller related data is immediate as the listings and transactions take place on its marketplaces, generating real-time, “first hand” data. Third-party listings and transactions data are highly *valuable*, which is why Amazon decided to contractually limit its external disclosure⁶⁰. The fact that “aggregated Seller information” is “commercially sensitive” is explicitly acknowledged in Amazon’s [internal policy document]: “[redacted].”⁶¹
- (123) In its SO, the Commission came to the preliminary conclusion that real-time access to and use of such volume, variety and granularity of non-publicly available data about its retail competitors, generates a significant competitive advantage for Amazon Retail, in each of the different decisional processes that drive its retail operations.

⁵⁹ See for instance of [third-party seller/manufacture]’s response to the Commission’s RFI of 4 October 2019; [third-party seller/manufacture]’s response to the Commission’s RFI of 4 October 2019; [third-party seller/manufacture]’s response to the Commission’s RFI of 22 October 2018; [third-party seller/manufacture]’s response to the Commission’s RFI of 19 December 2018; [third-party seller/manufacture]’s response to the Commission’s RFI of 29 November 2018.

⁶⁰ See [internal policy document].

⁶¹ See [internal policy document].

4.4.2. *The Conduct subject to the investigation in case AT.40703 – Buy Box*

4.4.2.1. The Buy Box-related Conduct

- (124) In its Preliminary Assessment, the Commission observed that, while the Buy Box qualification process and the identification of the Featured Offer have been evolving over time, different conditions continued to apply to MFN third-party offers and to AFN offers, at least for certain aspects of that qualification and identification process. Moreover, the Buy Box qualification process and the identification of the Featured Offer, including the discrepancies identified in the Commission's investigation, applied in the same manner to all of Amazon's marketplaces in the EU⁶².

4.4.2.1.1. The Buy Box qualification process⁶³

- (125) As a first step, the Buy Box qualification process identifies eligible third-party sellers that meet certain requirements set by Amazon. MFN sellers have always had to fulfil certain eligibility criteria, while AFN sellers have always been considered as eligible for the Buy Box by default.

4.4.2.1.2. Identification of the Featured Offer

- (126) In a second step, the [redacted] algorithmic tool identifies the Featured Offer from the list of eligible offers. [Description of the functioning of the Amazon algorithm]^{64, 65}. The [Amazon algorithm] is used to rank the offers and the highest scored offer becomes the Featured Offer.

From 2015 to spring 2020

- (127) In the Preliminary Assessment, the Commission observed that in the period from 2015 to spring 2020, the "[Amazon algorithm] scores" of competing offers were calculated on the basis of various offer attributes, including [description of offer attributes],⁶⁶. The [offer attribute] ceased to be taken into account in April-May 2020, due to the introduction of a more precise measurement of [offer attribute].
- (128) For the identification of the Featured Offer, Amazon applied different methods to AFN and MFN offers⁶⁷. In particular, [offer attribute].
- (129) The Commission observed in the Preliminary Assessment that such a [redacted] rating was artificial, in that it did not mirror the actual performance of Amazon Retail and FBA sellers. Amazon Retail could not be rated by customers on the website, contrary to all other sellers. However, during the investigation, the Commission identified thousands of transactions where Amazon Retail had been rated by customers as a result of a technical error⁶⁸. Screenshots registered from various Amazon websites show that

⁶² There may have been differences in certain thresholds or weightings for short, transitory periods of time, typically around the gradual introduction of changes in all Amazon marketplaces.

⁶³ See Amazon's responses to Q47 of the Commission's RFI of 19 June 2018, to Q31 of the Commission's RFI of 12 December 2018, and footnote 78 of Amazon's response to the Commission's RFI of 18 July 2019.

⁶⁴ Automatic filters relate to various scenarios where Amazon estimates that the offer should be automatically disqualified, for example, [description of the functioning of the Amazon algorithm].

⁶⁵ [Amazon algorithm] score is the value attributed to each eligible offer by the [Amazon] algorithm, when ranking the competing offers. It is based on a combination of offer attributes. The weights of the different attributes are updated periodically.

⁶⁶ [description of offer attributes]. See Amazon's response to Q32 of the Commission's RFI of 12 December 2018.

⁶⁷ See Amazon's response to Q32 of the Commission's RFI of 12 December 2018.

⁶⁸ See Amazon's response to Q1 of the Commission's RFI of 30 November 2019, [description of Amazon's customer rating features].

Amazon Retail's offers were typically rated between [80-90]% and [90-100]% by customers, with MFN offers showing better scores in many instances. In the Preliminary Assessment, the Commission expressed preliminary concerns that assuming a 100% [description of seller performance metrics] rating for AFN offers was likely unjustified. Data submitted by Amazon relating to the characteristics of listings and transactions for 2017 and 2018⁶⁹, further suggests that AFN sellers also scored below 100% on other seller performance metrics, such as [description of seller performance metrics].

Since June 2020

- (130) In June 2020, Amazon replaced the [description of seller performance metrics] with direct metrics that track performance for all types of offers, irrespective of the identity or fulfilment channel of the seller (i.e. Amazon Retail, FBA, or MFN).
- (131) Amazon has also made changes to the [redacted] offer attribute [description of offer attribute]^{70 71 72}.
- (132) The Commission preliminarily found that Amazon unilaterally adjusts the [offer attribute] based on the observed or anticipated performance of the relevant carrier. However, [adjustments to offer attributes], the criteria that Amazon applies to these adjustments result in more significant adjustments for MFN offers, [description of the functioning of the Amazon algorithm]. As a result, a negative adjustment of the [offer attribute] is likely to have a greater impact on an MFN than on an AFN seller.

4.4.2.1.3. Delivery Promises

- (133) For each offer on the Amazon website, a delivery promise indicating the estimated date of delivery is shown to the customer. The delivery promise takes into account the customer's delivery address and chosen delivery option, [description of the calculation of the Delivery Promise].
- (134) As set out in the Preliminary Assessment, the Commission has preliminary concerns that Amazon unilaterally adjusts the delivery promise of an offer where "*there is a risk the estimated delivery date will be missed*", in order "*to protect the customer experience and prevent the erosion of customer trust*". As explained by Amazon: "*Amazon strives to display a fast yet reliable delivery promise which carriers are likely to meet, to avoid disappointing customers.*"⁷³ These adjustments are typically based on observed or anticipated carrier performance and on external conditions that are likely to affect delivery, such as adverse nature conditions, natural disasters or peak demand periods.
- (135) While similar adjustments may also apply to AFN offers, the criteria applied result (similarly to the adjustments of the [offer attribute]) in more significant adjustments for MFN offers, even when both MFN and AFN sellers face the same conditions.
- (136) In particular, [adjustments to the offer attributes]⁷⁴. In the Preliminary Assessment, the Commission stated that this adjustment often results in later delivery promises being

⁶⁹ See data submitted in response to Q20 of the Commission's RFI of 12 December 2018.

⁷⁰ See Amazon's response to Q43 of the Commission's RFI of 6 July 2020.

⁷¹ See Amazon's response to Q43 of the Commission's RFI of 6 July 2020.

⁷² See Amazon's response to Q8 of the Commission's RFI of 10 December 2020.

⁷³ See Amazon's response to Q18 to Q20 of the Commission's RFI of 10 December 2020.

⁷⁴ See point 18.8 of Amazon's response to the Commission's RFI of 10 December 2020.

shown for MFN offers, which can negatively affect their overall attractiveness to consumers.

(137) [adjustments to the offer attributes]⁷⁵.

4.4.2.2. The Prime-related Conduct

4.4.2.2.1. The role of Prime eligibility: Access to the Prime customer base

(138) As explained in the Preliminary Assessment, Prime membership provides for two core advantages to customers: free and quick delivery. [Attributes of Prime-labelled offers]. For an offer to carry the Prime label, both the seller and its offer need to satisfy Amazon's relevant eligibility criteria.

(139) The number of Amazon Prime customers has increased consistently since the inception of the programme, and the sharp rise of e-commerce during the Covid-19 pandemic has further contributed to its growth. Prime customers are much more active on the marketplace than non-Prime customers: [Amazon's assessment of consumer loyalty of Prime users]⁷⁶. Furthermore, between 2017 and 2019, the majority of Prime members' purchases in the German, French and Spanish stores concerned Prime offers, representing between [70-80] and [80-90]% of their total spend across these stores⁷⁷.

(140) Prime eligibility also plays an important role in Amazon's special deals, given that a number of promotional events which generate high levels of customer visits and sales, such as the Prime day, Prime deals and Coupons, are exclusively reserved to Prime sellers.

4.4.2.2.2. The role of Prime eligibility in winning the Buy Box

(141) Prime eligibility of sellers is also one of the metrics taken into account by the [Amazon] algorithm, which determines the Featured Offer displayed to the consumer.

(142) As set out in the Preliminary Assessment, all other attributes being equal, the Commission has preliminary concerns that Prime eligible sellers have higher chances of seeing their offers being displayed as the Featured Offer than non-Prime sellers, thereby benefitting from increased visibility of their offers and, accordingly, an increased number of transactions. Depending on a number of features, [offer attributes], it nearly always has a positive value, systematically providing an advantage to Prime sellers' offers over those of non-Prime sellers.

4.4.2.2.3. Conditions and criteria of Prime eligibility

(143) In the Preliminary Assessment, the Commission explained that Amazon Retail and FBA sellers are by default eligible for Prime, whereas MFN sellers can only be eligible for Prime if they qualify for Amazon's Seller Fulfilled Prime or "SFP" programme.

(a) SFP seller qualification

⁷⁵ *Ibid*, fn 108: [adjustments to the offer attributes].

⁷⁶ See the [redacted]: Annexes Q28.1 to Q28.14 to Amazon's response to the RFI of 6 July 2020, and Annex Q47 to Amazon's response to the RFI of 10 December 2020.

⁷⁷ See paragraph 12 of Amazon's response to the Commission's Preliminary Assessment of 15 June 2022 in case AT.40703.

- (144) SFP is currently open to all sellers that are shipping from the country corresponding to the domain name of the particular website. To qualify for SFP, sellers must have opted for Amazon's professional selling plan ⁷⁸.

SFP qualification until January 2021

- (145) Until January 2021, the qualification process in Amazon's European marketplaces required that [SFP qualification process].

SFP qualification since January 2021

- (146) The qualification criteria were updated in January 2021 for all Amazon European websites with an SFP programme; in particular the new qualification criteria now mirror [offer attribute] (see recital (145)).

(b) SFP carrier integration

- (147) To qualify for the SFP programme, a third-party seller has to enter into an agreement with a specific carrier that has been designated by Amazon as the official carrier for the SFP programme for a particular Amazon website. To date, each Amazon e-commerce platform in Europe has one approved carrier only and Amazon directly negotiates the terms of service for the SFP programme with these carriers.

- (148) To become an *SFP carrier* for a particular Amazon website, [information on the qualification criteria for Prime carriers].

- (149) [information on the qualification criteria for Prime carriers].

- (150) Whilst Amazon Retail and FBA sellers' Prime offers rely on several carriers for each of Amazon's e-commerce platforms, SFP sellers do not have any choice of carriers for the delivery of their Prime offers, and can only rely on the SFP carrier qualified by Amazon, under the terms set by Amazon.

(c) Qualification of SFP offers to the Prime label

- (151) [information on the qualification criteria for the SFP programme].

- (152) If these thresholds are not met for a particular offer from a Prime eligible seller, it will not be eligible to carry the Prime label (suggesting free *and quick* delivery) but may instead include alternative wording expressing that delivery of that offer is free for Prime members, [information on the display of the Prime label]. Delivery speed thresholds apply equally to Amazon Retail, FBA and SFP offers.

4.4.2.3. Preliminary conclusion on the Buy Box and Prime-related Conducts

- (153) As set out in the Preliminary Assessment, the Commission has preliminary concerns that the selection mechanisms that determine the Featured Offer, as well as the conditions and criteria for the selection of Prime eligible sellers and offers, introduce an artificial difference in treatment between AFN and MFN offers. On the one hand, the Commission preliminarily found that these disparities artificially favour Amazon Retail's own offers and, on the other hand, unduly discriminate between third-party sellers, i.e. between FBA and MFN sellers.

⁷⁸ Amazon offers individual and professional selling plans: the individual plan enables sellers intending to sell lower volumes to pay fees in line with each item sold, whilst the professional selling plan caters to sellers of larger volumes and entails a fixed monthly fee. In addition to these plan fees, other fees apply, such as referral fees for each item sold and high volume listing fees for sellers listing items that cumulatively exceed a certain value.

- (154) In relation to the **Buy Box-related Conduct**, the Commission preliminarily found that MFN sellers have been subject to qualification conditions that are not applicable to AFN sellers. [details about qualification conditions].
- (155) Furthermore, delivery promise adjustments, as displayed directly to customers, were also found to be applied more narrowly to AFN offers, often resulting in later delivery promises being shown for MFN offers and reducing the overall attractiveness of such offers. Moreover, MFN sellers have also not been permitted to offer same and next-day delivery, which the AFN is able to offer to consumers.
- (156) With regard to the **Prime-related Conduct**, the Commission does not take issue with Amazon implementing a set of criteria to ensure the quality of the Prime programme. Instead, it preliminarily found that a number of disparities in the selection of Prime eligible sellers and offers, [details about selection conditions], introduces an artificial difference in treatment between AFN and MFN offers.
- (157) As referred to in the Preliminary Assessment, this is also evidenced by large data sets submitted by Amazon⁷⁹ [details about qualification conditions]. As regards carrier-related criteria, contrary to AFN sellers, who have access to several carriers, to date Amazon has approved only one carrier per website for the SFP programme that MFN sellers can use. Furthermore, such MFN sellers cannot freely negotiate their delivery conditions and criteria with carriers. As a result, in the Preliminary Assessment, the Commission preliminarily finds that MFN sellers face an increased risk of lower carrier-related performance, higher costs and/or otherwise less competitive offers in relation to delivery related features, as compared to AFN sellers, having a direct impact on their offers' Prime eligibility.
- (158) The potential effects of the unequal treatment of AFN and MFN sellers under the Buy Box-related Conduct and the Prime-related Conduct (Sections 4.4.2.1 and 4.4.2.2) are set out in Section 4.7.

4.5. Substantial part of the internal market

- (159) Amazon has eight e-commerce websites in the EEA at the time of this Decision (amazon.de, amazon.fr, amazon.it, amazon.es, amazon.nl, amazon.se, amazon.pl and amazon.com.be) and delivers products across the EEA. The SO on the Data-use Conduct covers Amazon's e-commerce platforms in Germany and France, given their position as two of the largest Amazon stores in the EEA, whilst the Preliminary Assessment on the Buy Box and Prime-related conducts relates to Germany, France and Spain, as some of the largest Amazon stores in the EEA in terms of the number of sellers, consumers and cross-border deliveries. The Conducts have thus been taking place in a substantial part of the internal market.

4.6. Legal assessment

4.6.1. Principles

- (160) Article 102 TFEU and Article 54 of the EEA Agreement prohibit abusive practices by dominant undertakings which may cause damage to consumers directly, but also those which harm them indirectly through their impact on an effective competition structure⁸⁰.

⁷⁹ See data submitted in response to Q20 of the Commission's RFI of 12 December 2018.

⁸⁰ See Case C-202/07 P, *France Télécom v Commission*, EU:C:2009:214, paragraph 105; see also Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paragraph 24.

- (161) Dominant undertakings have a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the internal market⁸¹. Competition on the merits may, by definition, lead to the departure from the market, or the marginalisation, of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation⁸².
- (162) A system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators⁸³. Equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified⁸⁴.
- (163) Article 102 TFEU not only prohibits practices by an undertaking in a dominant position which tend to strengthen that position⁸⁵, but also the conduct of an undertaking with a dominant position in a given market that aims at extending, or leveraging, that position to a neighbouring but separate market, thereby distorting competition in that neighbouring market⁸⁶.
- (164) The specific prohibition against discrimination under Article 102, second paragraph, point (c), TFEU “*is intended to ensure that competition is not distorted in the internal market.*”⁸⁷ The commercial behaviour of the undertaking in a dominant position should not distort competition on an upstream or a downstream market, in other words, between suppliers or customers of that undertaking⁸⁸. For the conditions for applying this provision to be met, there must be a finding, not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words, to hinder the competitive position of some of the business partners of that undertaking in relation to the others⁸⁹.

⁸¹ Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, paragraph 57; Case C-209/10, *Post Danmark*, EU:C:2012:172, paragraph 23; Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, paragraph 134; Case T-286/09, *Intel v Commission*, EU:T:2014:547, paragraph 205; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, paragraph 152.

⁸² Case C-209/10, *Post Danmark*, EU:C:2012:172, paragraph 22.

⁸³ Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, paragraph 230; Case T-336/07, *Telefónica SA v Commission*, EU:T:2012:172, paragraph 204.

⁸⁴ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, paragraph 155 and the caselaw cited therein.

⁸⁵ Case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, EU:C:1973:22, paragraph 26; Case C-85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, paragraph 91; Case C-322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, paragraph 57.

⁸⁶ Case C-311/84, *Centre belge d'études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, EU:C:1985:394, paragraph 27; Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, paragraph 25; Case T-228/97, *Irish Sugar plc v Commission*, EU:T:1999:246, paragraph 166; Case T-201/04, *Microsoft v Commission*, EU:T:2007:289, paragraph 1344.

⁸⁷ Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA*, EU:C:2018:270, paragraph 24.

⁸⁸ Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA*, EU:C:2018:270, paragraph 24. See also Case C-95/04 P, *British Airways v Commission*, EU:C:2007:166, paragraph 143.

⁸⁹ See, to that effect, Case C-525/16, *MEO – Serviços de Comunicações e Multimédia SA*, EU:C:2018:270, paragraphs 25 and 37. See also Case C-95/04 P, *British Airways v Commission*, EU:C:2007:166, paragraph 144.

- (165) Article 102 TFEU prohibits behaviour that tends to restrict competition or is capable of having that effect⁹⁰, regardless of its success⁹¹.
- (166) The fact that a dominant undertaking's abusive conduct has adverse effects on a market distinct from the dominated one does not preclude the application of Article 102 TFEU⁹². It is not necessary that the dominance, the abuse and the effects of the abuse all occur in the same market.

4.6.2. *Application – Data-use Conduct*

- (167) In the SO, the Commission came to the preliminary conclusion that the Data-use Conduct, also taking into account the anti-competitive effects (see Section 4.7.) amounts to an abuse of Amazon's dominant position in breach of Article 102 TFEU.
- (168) In the context of its marketplace services to third-party sellers, Amazon gets access to large sets of data, including the non-publicly available data relating to those third-party sellers' listings and transactions on its e-commerce platforms.
- (169) The Commission preliminarily found that: (i) the systematic reliance by Amazon Retail's automated systems and employees on its online retail competitors' non-public data, obtained in the context of the provision of Amazon's dominant marketplace services to those sellers, shields Amazon Retail from some of the normal risks and costs of retail competition, and (ii) consequently, by recourse to methods that do not constitute competition on the merits, Amazon distorts competition with third-party sellers. This allows Amazon to leverage its dominant position on the markets for the provision of marketplace services into online retail markets.
- (170) In particular, Amazon relies on third-party seller related data to optimise and calibrate Amazon Retail's operational decisions, by drawing on that data for its automated tools and making it available to employees that are responsible for the different stages of the relevant decision-making.
- (171) In view of Amazon's market power, the size and volume of the affected markets and number of online retailers concerned, as well as the volume, the variety, velocity and overall value of the data involved, the Commission preliminarily concluded that Amazon's Data-use Conduct was capable of distorting the competitive process in online retail markets by generating a structural competitive advantage for Amazon Retail. In turn, this structural advantage would typically materialise via increased risks and costs of its online retail competitors for winning transactions and/or their partial foreclosure from the sale of highest-demand products, thereby depriving them of scale and marginalising them.

4.6.3. *Application – Buy Box-related Conduct and Prime-related Conduct*

- (172) In the Preliminary Assessment, the Commission expressed preliminary concerns that Amazon's favouring of its own retail offers over those of MFN sellers, and discriminatory terms between FBA and MFN sellers, for the purposes of the selection and display of the Featured Offer, as well as for the purposes of Prime seller eligibility and the Prime label, may constitute an abuse of Amazon's dominant position in at least Germany, France and Spain, as they constitute a practice falling outside the scope of competition on the merits and have potential anticompetitive effects (see Section 4.7.).

⁹⁰ Case C-549/10 P, *Tomra Systems and Others v Commission*, EU:C:2012:221, paragraph 68.

⁹¹ See, to that effect, Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, paragraphs 109 and 111.

⁹² Case C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, paragraph 25; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, paragraph 85.

- (173) Sales through the Buy Box represent the vast majority of all transactions on each of Amazon's e-commerce platforms. In the same vein, Prime eligibility and labelling are crucial for sellers to reach the most loyal and highest spending user-base (Prime users). Applying more favourable conditions and criteria to promote the offers of AFN over MFN sellers, both in the selection of the offer that features in the Buy Box, and in the eligibility of sellers to Prime and of their offers to the Prime label, is capable to distort competition on Amazon's e-commerce platforms.
- (174) In view of the importance of the Featured Offer for the visibility of offers and the ability of sellers to generate transactions, the Preliminary Assessment came to the preliminary conclusion that Amazon's artificial settings that *favour Amazon Retail's offers* in the ranking (and thus display) of offers by the [Amazon] algorithm, is capable of distorting competition on its e-commerce platforms. In particular, the Preliminary Assessment suggests that such a systemic advantage in the access to the Buy Box favours Amazon Retail at the expense of competing MFN sellers, and limits MFN sellers' ability to compete with Amazon Retail on the merits.
- (175) The potential anti-competitive effects of the favouring of Amazon Retail's own offers in the Buy Box related Conduct are addressed in more detail in Section 4.7.
- (176) In view of the importance of the Featured Offer for the visibility of offers and the ability of sellers to generate transactions, Amazon's artificial settings *in favour of FBA sellers* lead to FBA sellers benefitting from increased opportunities to generate views and transactions on Amazon's e-commerce platforms as compared to MFN sellers. The Preliminary Assessment came to the preliminary conclusion that such inbuilt advantage in the ranking and display of offers by the application of dissimilar terms to equivalent offers by different groups of sellers is likely to place MFN sellers at a structural competitive disadvantage in relation to FBA sellers and is thus capable to distort competition between them.
- (177) The potential anti-competitive effects of the discrimination between FBA and MFN sellers in the Buy Box related Conduct are addressed in more detail in Section 4.7.

4.7. Potential anti-competitive effects

4.7.1. Principles

- (178) Article 102 TFEU prohibits abusive conduct that tends to restrict competition or is capable of having that effect⁹³, regardless of its success⁹⁴.
- (179) The objective of undistorted competition implies that competition takes place on a fair basis that is not adversely affected either by agreements between undertakings that restrict or eliminate competition, or by the unilateral conduct of dominant undertakings that abuse their power on the market in order, also, to restrict or eliminate competition⁹⁵.
- (180) Article 102 TFEU covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition⁹⁶.

⁹³ Case C-549/10 P, *Tomra v Commission*, EU:C:2012:221, paragraph 68.

⁹⁴ See, to that effect, Case C-457/10 P, *AstraZeneca v Commission*, EU:C:2012:770, paragraphs 109 and 111. See also Case T-219/99 *British Airways v Commission*, EU:T:2003:343, paragraphs 297 and 298.

⁹⁵ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, EU:T:2021:763, paragraph 433.

⁹⁶ Case C-209/10, *Post Danmark*, EU:C:2012:172, paragraph 20.

4.7.2. *Potential effects of the Data-use Conduct*

- (181) As set out in the SO, the Commission has preliminary concerns that the Data-use Conduct is capable of having, and likely to have, anti-competitive effects in online retail markets on Amazon's e-commerce platforms.
- (182) The Commission expressed its preliminary concern that the Conduct has the potential to affect competition between Amazon Retail and third-party sellers for all ASINs that both third-party sellers and Amazon Retail have been, are, or could start, listing. As a result, Amazon Retail's reliance on third-party seller data has the potential to directly or indirectly affect all third-party sellers on its e-commerce platforms.
- (183) The potential effects of the Data-use Conduct are structured along the lines of the different data-use cases that the data serves: typically Amazon Retail's decisions to start selling a product, its pricing decisions, inventory management and planning, as well as its Vendor selection decisions. The Commission expressed its preliminary concern that these data-use cases typically generate, on the one hand, a structural competitive advantage for Amazon Retail over third-party sellers competing on its e-commerce platforms, and on the other hand, increased risks and costs to third-party sellers in order to generate transactions on the Amazon e-commerce platforms, in competition with Amazon Retail. As a result, the Commission preliminarily found that the Data-use Conduct could ultimately lead to largely foreclosing third-party sellers from the sale of the highest demand products where Amazon Retail is typically competing. Informing and adjusting Amazon Retail's offers based on third-party seller data enables Amazon to largely control the outcome of competition on its e-commerce platforms and cap the ability of third-party sellers to become viable competitors of Amazon Retail.
- (184) For the purposes of its **decisions to start listing** an ASIN, the Commission preliminarily found that Amazon relies on a great number of third-party seller metrics. By relying on those non-publicly available, real-time data to swiftly and best identify expected consumer demand and profitability, Amazon Retail can maximise its profitability while shielding itself from the initial costs and risks of new product launches in retail competition.
- (185) Listings, sales and revenues data provided to the Commission by Amazon⁹⁷ show that Amazon has been able to generate the overwhelming share (typically between 50 to 90%) of the sales and revenues of entire product categories such as audio, TV & home theatre, desktops and laptops, computer components, household appliances, small appliances, printers & ink, DVD & Blu-ray, tablets & accessories, GPS, Auto & Sports, baby toys, while offering only a very limited share (typically between 2 to 15%) of all available products (ASINs) in those product categories.
- (186) The evidence on the file provides the following indications, as expressed in the SO:
- [Information on Seller and Amazon Retail sales trends in the Amazon Stores];
 - Amazon Retail is systematically capturing a large share of the revenues of best-selling products on its e-commerce platforms. For products where Amazon is competing with third-party sellers, it typically wins a large share of the transactions, nearly immediately after its market entry. By skimming off the value of transactions on high demand products, Amazon Retail is depriving third-party sellers of *scale efficiencies*. Since there are sizeable scale efficiencies

⁹⁷ See data provided by Amazon in response to Q7 and Q8 of the Commission's RFI of 19 June 2018.

in retail, typically in sourcing, inventory management and shipping, pushing third-party sellers to lower turnover products limits the competitiveness of third-party sellers and renders them weaker competitors of Amazon Retail;

- Amazon Retail’s entry decisions automatically and systematically lead to, and are likely to continue to lead to, a reduced presence of third-party sellers and, therefore, reduced competitive pressure on Amazon Retail in the sale of best-selling products on the Amazon e-commerce platforms. This systematically reduced presence of third-party sellers in higher volume products where Amazon is competing, is consistent with the systematic advantage of Amazon Retail stemming from the Data-use Conduct.
- (187) For the purposes of its **pricing decisions**, Amazon Retail relies on information from the [Amazon] algorithm, which uses and compares all relevant data on third-party sellers and offers. By its advantageous position for testing each of its prices against the [Amazon] algorithm before posting them, Amazon Retail is able to optimise its prices more efficiently compared to third-party sellers.
- (188) As set out in the SO, the Commission has preliminary concerns that the relative disadvantage of third-party sellers in terms of (re)pricing possibilities and efficiency may lead to increased risk of loss of transactions and revenue for third-party sellers and, eventually, to stop selling the relevant products. Indeed, it appears that third-party sellers typically exit the market when Amazon Retail enters.
- (189) These increased risks of revenue loss and of exiting of third-party sellers contribute to the Data-use Conduct’s ability and likelihood to result in the long-term marginalisation of third-party sellers on the Amazon e-commerce platforms and to reduced competitive pressure on Amazon Retail.
- (190) As set out in the SO, for the purposes of its **inventory management and planning decisions**, Amazon Retail’s tools and teams rely on various non-publicly available metrics relating to third-party sellers’ listings and sales, [information about metrics relating to third-party sellers’ listings and sales], allowing Amazon Retail to consistently improve its demand forecasts for particular products. Forecast accuracy improves Amazon Retail’s inventory planning and thus the overall performance of Amazon Retail. The more precisely – based inter alia on non-public third-party seller data – Amazon Retail’s inventory management is able to forecast the optimal level of purchase orders, the less likely it is that Amazon Retail runs out of stock and foregoes sales.
- (191) Available evidence shows that Amazon Retail relies, amongst others, on [information about metrics relating to third-party sellers’ listings and sales] to limit overstock risk when launching new products.
- (192) As set out in the SO, optimal product availability is a crucial metric both for winning the Buy Box and for the eligibility to sell under the Prime label. Amazon Retail’s ability to better control both price-competition and stock levels, based on the relevant non-public third-party seller data and privileged access to the [Amazon algorithm] (and thus the data the [Amazon algorithm] relies on), provides it with a significant competitive advantage.
- (193) To set the optimal level of inventories and manage stock levels (inventory gaps, overstock situations), third-party sellers need to take higher risks and make either more significant losses than Amazon Retail or incur increased costs, contributing to their

likely marginalisation on the Amazon e-commerce platforms, and the reduced competitive pressure on Amazon Retail.

- (194) For the purposes of its **Vendor selection decisions**, Amazon Retail relies on [data relied on by Amazon for the purposes of its Vendor selection decisions]. By relying on such data, Amazon Retail is able to identify suppliers that have already shown high performance capabilities on the Amazon Marketplace, thereby avoiding some of the normal risk and costs of supplier recruitment that other retailers must bear. In addition, as retailers and brands/manufacturers explain, when they achieve high performance on the Amazon e-commerce platforms, Amazon Retail's Vendor recruitment teams would contact them and propose to them to become Amazon Retail's suppliers. Hundreds of third-party sellers are successfully recruited by Amazon each year for each e-commerce platform, to become Vendors and stop selling directly on the e-commerce platform.
- (195) The Commission expressed its preliminary concerns that, by relying on data [data relied on by Amazon for the purposes of its Vendor selection decisions] to (i) identify highest performing suppliers, as well as to (ii) identify and recruit hundreds of best-performing sellers as Vendors from each European marketplace, each year, Amazon is limiting the normal risk and costs of supplier choice and is also directly eliminating well-performing competitors for the sale of the relevant products on its e-commerce platforms.
- (196) On the basis of the above, in its SO, the Commission reached the preliminary conclusion that the reliance on non-publicly available data relating to third-party sellers' listings and transactions, obtained in the context of the provision of marketplace services to third-party sellers, enables Amazon Retail to calibrate its competing offers for the most profitable, high demand products, thereby generating increased risks and/or costs for third-party sellers when competing with Amazon Retail.
- (197) This structural data-advantage over third-party sellers in Amazon Retail's operational decisions was preliminarily found to contribute to the likely marginalisation of third-party sellers and to the likely limitation of their ability to grow into viable competitors of Amazon Retail. The Data-use Conduct is thus capable of distorting retail competition on Amazon's dominant e-commerce platforms, affecting the structure of competition on those platforms and hindering the maintenance of the degree of competition still existing on those platforms or the growth of that competition.

4.7.3. *Potential effects of the Buy Box-related Conduct and the Prime-related Conduct*

- (198) In the Preliminary Assessment, the Commission came to the preliminary conclusion that the Buy Box-related and the Prime-related Conducts are capable of having, and likely to have, anti-competitive effects in online retail markets on Amazon's e-commerce platforms.
- 4.7.3.1. The role of the Featured Offer in the outcome of competition on Amazon's e-commerce platforms
- (199) As set out in the Preliminary Assessment, the Featured Offer drives both the visibility of available offers and actual sales.
- (200) In terms of *visibility* of the offers outside the Buy Box, in the period 2017 to 2020, out of all transactions, consumers visited the Offer Listing Page to view all competing

offers for less than [0-10]% of the transactions⁹⁸. The introduction of the AOD in 2020 did not generate any improvement in terms of the visibility of competing offers outside the Buy Box, in any of Amazon's marketplaces in the EEA.

- (201) In terms of *sales*, the available evidence shows that only between [0-10] to [0-10]% of all sales materialised directly via links to competing offers in the period 2017 to 2020, i.e. outside the Buy Box, either via the "Other Sellers on Amazon" direct links, or via the Offer Listing Page. The introduction of the AOD did not generate any improvement in terms of the proportion of sales through the AOD, in any of Amazon's marketplaces in the EEA.
- (202) The system of display of one single Featured Offer on the product detail page, with the very low levels of visibility and sales of the competing offers, therefore significantly drives consumers to the Featured Offer in the Buy Box and thus plays a major role in the outcome of competition on the platform.
- 4.7.3.2. The effects of the Buy Box-related Conduct (covering both the favouring of Amazon Retail and the discrimination between FBA and MFN offers)
- (203) As set out in the Preliminary Assessment, the Commission has preliminary concerns that the preferential settings applicable to Amazon Retail and FBA offers in the selection mechanism of the single Featured Offer may artificially increase the potential of AFN offers to generate traffic and transactions, thereby putting MFN offers at a disadvantage when competing with AFN offers.
- (204) The Commission observed that the single Featured Offer shows overwhelmingly Amazon Retail offers, when both Amazon Retail and third-party seller offers are available. Amazon Retail's offers in the Buy Box represent over [80-90]% of all visits to detail pages where competing offers were available, in all of Amazon's European marketplaces.
- (205) The high share of Amazon Retail cannot be exclusively explained by competition on the merits: Amazon Retail wins the Buy Box in more than [80-90]% of the cases, even when competing offers can match its offer in terms of the main offer parameters such as price, seller rating and delivery speed. As stated in the Preliminary Assessment, this is the case even for transactions where an Amazon Retail and a Prime eligible FBA offer were competing for the Buy Box directly. Similar trends can be observed on all of Amazon's European marketplaces.
- (206) MFN offers suffer a disadvantage compared not only to Amazon Retail but also compared to FBA offers. Where an FBA and an MFN offer are available, FBA offers have a Buy Box share of [80-90]% to [90-100]%, while MFN offers have a Buy Box share of [0-10]% to [10-20]%. This observation holds even when comparing FBA and MFN offers available at the same price, seller rating and delivery speed. Similar trends are observable on all of Amazon's European marketplaces.
- (207) As set out in the Preliminary Assessment, the Commission has preliminary concerns that the Buy Box-related Conduct has a direct and immediate effect on sellers. Amazon displays a unique Featured Offer, shown in the Buy Box. Most consumers will only look at this unique Buy Box offer. Accordingly, for third-party sellers the unique Featured Offer display implies that they are visible to consumers only through winning

⁹⁸ 2018 is the first full year for which Amazon had relevant data available. Figures were also available for the period April to December 2017: consumers visited the Offer Listing Page to view all competing offers for less than 5.4% on amazon.de and 5.6% on amazon.fr. See Amazon's response to Q30 of the Commission's RFI of 12 December 2018.

the Buy Box. By artificially altering the winner of the Featured Offer, the Conduct may directly distort competition among sellers.

- (208) The Commission also has preliminary concerns that the Buy Box-related Conduct also prejudices consumer choice and directly harms consumers by driving them to view and transact offers whose selection and display does not mirror the outcome of competition on the merits. In particular, the systemic biases may lead to not displaying the best offer as the Featured Offer where those would be proposed by MFN sellers, or may display the best offer by an AFN seller but typically with a higher price than the one which that seller would have had to offer should it not benefit from those preferential conditions and the resulting more favourable ranking by the [Amazon algorithm].
- (209) Moreover, the available data suggests that the Buy Box-related Conduct has spill-over effects on third-party sellers' general business: it reduces their catalogue size growth and their capacity to introduce new products to the platform.
- (210) Overall, the Commission has preliminary concerns that the visibility, traffic and transaction figures, as well as Amazon's listings and transaction data, suggest that the favourable treatment of the offers of Amazon Retail as well as the discrimination of MFN sellers as compared to FBA sellers in the selection of the Featured Offer place MFN sellers at an artificial competitive disadvantage both for the visibility of their offers and their ability to generate traffic and transactions.
- (211) As set out in the Preliminary Assessment, the Commission has preliminary concerns that such conduct may steer consumers to offers whose selection and display do not necessarily mirror the outcome of competition on the merits. In particular, there is a concern that consumers may be steered to viewing and purchasing Amazon Retail or FBA offers that might not correspond to the best offer, as offers of MFN sellers that would have met the same or superior quality requirements as the Featured Offer got lower ranked by the [Amazon algorithm], did not show as the Featured Offer and were therefore *de facto* scarcely visible to the consumer.

4.7.3.3. The role of Prime eligibility and Prime labelling in the outcome of competition on Amazon's e-commerce platforms

- (212) As set out in the Preliminary Assessment, the Commission has preliminary concerns that Prime eligibility and Prime labelling generate crucial advantages for sellers on the Amazon e-commerce platforms.
- (213) First, the number of Prime users is constantly increasing on all of Amazon's European e-commerce platforms. This growing group of Prime members is the *most loyal group* of customers, [Amazon's assessment of consumer loyalty of Prime users].
- (214) Second, *Prime eligibility* is a feature that the [Amazon algorithm] takes into account for the selection of the Featured Offer, including for non-Prime users.
- (215) Third, in the vast majority (around [80-90]%) of Prime user visits, the Featured Offer is Prime *labelled*. As the Prime label is the indication for Prime members that the offer fully covers the advantages of the Prime programme, i.e. both free delivery and quick shipment, Prime labelled offers are the preferred choice for Prime members in the majority of cases.
- (216) Fourth, Prime users may activate the "*Prime*" filter: where activated, exclusively Prime eligible offers can become the Featured Offer as viewed by that user.

4.7.3.4. The effects of the Prime-related Conduct (covering both the favouring of Amazon Retail and the discrimination between FBA and MFN offers)

- (217) As set out in the Preliminary Assessment, the Commission has preliminary concerns that, by setting unequal conditions and criteria for the eligibility of sellers to Prime and of their offers to the Prime label, Amazon deprives MFN sellers of the ability to develop a large Prime user base and thus places MFN sellers at an artificial competitive disadvantage both in terms of the visibility of their offers to Prime users and their ability to generate Prime transactions, as compared to both its own retail business, and those of FBA sellers.
- (218) Evidence referred to in the Preliminary Assessment pointed to a negligible proportion of *Prime labelled offer sales* by any seller other than Amazon Retail or FBA sellers, throughout Amazon's European marketplaces. *Sales revenues* from Prime labelled products are nearly exclusively reserved to Amazon Retail and FBA sellers.
- (219) Overall, as set out in the Preliminary Assessment, the Commission has preliminary concerns that favourable treatment of Amazon Retail and the discrimination of MFN sellers, as compared to FBA sellers with regard to the conditions and criteria for access to Prime, place MFN sellers at an artificially competitive disadvantage. Such a competitive disadvantage applies to the visibility of MFN offers to Prime users and their ability to generate Prime transactions, as compared to both Amazon's own retail business and those of FBA sellers, thereby distorting retail competition on Amazon's e-commerce platforms.
- (220) The Commission has preliminary concerns that such unequal conditions of access to the Prime programme, in turn, steer Prime users to offers whose selection and display do not necessarily mirror the outcome of competition on the merits. In particular, Prime users may be steered to viewing and purchasing Amazon Retail or FBA Prime offers that may, on quality, not correspond to the best offer, where offers of MFN sellers that would have met the same, or superior, quality requirements as the Featured Offer of Amazon Retail or of an FBA seller, were disqualified from Prime eligibility or the Prime labelling of their offers.

4.7.4. *Preliminary conclusion on potential anti-competitive effects*

- (221) In light of the reasons outlined above, as set out in the Preliminary Assessment, the Commission has preliminary concerns that the Data-use Conduct, the Buy Box-related Conduct and the Prime-related Conduct restrict competition or are capable of having that effect, within the meaning of Article 102 TFEU.
- (222) The potential effects that Amazon's Data-use Conduct may generate, and which essentially stem from the impact on the individual data-use cases that feed into Amazon Retail's various retail operation decisions, are independent of the potential effects of Amazon's Buy Box-related Conduct and Prime-related Conduct. Nevertheless, as a result of the three Conducts taking place simultaneously on Amazon's e-commerce platforms, and distorting competition between Amazon Retail and third-party sellers, their potential effects complement each other in so far as such effects are ultimately all capable of marginalising third-party sellers by limiting their ability to grow and/or partially foreclosing them from the sale of highest demand products, thereby depriving them of scale, and thus lessening competitive pressure on Amazon Retail.

4.8. No objective justification

- (223) The Commission is not required, in the context of a decision under Article 9 of Regulation No 1/2003, to make a final assessment as to whether the conduct at stake had pro-competitive effects and whether those pro-competitive effects outweigh the anticompetitive effects. A decision adopted by the Commission under Article 9(1) of Regulation No 1/2003 is based on a preliminary assessment of the anticompetitive nature of the conduct in question. Accordingly, since such a decision does not involve a full and thorough assessment of all the anticompetitive effects of that conduct, the Commission is not in a position to compare those effects against any pro-competitive effects that could be relied on by the dominant undertaking⁹⁹.
- (224) It follows that the question whether the Data-use Conduct, the Buy Box-related Conduct and the Prime-related Conduct would satisfy the conditions for objective justifications is irrelevant for the purposes of this Decision, which is adopted pursuant to Article 9(1) of Regulation No 1/2003.

5. EFFECT ON TRADE BETWEEN MEMBER STATES

- (225) In the SO in case AT.40462 – *Amazon Marketplace* and in the Preliminary Assessment in case AT.40703 – *Amazon Buy Box*, the Commission reached the preliminary conclusion that the Data-use Conduct, the Buy Box-related Conduct and the Prime-related Conduct are each capable of having an appreciable effect on trade between Member States (and Contracting Parties to the EEA Agreement) for the following reasons.
- (226) First, many third-party sellers selling on Amazon’s e-commerce platforms are active in several Member States. For example, out of all active third-party sellers, in 2018, [20-30]% on amazon.de, [30-40]% on amazon.fr and [40-50]% on amazon.es were sellers established in other EEA countries than Germany, France and Spain, respectively.
- (227) Second, Amazon Retail as well as third-party sellers typically sell products from their German, French or Spanish e-commerce platforms to customers located in other Member States¹⁰⁰.
- (228) Third, neither the legal nor the technical arrangements allowing for each of the Conducts to take place differ between Amazon’s European marketplaces: Amazon’s automated systems and data-bases are largely centralised and common to all of its European marketplaces.

6. DURATION OF THE CONDUCTS THAT GAVE RISE TO CONCERNS

6.1. Data-use Conduct

- (229) In the SO, the Commission preliminarily concluded that the Data-use Conduct started when Amazon reached a degree of market power equal to a dominant position in the relevant markets, which the Commission considered to be on 1 January 2017 in both Germany and France. The SO preliminarily found that the Conduct was still ongoing in all of the relevant markets.

⁹⁹ See, to that effect, Case C-132/19, *P Groupe Canal+ SA*, EU:C:2020:1007, paragraphs 56 to 60.

¹⁰⁰ The value of sales of products by Amazon Retail associated with orders of customers located outside the country of the relevant website is typically between 10% to 20% of its total value of sales across its European marketplaces.

6.2. Buy Box-related Conduct and Prime-related Conduct

- (230) In its Preliminary Assessment, the Commission took the view that the Buy Box-related Conduct and the Prime-related Conduct that gave rise to concerns started when Amazon reached a degree of market power equal to a dominant position in the relevant markets, which the Commission considered to be on 1 January 2016 in Spain, and on 1 January 2017 in Germany and in France. The Preliminary Assessment found that the Conduct was still ongoing in all of the relevant markets.

7. INITIAL COMMITMENTS

- (231) On 8 July 2022, Amazon submitted the Initial Commitments comprising three sets of commitments: the data-silo commitment, the Buy Box-related commitments and the Prime-related commitments.
- (232) Under the data-silo commitment, Amazon commits itself not to use non-public data¹⁰¹ provided by third-party sellers to Amazon in the context of their use of Amazon's marketplaces services, or derived through third-party sellers' use of Amazon marketplace services or related services such as payment and fulfilment services, for the purposes of Amazon's own retail operations, in competition with those third-party sellers.
- (233) In particular, Amazon commits itself not to use such third-party seller data either via Amazon's automated systems or via its employees, whether for the purposes of selling branded goods or for the purposes of selling its private label products. The relevant data covers aggregated, individual, anonymised and personal data, whether in raw form or processed.
- (234) Under the Buy Box-related commitment, Amazon commits itself to apply non-discriminatory conditions and criteria for the purposes of identifying the Featured Offer displayed in the Buy Box. These would apply to all applicable parameters and weightings in order to establish a level-playing field for competition between all sellers for the Buy Box.
- (235) In addition, Amazon commits itself to display at least one competing offer next to the Featured Offer where available and different on price/delivery time from the Featured Offer (the "Second Displayed Offer"). The Featured Offer and the Second Displayed Offer will display on an equal basis the same descriptive information and operate at complete parity with respect to purchasing possibilities.
- (236) Finally, under the Prime-related commitment, Amazon commits itself to apply non-discriminatory conditions and criteria for (i) the Prime eligibility of third-party sellers and offers and (ii) the Prime label in order to ensure parity between all sellers and to allow Prime sellers to freely choose carriers and negotiate rates and commercial terms with those carriers. Amazon commits itself also to not use any data relating to the terms or performance of third-party carriers for the purposes of Amazon's own logistics operations.
- (237) These Initial Commitments would apply for a duration of 5 years and cover all current and future Amazon marketplaces in the EEA, with the exception of the commitments described in recitals (234) to (236) above which, in view of the decision of 30

¹⁰¹ Under the Initial Commitments, "non-public" data means "data not made available to Sellers by Amazon or otherwise available through published sources (including the Amazon Store)."

November 2021 of the Italian Competition Authority in case A528¹⁰², would not apply to Italy.

- (238) An independent monitoring trustee would monitor Amazon's compliance with the Initial Commitments, throughout their duration.

8. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)

- (239) The Commission published the Article 27(4) Notice on 14 July 2022. In response, the Commission received 25 submissions from interested third parties (the "Market Test").

8.1. Summary of the main comments from third parties during the Market Test

8.1.1. Data-silo commitment

- (240) Some respondents reported that the data-silo commitment would be more efficient if, in addition to Amazon refraining from using non-public third-party seller data, the commitments also included mechanisms to control access to such data or for a technical separation of the data-sets.

8.1.2. Buy Box-related commitments and Prime-related commitments

- (241) Various respondents highlighted ways in which the visual display of the Second Displayed Offer could be improved, to make that offer more "inviting" to consumers.
- (242) Some respondents mentioned that the scope of specific customer promotion and membership programmes¹⁰³ (that would form an exception to the obligation to display a Second Displayed Offer) should be better circumscribed and that the commitments should warrant non-discriminatory access to those.
- (243) Various respondents considered that the third-party sellers should be better informed, and sufficiently in advance, about the impact of the commitments on their right to freely choose the carrier (and negotiate terms and conditions directly with them), the conditions and criteria Amazon will apply to determine Prime eligibility and display of the Prime label and, more generally, about Amazon's Buy Box- and Prime-related commitments.
- (244) Various respondents argued that carriers will not be able to compete on equal grounds with Amazon if Amazon does not share with them the contact details of the end-users to whom they deliver the parcels.
- (245) Various respondents suggested that there are biases within Amazon's FBA systems and therefore that the commitment relating to the free choice of carriers, should also apply to sellers that use Amazon's FBA services, where Amazon relies on third-party carriers to fulfil FBA orders.

8.1.3. The role of the independent monitoring trustee and the risk of circumvention

- (246) A number of respondents expressed their general concern about an efficient monitoring of the commitments. They highlighted the need to reinforce the powers of the independent monitoring trustee. In particular, they proposed that any change to the non-discriminatory conditions and criteria for determining the Featured Offer, the

¹⁰² <https://en.agcm.it/en/media/press-releases/2021/12/A528>, accessed on 23 November 2022.

¹⁰³ Such as "subscribe and save" (allowing customers to save up to 15% by scheduling repeat deliveries of some items) or "Prime Wardrobe" (aka. "Prime try before you buy" – a Prime-exclusive programme where customers can try on before buying eligible items across women's, men's, children's, and baby clothing, shoes, and accessories).

Second Displayed Offer and Prime eligibility, and the display of the Prime label, should at least be subject to prior notification to the independent monitoring trustee. In the same vein, several carriers claimed that Amazon should notify the monitoring trustee of the list of data that Amazon deems necessary to use in order to monitor and track carriers' Prime performance.

- (247) Closely related to the need for a reinforced monitoring of the commitments, some respondents proposed to reinforce the anti-circumvention provision and to introduce the possibility for the Commission to impose significant periodic penalty payments in case of breach and/or circumvention of the commitments.

8.1.4. Duration of the commitments

- (248) Some respondents argued that a duration of longer than 5 years is necessary for a meaningful change for business and investments.

8.1.5. Other comments

- (249) Several respondents mentioned that Amazon's websites outside the EEA should also be covered for the purposes of sales into the EEA.
- (250) Several respondents referred to the need to introduce a dispute resolution or complaint mechanism in case of suspected breach of the commitments.
- (251) Some respondents considered that the commitments should also apply when Amazon's marketplaces in the EEA are accessed through virtual assistants (e.g. Alexa).
- (252) Some respondents complained about price control and price parity mechanisms that Amazon would apply to third-party sellers.
- (253) Finally, some respondents suggested ways in which to improve the definitions and other wordings contained in the commitments.

8.2. The Commission's assessment of the Initial Commitments in light of the comments from third parties during the Market Test

- (254) In light of the comments received from third parties during the Market Test, as summarised in Sections 8.1.1 to 8.1.5, the Commission concludes that some of those comments raised doubts about the Initial Commitments' ability to effectively address all the preliminary competition concerns outlined in the Commission's SO and Preliminary Assessment. In particular, the Commission notes the following:
- (255) The Commission concludes that Amazon should have an obligation to set up technical and/or manual mechanisms designed to monitor access to third-party seller data in order to ensure that Amazon's obligation not to use non-public data provided by third-party sellers to Amazon can be effectively monitored and is not circumvented.
- (256) The Commission concludes that the presentation of the Second Displayed Offer should be noticeably improved. The Second Displayed Offer is an integral part of the commitment offered by Amazon to eliminate the competitive disadvantage of third-party sellers in the selection and display of the Featured Offer(s). Furthermore, in order to avoid any future bias and preferential settings as preliminarily identified in the Preliminary Assessment, the display of the Featured Offer and the Second Displayed Offer will remain substantially similar to the revised presentations annexed to the commitments to be offered by Amazon. With a view to ensuring that the commitment relating to the Second Displayed Offer remains effective, the commitments should enable the Commission to request adjustments to that display over the duration of the commitments.

- (257) The Commission also concludes that the commitments should objectively define the scope of the specific programmes – to the extent they constitute an exception to the display of a Second Displayed Offer – in order to ensure that the commitments are not undermined and can thus address the preliminary competition concerns identified in the Preliminary Assessment.
- (258) In order to ensure a level-playing field between third-party carriers and Amazon’s fulfilment services and, as a result, between the delivery performance of third-party sellers and Amazon Retail, the Commission finds it necessary that third-party carriers get access to direct means of communication with the final customers.
- (259) The Commission considers that it is necessary for the commitments to reinforce the information obligations towards third-party sellers about Amazon’s Buy Box- and Prime-related commitments so as to ensure that the commitments are effective in addressing the preliminary competition concerns identified in the Preliminary Assessment. This will allow third-party sellers to make the adequate adjustments to their business decisions when dealing on Amazon’s marketplaces and allow them to compete on the merits.
- (260) In light of the impact of the commitments on the business decisions and investments of third-party sellers and independent carriers, notably in relation to the Prime-related commitments and the commitments concerning the Second Displayed Offer, the Commission concludes that a 5-year duration is too short to stabilise effective competition in the relevant markets.
- (261) The Commission concludes that, while the Initial Commitments are not limited to any particular device, the commitments may be complemented by an additional clarification that they are device-neutral.
- (262) It furthermore appears necessary to, on the one hand, reinforce the role of the independent monitoring trustee to ensure compliance with the commitments and, on the other hand, establish a centralised complaint mechanism through which third-party sellers and independent carriers suspecting non-compliance with the commitments can submit a written complaint to the monitoring trustee.
- (263) The Commission does not find it necessary to amend the Initial Commitments to reflect the following comments made during the Market Test.
- (264) The Commission considers that the commitments should not cover Amazon’s marketplaces outside the EEA (for which delivery within the EEA may be possible) as this would be disproportionate. Sales from Amazon’s non-EEA marketplaces into the EEA are negligible and therefore do not have an appreciable effect on trade between Member States. Moreover Amazon’s data-use, Buy Box and Prime related practices in Amazon’s marketplaces outside the EEA are outside the scope of the investigations of the Commission.
- (265) The Commission does not find it necessary to amend the anti-circumvention clause. The scope of the clause is such as to cover for any direct or indirect circumvention by any act or omission, which is sufficiently broad to cover for all possible circumventions. In addition, this clause is complemented by the penalty payments provided for in this Decision in case of failure to comply with the commitments, the increased role of the monitoring trustee and the introduction of a complaint mechanism, all of which further reinforce efficient enforcement and the prevention and control of circumvention of the commitments.

- (266) The Commission concludes that the commitments do not need to address (i) any price control and price parity mechanisms that Amazon would apply to third-party sellers and (ii) biases within Amazon's FBA systems¹⁰⁴, as these alleged conducts are not part of the Commission's investigations and are thus not covered by the Commission's preliminary concerns set out in the SO or in the Preliminary Assessment.
- (267) In view of the above, the Commission considers that certain improvements to the Initial Commitments were necessary.

9. THE REVISION OF THE INITIAL COMMITMENTS IN THE LIGHT OF THE MARKET TEST

- (268) In response to the comments received pursuant to the Article 27(4) Notice, Amazon modified its Initial Commitments with a revised proposal on 22 November 2022 (the "Final Commitments").
- (269) The Final Commitments modified the Initial Commitments in the following ways:
- (a) Amazon proposed in the Final Commitments to amend the duration of the Prime-related commitments and the commitments concerning the Second Displayed Offer to 7 years, instead of the period of 5 years contemplated in the Initial Commitments. The data-silo commitment and the commitment relating to the non-discriminatory conditions and criteria for the purposes of identifying the Featured Offer displayed in the Buy Box would continue to have a duration of 5 years.
 - (b) The Final Commitments reinforce Amazon's obligation to set up technical and/or manual control mechanisms designed to audit and monitor access by Amazon Retail to third-party seller data.
 - (c) The Final Commitments make reference to device-neutrality.
 - (d) Amazon improved the presentation of the Second Displayed Offer compared to the version subject to the Market Test, for instance, regarding the choice of colours as well as the positioning of the Second Displayed Offer on the screen of the device. The Final Commitments thus ensure that the display of the two offers remains substantially similar to the presentation shown in the Annex to the Final Commitments. The Commission, however, acknowledges that the visual presentation of the Featured Offer and Second Display Offer is a dynamic process and may evolve over time. Accordingly, the Final Commitments foresee the possibility of a revision mechanism with respect to the rules relating to the display of the Second Display Offer, including the visual display, based on reporting by Amazon on various metrics relating to the outcome of that display, such as how often that display appears and consumer interaction with the Second Displayed Offer. For the same reasons, the Final Commitments also include the possibility, after 5 years, to amend the design of the Second Displayed Offer, should the design of Amazon's product detail pages change materially. However, the new design of the Second Displayed Offer is to comply with the principles established in the Final Commitments and governing the Second Displayed Offer.
 - (e) To enable carriers to provide independent fulfilment services to customers, equivalent to those offered by Amazon, Amazon commits itself to make available to carriers the means to directly contact the final customers, including

¹⁰⁴ See recital (245) of this Decision.

via their email address, subject to the relevant data protection standards. These are understood to be in accordance with generally accepted industry standards, in line with the applicable EU data protection laws.

- (f) The Final Commitments reinforce the role and powers of the monitoring trustee in various regards. In particular, the monitoring trustee will be informed of the different fraud and abuse factors relied on by Amazon when deciding whether an offer by a third-party seller qualifies for participation in the Featured Offer or whether a third-party seller qualifies for offering a product under the Prime label. Any changes to those factors will have also to be notified to the monitoring trustee. In relation to Prime, Amazon commits itself to prepare a list of information that it deems necessary to monitor Prime performance of third-party sellers and notify to the monitoring trustee in due time. Amazon has also to keep the monitoring trustee updated of any further changes made to that list.
- (g) The Final Commitments also introduce a complaint mechanism allowing third-party sellers and carriers suspecting non-compliance with the Final Commitments to submit a written complaint to the monitoring trustee.
- (h) The Final Commitments better circumscribe the provision relating to specific programmes, notably by including a notification mechanism to the monitoring trustee to control any potential growth of those programmes throughout the duration of the Final Commitments.
- (i) The Final Commitments reinforce Amazon's information obligations towards third-party sellers. In particular, within two months of this Decision being notified to Amazon, Amazon will inform third-party sellers in an adequate and sufficiently prominent and durable manner: (i) that Amazon will use objectively verifiable, non-discriminatory conditions and criteria for the selection of the Featured Offer and will not use Prime eligibility or Prime labelling as relevant criteria, (ii) about the commitments made in relation to the criteria for Prime-eligibility and Prime labelling of third-party sellers' offers, and (iii) that third-party sellers are free to choose carriers and negotiate rates and commercial terms and conditions directly with those carriers. Amazon will also make available to third-party sellers, in an adequate and sufficiently durable manner, the applicable conditions and criteria for Prime-eligibility and Prime labelling. Lastly, Amazon will provide reasonable notice to third-party sellers in the event of changes to the Prime eligibility and Prime labelling conditions and criteria.
- (j) Finally, the Final Commitments introduce a few clarifications to the wording of the Initial Commitments (such as the definition of "Filters" or "Specific Material Programs", inclusion of certain timeframes within which Amazon needs to comply with certain obligations).

10. EFFECTIVENESS AND PROPORTIONALITY OF THE FINAL COMMITMENTS

10.1. Principles

- (270) The principle of effectiveness requires that the Commission must ensure that the commitments fully address its preliminary concerns, while the principle of proportionality requires that the measures adopted by institutions of the Union must

be suitable and not exceed what is appropriate and necessary for attaining the objective pursued¹⁰⁵.

- (271) In the context of Article 9 of Regulation No 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately¹⁰⁶. When carrying out that assessment, the Commission must take into consideration the interests of third parties¹⁰⁷.

10.2. Application in this case

- (272) As regards effectiveness, the commitments in their final form are sufficient to address the preliminary concerns identified by the Commission (see Section 4) for the following reasons.
- (273) First, the data-silo commitment ensures that Amazon will put an end to its continued practice of using non-public data of third-party sellers to compete with these sellers. To address the Commission's preliminary concerns, Amazon will refrain from using non-public data for the purposes of all of Amazon's retail operations. The commitment covers the use of such seller data by Amazon's automated systems and employees.
- (274) Second, the Buy Box-related commitments will eliminate the biases that favour Amazon Retail and FBA sellers in the selection and display of the Featured Offer in the Buy Box. The Final Commitments also include a Second Displayed Offer to increase consumer choice. These changes are crucial given the importance of winning the Buy Box for third-party sellers to be visible to consumers and to convert their offers into actual sales.
- (275) Third, the Prime-related commitments will also eliminate the biases that favour Amazon Retail and FBA sellers in their offers' eligibility to Prime and to the Prime label. They also address the competitive disadvantage of MFN sellers in Amazon's Prime system by carrier-related obligations that will allow for an effective choice of carriers that sellers can rely on for their parcel deliveries.
- (276) Fourth, the Commission considers the 7-year duration for the Prime-related commitments and the commitments concerning the Second Displayed Offer and the 5-year duration for the data-silo commitment and the commitment relating to the non-discriminatory conditions and criteria for the purposes of identifying the Featured Offer displayed in the Buy Box as described in the Final Commitments to be proportionate, as they are sufficiently long to address the Commission's preliminary concerns, while also providing certainty to market participants for a sufficiently long period. The implementation of the Final commitments will also be subject to independent expert review by a monitoring trustee, acting under the Commission's supervision, for the entire duration of the Final Commitments. The use of a monitoring trustee is a proportionate and necessary measure for ensuring effective implementation of this Decision.
- (277) Fifth, the Commission considers that the non-circumvention clause, the complaint mechanism and the reinforced powers of the monitoring trustee, together with the

¹⁰⁵ See for instance, Case T-260/94, *Air Inter v. Commission*, EU:T:1997:89, paragraph 144, and Case T-65/98, *Van den Bergh Foods v. Commission*, EU:T:2003:281, paragraph 201.

¹⁰⁶ Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377, paragraphs 41 and 61.

¹⁰⁷ Case C-441/07 P, *Commission v Alrosa*, EU:C:2010:377, paragraph 41.

penalty payments provided for in this Decision for non-compliance, provide sufficient safeguards against non-compliance with the Final Commitments.

- (278) The Commission concludes that the Final Commitments effectively address the preliminary competition concerns identified in its SO and Preliminary Assessment.
- (279) As regards proportionality, the Commission notes that Amazon has not offered less onerous commitments in response to the SO and the Preliminary Assessment that also address the Commission's preliminary concerns adequately.

10.3. Conclusion on the effectiveness and proportionality of the Final Commitments

- (280) The Commission considers that the Final Commitments effectively meet the preliminary competition concerns identified above in Section 4.
- (281) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test and considers that the Final Commitments will not hinder the legitimate commercial interests of any third party. The Commission has carefully analysed all comments received. To the extent that they contribute to meeting the preliminary competition concerns identified in the SO and Preliminary Assessment and are proportionate, those comments were discussed with Amazon and are reflected in the Final Commitments. Amazon will thus put an end to the conduct preliminarily found to breach Article 102 TFEU in the SO.
- (282) No third party has given any indication that the Final Commitments would limit their contractual rights, let alone empty them of their substance.
- (283) This Decision accordingly complies with the principle of proportionality.

11. PERIODIC PENALTY PAYMENTS

11.1. Principles

- (284) Pursuant to Article 24(1), point (c), of Regulation No 1/2003 and Article 5 of Council Regulation (EC) No 2894/94¹⁰⁸, the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the day appointed by the decision, in order to compel them to comply with a commitment made binding by a decision pursuant to Article 9 of Regulation No 1/2003.

11.2. Application to this case

- (285) The Commission concludes that it is necessary to impose periodic penalty payments pursuant to Article 24(1), point (c), of Regulation No 1/2003 and Article 5 of Regulation (EC) No 2894/94 if Amazon were to fail to comply with the commitments made binding by this Decision.
- (286) In setting the level of the periodic penalty payments, the Commission considers that they must be sufficient to ensure compliance by Amazon with this Decision. The Commission has also taken Amazon's significant financial resources into account.
- (287) The data-silo related commitments mirror Amazon's fully data-based decisional processes and involve a major change to Amazon's business model. The Buy Box- and

¹⁰⁸ Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p. 6).

Prime-related commitments require a revision of two major mechanisms of Amazon's ecosystem that drive visibility and sales on its e-commerce platforms. Notwithstanding these changes, Amazon will retain control of the operations of its e-commerce platforms. It is therefore key to ensure a sufficient level of deterrence to minimise any risk of circumvention.

- (288) The results of the Market Test also highlighted such risk of circumvention and the need to provide for the imposition of significant periodic penalty payments in case of breach and/or circumvention.
- (289) Consequently, if Amazon were to fail to comply with the commitments made binding by this Decision, Amazon would incur a daily periodic penalty payment of 5% of Amazon's average daily turnover in the business year preceding such failure to comply.

12. CONCLUSION

- (290) By adopting a decision pursuant to Article 9(1) of Regulation No 1/2003, the Commission makes commitments offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment binding upon them. Recital 13 of Regulation No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.
- (291) The Commission's assessment of whether the Final Commitments offered are sufficient to meet its concerns is based on its SO concerning the Data-use Conduct and on its Preliminary Assessment concerning the Buy Box-related Conduct and the Prime-related Conduct, which represent the preliminary view of the Commission based on the underlying investigation and analysis, and on the observations received from third parties following the publication of the Article 27(4) Notice.
- (292) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation No 1/2003, the proceedings in these cases should therefore be brought to an end.
- (293) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty and Article 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The Final Commitments as listed in the Annex shall be binding on the addressees of this Decision as identified in Article 5, and any legal entity directly or indirectly controlled by them.

Article 2

This Decision shall apply for the following periods from the date of receipt of notification of this Decision by the addressees identified in Article 5:

- 5 years and 6 months for the data-silo commitment and the commitment relating to the non-discriminatory conditions and criteria for the purposes of identifying the Featured Offer displayed in the Buy Box as described in paragraphs 1 to 6 of the Final Commitments;

- 7 years and 6 months for the Prime-related commitments and the commitments concerning the Second Displayed Offer as described in paragraphs 7 to 24 of the Final Commitments.

Article 3

It is hereby concluded that there are no longer grounds for action by the Commission in relation to the conducts covered by this Decision.

Article 4

If the addressees of this Decision fail to comply with the Final Commitments made binding by Article 1, they shall incur a daily periodic penalty payment of 5% of the average daily turnover of the undertaking to which they belong in the business year preceding such a failure to comply.

Article 5

This Decision is addressed to:

Amazon.com, Inc., 410 Terry Avenue North, USA - Seattle, Washington 98109-5210

Amazon Services Europe S.à.r.l., 38 avenue John F. Kennedy, L-1855 Luxembourg

Amazon EU S.à.r.l., 38 avenue John F. Kennedy, L-1855 Luxembourg

Amazon Europe Core S.à.r.l., 38 avenue John F. Kennedy, L-1855 Luxembourg.

Done at Brussels, 20.12.2022

*For the Commission
Margrethe VESTAGER
Executive Vice-President*