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Break-Up Amazon?

Expert opinion on the competitive appropriateness and legal feasibility of unbundling of the Amazon Group.

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Frankfurt am Main, November 2023

On behalf of:



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Remarks regarding the translation

In the following we present an English translation of our expert opinion on the unbundling of Amazon. The language of the original is German.

In comparison to the German document, we omitted minor parts in this translation that related to German notions and semantics in the field of unbundling that cannot be simply translated. As a result, the numbering and margin numbers of the two versions do not always correspond.

The original document contains many footnotes with references to German documents or articles. These reference have not been translated.

Summary

Amazon relies on a business model that offers goods and services (video and music streaming) very cheaply and without any expectation of short- to medium-term profits, so that complementary services with high profit margins can be sold around this offering, which has been expanded into an infrastructure. In conjunction with intra-group scaling and self-preference, Amazon is specifically positioning itself to expand its business activities into other areas such as logistics, fulfillment, Web services, etc. These additional services have a built-in advantage over the respective providers already active in the market, as they already have Amazon, by far the largest online retailer in the world and the fifth largest company in the world (by market capitalization), “as a customer” for which they do not have to compete with other providers. This structure enables and incentivizes Amazon to engage in unfair trading practices such as predatory pricing below cost recovery, excessive tapping of strategic competitive data, detour of demand to its own products, and high access fees (e.g., for Buy Box and better ranking in search results on the Amazon website/marketplace).

The strategic, structural and systematic construct leads to far-reaching competitive concerns “by design” and inherent conflicts of interest. These cannot be efficiently addressed with selective conduct controls. Following the general idea lived in competition law that the remedy must mirror the anticompetitive behavior, it is obvious and necessary in the case of a purposefully anticompetitive business model, as in Amazon's case, to remedy it as a whole. Therefore, if as many of the anti-competitive concerns about Amazon's current business model as possible are to be eliminated, unbundling like retail, services to third-party sellers (Marketplace), AWS, smart home devices (Echo & Alexa), and logistics is appropriate.

In particular, the newly introduced unbundling provision following a sector inquiry pursuant to Section 32f (3) and (4) German Act against Restraints of Competition (“ARC”) can be considered as a legal intervention standard for this purpose.

Considerable objections are frequently raised against such structural measures, e.g., with regard to the length of time required for unbundling measures and the associated high costs or the legal uncertainty for the companies concerned. Viewed in the light of day, the vehemence or sweeping nature of the criticism in particular is only understandable if the alternative to unbundling measures would be complete non-intervention by the authorities. If the counterfactual scenario is regulatory inaction, then any structural measure is inherently more protracted, costly and invasive.

However, this does not reflect the reality, which is characterized by ever-changing procedures and legislative initiatives. Therefore, when behavioral measures are considered as a counterfactual scenario to structural measures such as unbundling, it is apparent that the design, enforcement, monitoring, and oversight of behavioral measures are often significantly more costly than structural unbundling measures.



Structural unbundling measures are often justified precisely because competition authorities would be overwhelmed by the implementation of behavioral remedies.

Main results

- With its online shop, which also serves as a platform (“marketplace”), Amazon has consciously and strategically created an infrastructure that is in fact unavoidable in many geographical regions. Amazon's market position is hardly vulnerable, at least up to a possible media break (e.g., from the internet to the metaverse), especially due to the following circumstances:
 - Strongly pronounced positive indirect network effects (see 2.4.2.1),
 - Privileged access to data (see 2.4.2.2),
 - Multi-level vertical integration (see 2.4.2.3),
 - Pronounced economies of scale and scope (see 2.4.2.4),
 - High market capitalization (“deep pockets”; see 2.4.2.5),
 - Targeted predatory pricing through cross-subsidization (see 2.4.2.6),
 - Structural incentivization for self-preference (see 2.4.2.7).
- Amazon has built an ecosystem of services and goods around the central, infrastructural position of the Amazon web shop and trading platform, which either serves to round off its market position (e.g. Prime membership with video and music streaming service), enables (often systematically preferred) services to be offered to retailers on the Marketplace (e.g. fulfilment services, logistics, web space) and, based on the economies of scale of these activities, allows an attack on other markets (e.g. web and cloud service via AWS, services to retailers). It is with these services that the Amazon group generates its revenues.
- The joint group affiliation of Amazon's online retail business including Prime on the one hand and the profitable services and goods from the ecosystem built around the consumer and merchant lock-in (in particular AWS and merchant fees via the Marketplace) lead to cross-subsidization in favor of the central platform and thus to a strengthening of its unassailable market position while at the same time necessarily favoring the offerings from the ecosystem in order to achieve economies of scale. As a result, this has the effect of inhibiting competition in market segments in which Amazon would otherwise have to resort to competing third-party providers for the services and goods from the ecosystem and allow them to enter into a competitive relationship.
- Amazon's current business model is a strategic, structural, and systematic construct that leads to far-reaching competition concerns “*by design*”. It cannot be efficiently contained in a competition-compliant manner with selective behavioral controls as long as the structurally mediated conflict of interest of self-preference is not eliminated.

- Amazon has entered a phase where it is reaping the rewards of consolidated and expanded market dominance announced in 1997. The non-cost-recovery predatory pricing of Prime and Amazon's retail business are the means to maintain market dominance, while the rising third-party merchant fees and Marketplace profits are the result of that dominance. Turned another way, from a competition law perspective, the creation of an announced monopoly with announced monopoly rents has not been prevented.
- If as many of the competitive concerns about Amazon's current business model as possible are to be eliminated, a multiple unbundling along the business areas of retail, services to third-party sellers (Marketplace), Amazon Web Services (AWS), smart home devices (Echo & Alexa) and logistics is expedient (see 6.1.4).
- Blanket objections to (ownership) unbundling are not persuasive and are often based on an erroneous comparison between the implementation of unbundling and complete regulatory inactivity. In fact, the counterfactual scenario to be used is the initiation of a large number of proceedings by the competition authorities with the aim of proving competition violations by Amazon and imposing conduct-related measures. The latter, while less effective, often turn out to be at least as time-consuming, lengthy, costly and legally uncertain as structural measures (see 3.3, 3.4 and 6.2).
- The prevalence of structural remedies, in particular ownership divestiture in merger control, to remove competition authorities' concerns and for the purpose of maintaining competitive market structures proves that the legal system approves far-reaching structural measures even without linking them to reproachable antitrust conduct. The general assertion that structural measures are fundamentally disproportionate to behavioral measures is therefore not convincing, especially when the focus is on maintaining or restoring competitive market structures (see 5.1.4.1). In principle, a corresponding unbundling standard is also conceivable outside merger control, as is also evidenced by the existence of ownership unbundling under Section 8 EnWG in the energy industry (see **Fehler! Verweisquelle konnte nicht gefunden werden.**).
- *De lege ferenda*, the proposed unbundling provision of Section 32f (3), (4) ARC of the recently amended German Act against Restraints on Competition provides a suitable legal basis for unbundling Amazon. The norm aims to restore competitive market structures and therefore justifies far-reaching ownership disposals in individual cases, provided proportionality is observed. Nonetheless, strict conditions are attached to ownership unbundling (see 7.1).
- In addition, the introduction of a monopolization prohibition modelled on US antitrust law should be considered in order to also introduce a structural

element at the factual level, which, in line with merger control, can also be dealt with primarily through structural follow-up measures (see 7.2).

1. Forms of “unbundling”

In the following we describe different forms of “unbundling” (see 1.1) and their functional objectives of unbundling (see 1.2).

1.1 Forms of unbundling

There are many different forms of unbundling. Therefore, if unbundling (of certain corporations) is demanded or rejected in contributions to the debate, it must first be made clear which form of unbundling is being sought or rejected. Only on this basis can it be further discussed which (social) problem can be expediently solved with the form of unbundling demanded in each case or which reasons speak against this assumption. The various potential forms or differentiation criteria are presented in the following and - against the background of the subject of this assessment - examples are formed on the basis of the Amazon Group¹, without a recommendation for or against certain unbundling measures being made at this point (see 6.1.4 and 7.).

With regard to the classification of the forms of unbundling, it is possible to distinguish, on the one hand, with regard to the market levels concerned (see 1.1.1.1) and, on the other hand, with regard to the intensity or the subject matter of the unbundling (see 1.1.2).

1.1.1 Distinction according to affected market level

With regard to the market level affected by the unbundling measure, a distinction can be made between horizontal (see 1.1.1) and vertical unbundling (see 1.1.2).²

1.1.1.1 Horizontal unbundling

Horizontal unbundling occurs when the unbundling of a company or a group takes place at the same market levels.³ Such unbundling can take place quantitatively.

Example: The Amazon Marketplace is divided into six independent online trading platforms.

In addition to pure size, it should be noted that Amazon has greatly expanded its business areas over the last few years and horizontally integrated different models into the group. Examples of this are expansions (at least in the USA) to include Amazon Pharmacy as a mail-order pharmacy⁴ or Amazon Fresh as an online

¹ For the structure of the Amazon Group see 2.2.

² *Bernhardt/Voges*, WuW 2022, 651.

³ *Bernhardt/Voges*, WuW 2022, 651.

⁴ *Shieber/Lunden*, “Amazon launches Amazon Pharmacy, a delivery service for prescription medications”, [techcrunch.com](https://techcrunch.com/2020/11/17/amazon-launches-amazon-pharmacy-its-delivery-service-for-prescription-medications/), 17 November 2020, available at: <https://techcrunch.com/2020/11/17/amazon-launches-amazon-pharmacy-its-delivery-service-for-prescription-medications/>.

supermarket⁵ with groceries. Along these lines, a qualitative horizontal unbundling of Amazon is also conceivable.

Example: Amazon Marketplace is divided into thematically different online trading platforms according to categories such as food, toys, fashion items, DIY, etc.

1.1.1.2 Vertical unbundling

Vertical unbundling occurs when a company is active at several market levels along the value chain and unbundling is carried out between these market levels.⁶

Example: Amazon not only trades in products, but also increasingly manufactures them itself, i.e., becomes active on the market level of manufacturing upstream of retail. Separating the retail level on the one hand and the manufacturing level on the other therefore constituted vertical unbundling.

1.1.2 Differentiation according to intensity or subject matter

Furthermore, unbundling measures can be differentiated according to their intensity or their subject matter. Following the differentiation of the EU Directive on the Internal Market in Natural Gas⁷ and the EU Directive on the Internal Market in Electricity⁸ and the national implementation in Sections 6 et seqq. of the German Energy Industry Act (EnWG), a distinction can be made between informational, operational and ownership unbundling.

1.1.2.1 Informational unbundling

Informational unbundling consists of requiring the company to set up an information barrier between different business units, sometimes referred to as a “Chinese wall” or “fire wall”. This is to prevent the sharing of information that may otherwise lead to favoritism of integrated companies.⁹

Example: Amazon is prohibited from using data of third-party merchants on the Marketplace for its own retail and private label business.¹⁰

⁵ Jansen, “Amazon Fresh startet in Deutschland”, faz.net, 4 May 2017, available at: <https://www.faz.net/aktuell/wirtschaft/netzwirtschaft/amazon-fresh-lebensmittelversand-startet-in-deutschland-14998939.html>.

⁶ Bernhardt/Voges, WuW 2022, 651 with further references.

⁷ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; OJ L 2009 211/94.

⁸ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 concerning common rules for the internal market in electricity and amending Directive 2012/27/EU, OJ L 2019 158/125.

⁹ Cf. Heinlein/Büsch, in: Theobald/Kühling, Energierecht, 117th EL (July 2022), Section 6a EnWG, para 2; Bernhardt/Voges, WuW 2022, 651, 656.

¹⁰ Comm., Case AT.40462 - Amazon Marketplace and Case AT.40703 - Amazon Buy Box.

1.1.2.2 Operational unbundling

An operational unbundling does not lead to a change in the civil law ownership situation.¹¹ At least the ultimate parent company remains the owner of the part of the company directly affected by the unbundling measure. However, the prerequisite for an operational unbundling is the transfer of the de facto operational management to an independent entity. This independence requires that the beneficial owner cannot exercise any control over this entity, even indirectly. In practice, this means that the beneficial owner cannot in fact determine or prevent the composition of the management or the board of directors. 14

1.1.2.3 Ownership unbundling

Ownership unbundling is necessarily accompanied by the sale of specific parts of the company or assets.¹² This may also involve the sale of minority shareholdings in order to avoid conflicts of interest under competition law.¹³ 15

1.2 Functional objectives of structural unbundling measures

Structural unbundling measures as part of the instruments of competition law are attributed the following functions in particular:¹⁴ 16

1.2.1 Elimination of conflicts of interest

Structural unbundling is suitable for eliminating structurally related conflicts of interest.¹⁵ For example, the EU Commission bases its threat of ownership unbundling of Google in the online advertising market on the need to eliminate an “inherent conflict of interest” (see 4.3.2).¹⁶ 17

Also, the German Federal Cartel Office (“FCO”) justified the sector-wide unbundling of joint ventures in the rolled asphalt sector with the elimination of conflicts of interest as far as suppliers of rolled asphalt are involved in joint ventures with their competitors via minority shareholdings. Specifically, the President of the German Federal Cartel Office stated: “*Such a nationwide network can lead to conflicts of interest as well as mutual dependencies and considerations and thus have anti-competitive effects*”.¹⁷ 18

¹¹ See *Heinlein/Büsch*, in: Theobald/Kühling, 117th EL (July 2022), Section 6 EnWG, para 12.
¹² *Bernardt/Voges*, WuW 2022, 651, 652.
¹³ See the FCO’s sector enquiry into rolled asphalt (see 4.4.2); *Khan*, Columbia Law Review, Vol. 119 (2019), 973, 977.
¹⁴ Instructive: *Khan* (fn. 13), 973, 1052 et seqq.
¹⁵ *Khan* (fn. 13), 973, 1052 et seq.
¹⁶ Comm., press release as of June 14, 2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.
¹⁷ FCO, Press release as of 1 October 2012, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2012/01_10_2012_SU_Walzasphalt.html.

The same applies to companies that manage an essential infrastructure vis-à-vis those companies with which they are also in competition, as is the case with Amazon between its own retail business and the provision of the Marketplace.¹⁸ 19

1.2.2 Preventing cross-subsidization of expansion into other markets

Structural unbundling is also used in part to prevent profits from one sector being used to finance entry into other competitive markets and thereby gaining an unfair advantage in that market.¹⁹ *Lina Khan* explains how the separation rules in the regulation of the banking and telecommunications sectors in the US and the UK, in particular, have been justified in this way.²⁰ 20

1.2.3 Preventing concentration of market power

Finally, unbundling obviously aims at dissolving concentrations of market power identified as problematic.²¹ This objective does not usually address disapproved behavior of companies and therefore does not consider unbundling as a “punishment” for a certain behavior. It is not a structural solution to a behavioral problem, but a structural solution to a structural problem. This structural approach forms the basis of non-abusive unbundling.²² 21

¹⁸ *Khan* (fn. 13), 973, 1052 et seq.

¹⁹ *Khan* (fn. 13), 973, 1055 et seq.

²⁰ *Khan* (fn. 13), 973, 1055 et seq.

²¹ *Khan* (fn. 13), 973, 1061 et seq.

²² *Kühling*, “Missbrauchsunabhängige Entflechtung – verfassungswidriger Kartellrechtspopulismus oder sinnvolle Ultima Ratio?”, *VerfBlog*, 2022/6/24, <https://verfassungsblog.de/missbrauchsunabhängige-entflechtung/>, DOI: 10.17176/20220624-162219-0; *Wegner*, BB 2022, Heft 44, Umschlagteil, I.

2. Amazon's development, current structure, and market position

The analysis of the appropriateness of any kind of unbundling measures against Amazon requires an analysis of the origins of the business model, the current structure as well as the market position of Amazon and related competition concerns. 22

2.1 Amazon's emergence and strategy

Amazon started in the USA in 1994 as an online retailer of books.²³ Amazon's role today is not a product of chance but was planned by founder Jeff Bezos as if on a drawing board. Amazon started as an online bookseller in the US. Before that, Bezos analyzed about fifteen different candidate markets to start an online retail business, including for instance software, video games, small electrical appliances, etc. 23

Contrary to the often-used ideal of the devoted retailer, Amazon's founding was therefore not about identification with the product and the desire to make a living by trading it. Amazon's business was designed from the outset to play such a large and significant role that it would become an unavoidable player in the retail sector.²⁴ It was, and continues to be, about building the broadest possible user base to which other, related goods and services can then be offered. In order to achieve this goal, Amazon first had to build up such a user base by offering the lowest possible prices with the most convenient service and the broadest possible product portfolio, and to bind them to it permanently through loyalty programs. 24

2.1.1 Market leadership instead of profits

In order to achieve the goal of building and maintaining as broad a user base as possible, Amazon refrained from making an operating profit for decades.²⁵ Amazon went public in 1997, but was only able to report its first annual profit in 2003.²⁶ Since Amazon is willing to accept a loss with every product sold, Amazon's losses rose to USD 1.4 bn in 2000, while at the same time it turned over USD 2.7 bn.²⁷ However, by promising to scale its business model, Amazon has always managed to attract enough investors to more than cover its capital needs on an ongoing basis.²⁸ This is achieved despite the fact that Amazon does not pay dividends to 25

²³ Report of the US House of Representatives (fn. 108), p. 207; *Snyder/Canaday/Hughes*, George J. Stigler Center for the Study of the Economy & the State Working Paper No. 319, p. 3; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162112.

²⁴ *Khan*, *The Yale Law Journal*, 126 (2017), 710, 747 et seq.

²⁵ *Khan* (fn. 24), 755.

²⁶ Report of the US House of Representatives (fn. 108), p. 207.

²⁷ *Snyder/Canaday/Hughes* (fn. 23), p. 5.

²⁸ *Streitfeld*, "As Competition Wanes, Amazon Cuts Back Discounts", *nytimes.com*, 4 July 2013, available at: <https://www.nytimes.com/2013/07/05/business/as-competition-wanes-amazon-cuts-back-its-discounts.html>.

shareholders and has very high price-earnings,²⁹ and price-book ratios,³⁰ i.e. it is actually constantly “overvalued”.³¹ From the outset, and as early as his first letter to investors, Amazon’s founder and former CEO *Jeff Bezos* told investors in 1997 that Amazon was not about short-term profits but long-term shareholder value and that this shareholder value resulted directly from Amazon's ability to secure its market leadership and expand.³² The stronger the market leadership, the more robust the economic model, as market leadership translates directly into higher sales, profitability and return on investment.³³ *Lina Khan* points out that *Bezos'* short letter uses the term “market leadership” six times.³⁴ She aptly describes the strategy as a “willingness to forgo profits in order to achieve supremacy”.³⁵ *Bezos* has confirmed the pursuit of this strategy in the decades since, during a hearing of the US House of Representatives.³⁶

2.1.2 Amazon’s expansion strategy

At the same time, Amazon pursued an ongoing strategy of triple expansion: Horizontal expansion of the product portfolio offered³⁷, vertical expansion into upstream and downstream markets, and geographical expansion, e.g. into Canada, the UK, Germany, France, Spain, Italy, the Netherlands, Poland and China.³⁸ Horizontal expansion and geographic expansion took place in particular through corporate acquisitions.³⁹

For example, Amazon acquired other online retailers that were specialized but offered a broad product portfolio within that specialization.⁴⁰ Thus, Amazon acquired a stake in the online supermarket Home Grocer in 1999, in the hardware manufacturer and online retailer Small Parts⁴¹ in 2005, and in the online fashion and accessories business Shopbob⁴² in 2006. This allowed Amazon to use the functionality and customer data of the acquired companies to improve its own

²⁹ *Gottschalck*, “Amazon hängt Apple ab”, *manager-magazin.de*, 6 November 2015, available at: <https://www.manager-magazin.de/lifestyle/artikel/amazon-warum-alle-die-aktie-lieben-a-1061534.html>.

³⁰ *Toller*, “Amazon trumps Wal-Mart - but only on the stock market”, *wiwo.de*, 24 July 2015, available at: <https://www.wiwo.de/finanzen/boerse/hoehere-bewertung-amazon-uebertrumpft-wal-mart-aber-nur-an-der-boerse/12101304.html>.

³¹ *Streitfeld* (fn. 28).

³² *Bezos*, Letter to Shareholders 1997, available at: <https://www.sec.gov/Archives/edgar/data/1018724/000119312513151836/d511111dex991.htm>

³³ *Bezos* (fn. 32).

³⁴ *Khan* (fn. 24), 750.

³⁵ *Khan* (fn. 24), 747.

³⁶ Report of the US House of Representatives (fn. 108), p. 207 (fn. 1514).

³⁷ *Snyder/Canaday/Hughes* (fn. 23), p. 4.

³⁸ Overview in: *Snyder/Canaday/Hughes* (fn. 23), p. 9 et seqq.; Amazon has, according to the EU Commission (Case AT.40462, para. 9 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.) localized 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*.

³⁹ *Parker et al*, 30 *Industrial and Corporate Change* (2021), 1307, 1312 et seq.

⁴⁰ *Snyder/Canaday/Hughes* (fn. 23), p. 4; *Zimmermann*, *Supermarket News Online*; available at: <https://www.supermarketnews.com/archive/amazoncom-takes-stake-homegrocer>.

⁴¹ *Snyder/Canaday/Hughes* (fn. 23), p. 4.

⁴² See overviews in *Snyder/Canaday/Hughes* (fn. 23), *passim*; *Geradin/Smith*, *Spinning Amazon's Flywheel: How Amazon's business model harms competition A view from Europe*, p. 5 ff, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4398725.

services.⁴³ Amazon can also achieve better customer data and profiles through acquisitions of camera (Blink 2017),⁴⁴ door security (Ring 2018),⁴⁵ and robot vacuum cleaner manufacturers (iRobot 2022),⁴⁶ partly through technical transfer to or in combination with Amazon's smart home devices (Echo & Alexa devices).

The vertical expansion took place primarily less through acquisitions than through the expansion of internal services and capacities, which were later opened up to third-party customers in the form of already highly scaled internal service providers. Thus, Amazon expanded relatively early on from a pure online retailer to an e-commerce platform operator on which both Amazon's retail division and independent third-party sellers can offer products for sale to consumers.⁴⁷ Later, Amazon opened up services in the area of web services, logistics, payment, etc. to business customers. But also, for these services such as cloud computing and web services via AWS, Amazon made strategically important acquisitions, e.g. the acquisition of the Israeli company EC2, which had efficient data storage technology, which gave AWS a big advantage.⁴⁸

In the case of Amazon's vertical integration through its own production and distribution of products under private labels such as Amazon Basic, on the other hand, there was no opening up of internally developed services to third parties. Rather, this is a classic retail diversion of demand away from manufacturer brands and towards private labels in order to increase their own value creation.

2.1.3 Amazon's loyalty scheme

In addition to building a broad customer and user base, it is essential for Amazon's business models to retain these customers and users in the long term. The central element for this is Amazon's Prime membership. This is subject to a fee and currently costs EUR 89.90 per year in Germany, for example. In return, users or "Prime members" currently receive the following benefits:⁴⁹

- Free premium shipping;
- Free same-day delivery to available regions on qualifying orders of EUR 20.00 or more;

⁴³ Parker et al, 30 Industrial and Corporate Change (2021), 1307, 1312.

⁴⁴ Dastin, Why Amazon Bought Camera Maker Blink for \$90 Million, BusinessInsider.com, 12 February 2018, available at: <https://www.businessinsider.com/amazon-blink-camera-maker-acquisition-2018-2>.

⁴⁵ Kim, Amazon buys smart doorbell maker Ring for a reported \$1 billion, CNBC.com, 27 February 2018, available at: <https://www.cnbc.com/2018/02/27/amazon-buys-ring-the-smart-door-bell-maker-it-backed-through-alexa-fund.html>.

⁴⁶ This transaction is the subject of an ongoing merger investigation by the EU Commission: Espinoza/Lee, EU set to investigate Amazon's \$1.7bn purchase of Roomba-maker, ft.com, 15 February 2023, available at: <https://www.ft.com/content/b05a1260-ee5a-4ac8-9a34-31cdb8104cf1>.

⁴⁷ Comm., Case AT.40462, para. 9 - Amazon Marketplace and Case AT.40703 – Amazon Buy Box.

⁴⁸ Snyder/Canaday/Hughes (fn. 23), p. 13.

⁴⁹ Listing according to Kastenhuber, "Amazon Prime: For whom the service is still worthwhile", businessinsider.de from 18 January 2023, available at: <https://www.businessinsider.de/insider-picks/technik/amazon-prime-lohnt-sich-das-2023/>.

- Access to Prime Video with a wide range of free and paid content, Amazon Originals and selected UEFA Champions League top matches, 33
- Access to Amazon Music Prime with two million free songs, podcasts, and radio plays, 34
- Access to Prime Reading via the Kindle app with hundreds of e-books, e-magazines, comics, and Kindle Singles, 35
- Access to Prime Gaming (formerly Twitch Prime) with new free gaming content every month and free Twitch channel subscription, 36
- Access to Prime Photos with unlimited storage space for photos. 37

The Prime membership is not cost covering in itself (see 2.3).⁵⁰ 38

Important strategic acquisitions were also made in the context of Amazon Prime, which served to expand the benefits of Prime membership in order to retain customers or attract new ones and to build up or maintain indirect network effects. This category includes the acquisition of Audible in 2008, which was already the leading provider of audio books at the time,⁵¹ the acquisition of MGM Studios in 2021 for Prime Video,⁵² and the acquisition of Twitch, the largest video game gaming platform in the world with approximately 140 million monthly active users.⁵³ 39

Interim result: From the beginning, Amazon pursued a strategy of growth at the expense of short-term profits through “loss-leading” in order to build market leadership and be able to expand. With this promise of market leadership, investors were and are promised higher returns on capital. With the capital provided by investors, Amazon pursues an aggressive expansion strategy, particularly by way of strategic corporate acquisitions. These lead to a (partly cross-subsidized) bundle of services, especially within the framework of the loyalty program “Prime”, which can no longer be attacked by other competitors. 40

2.2 Amazon's current structure

The business segments currently covered by Amazon can be categorized as follows according to the quarterly financial reports in the USA:⁵⁴ 41

⁵⁰ Report of the US House of Representatives (fn. 108), p. 207 (fn. 1514).

⁵¹ Stone, “Amazon to Buy Audiobook Seller for \$300 Million”, nytimes.com, 1 August 2008, available at: <https://www.nytimes.com/2008/02/01/technology/01amazon.html>.

⁵² Comm., press release of 15 March 2022, Commission approves acquisition of MGM by Amazon, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1762.

⁵³ Geradin/Smith (fn. 42), p. 19.

⁵⁴ Available at: <https://ir.aboutamazon.com/quarterly-results/default.aspx>; Mitchell, Amazon's Toll Road, p. 16, available at: https://cdn.ilsr.org/wp-content/uploads/2021/11/ILSR-AmazonTollRoad-Final.pdf?_gl=1*6thoo4*_ga*MTMwNTc5NzU5MS4xNjgzMTg4NzU5*_ga_M3134750WM*MTY5NDc5MDI0OC4zLjEuMTY5NDc5MDI0OC4wLjAuMA..&_ga=2.104989827.1827800919.1694790249-1305797591.1683188759; see also: Snyder/Canaday/Hughes (fn. 23), *passim*; Geradin/Smith (fn. 42), p. 5 et seqq.

2.2.1 Online shops

Amazon continues to be active on a large scale as a retailer in online sales. The group now manufactures over 240,000 products itself under its approx. 50 private labels such as Amazon Basics and sells them via its e-commerce platform.⁵⁵ When selecting the products that Amazon manufactures and sells itself, Amazon uses data from third-party sellers on its e-commerce platform.⁵⁶ The manufacture of these products is upstream of the sale via the e-commerce platform and there is in this respect a vertical interconnection between Amazon's private labels, its retail activities, and its e-commerce platform. 42

2.2.2 Stationary shops

Amazon now has an entire range of brick-and-mortar shops. These include in particular a small-space concept for grocery needs (Amazon Go), food retail (Amazon Fresh), and fashion retail (Amazon Style). These activities have so far been concentrated mainly in the USA. So far, Amazon has not been able to successfully transfer its business model to brick-and-mortar retail. Last year, for example, Amazon had to close its approximately sixty-eight stationary bookstores in the USA.⁵⁷ 43

2.2.3 Services to third-party sellers / e-commerce platform

In the countries where Amazon offers the Marketplace platform, it uses a specific website both for its own retail activities and for third-party sellers' sales. Because of this dual function, Amazon, as both a retailer and a provider of the platform to third-party sellers, is a competitor of those third-party sellers on Amazon's websites in many product categories.⁵⁸ 44

For the use of the platform, third-party sellers pay a selling rate fee to Amazon. In addition, a sales fee in the form of a percentage of the total price (i.e., item price plus shipping and gift wrapping costs; 8-15%) or a minimum amount is payable to Amazon for each item sold.⁵⁹ 45

In addition to paid use of the platform, Amazon offers a number of optional (paid) services to third-party sellers. The standard services provided to all third-party sellers include the provision of payment services. In addition, third-party sellers can take advantage of other services such as complaint handling, and promotional activities for an additional payment. In addition, Amazon offers fulfilment services (Fulfillment by Amazon; "FBA"), allowing third-party sellers to use Amazon's 46

⁵⁵ Snyder/Canaday/Hughes (fn. 23), p. 8.

⁵⁶ Comm., Case AT.40462, para. 9 – Amazon Marketplace and Case AT.40703 – Amazon Buy Box.

⁵⁷ Dastin, "Amazon to shut its bookstores and other shops as its grocery chain expands", reuters.com, available at: <https://www.reuters.com/business/retail-consumer/exclusive-amazon-close-all-its-physical-bookstores-4-star-shops-2022-03-02/>.

⁵⁸ FCO, case report of 17 July 2019, B2-88/18, available at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=4.

⁵⁹ Amazon.de as of 18 July 2023, available at: <https://sell.amazon.de/preisgestaltung>.

logistics centers and services to store, pack and ship their products to end customers for a fee. For this purpose, Amazon operates over 110 warehouses and has more than 100,000 transport vehicles.⁶⁰ It is true that the use of FBA for a fee is basically optional for third-party sellers. However, FBA is becoming more relevant for third-party sellers in that the product becomes part of the Prime program, can be selected for the Buy Box or can participate in Prime Day.⁶¹

2.2.4 Other (advertising revenue)

“Other” includes Amazon's online advertising revenue. Merchants or advertisers can book various advertising formats on Amazon's websites and pay a fee to Amazon for this.⁶² The pricing structure of advertising formats in the form of keyword bidding is opaque.⁶³ Due to an ever-stronger link with visibility, advertising formats are gaining relevance for merchants. This is because display results on Amazon are moving away from organic results (ranking by quality, relevance, price) to ranking by sponsored content.⁶⁴

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2.2.5 Subscription services (Prime, Audible, Kindle Unlimited)

Worldwide, over 200 million people are registered with Prime; Amazon achieved sales of USD 35.22 billion with Prime in 2022.⁶⁵ In the USA alone, around 112 million members were registered with Prime in January 2020, which corresponds to a share of 44 % of the adult population.⁶⁶ The rapid growth is also striking, as there were still around 50 million members in 2015.⁶⁷ In addition, Amazon operates subscription services for audiobooks (Audible) and for eBooks, eMagazines and audiobooks (Kindle Unlimited).

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2.2.6 Cloud computing and web services (AWS)

Amazon Web Services (AWS) also belongs to the Amazon Group. Through AWS, Amazon offers cloud computing and web services, i.e., in particular also server capacities, the construction and operation of websites, and online shops, data management, etc. AWS was officially launched in July 2002.⁶⁸ AWS' first and largest customer was Amazon itself, so AWS was able to build on the great economies of scale of Amazon's e-commerce business and serve the high demand for data transfer, management, and storage.⁶⁹

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⁶⁰ Snyder/Canaday/Hughes (fn. 23), p. 9.

⁶¹ Stichting Onderzoek Multinationale Ondernemingen (SOMO), Amazon's European chokehold, [somo.nl](https://www.somo.nl/amazons-european-chokehold/) as of July 14, 2023, available at: <https://www.somo.nl/amazons-european-chokehold/>, p. 4, 11 et seq.

⁶² See overview of offers: <https://advertising.amazon.com/library/guides/basics-of-success-understanding-amazon-advertising>.

⁶³ Stichting Onderzoek Multinationale Ondernemingen (SOMO), (fn. 61), p. 4.

⁶⁴ Stichting Onderzoek Multinationale Ondernemingen (SOMO), (fn. 61), p. 4, 11.

⁶⁵ Geradin/Smith (fn. 42), p. 19.

⁶⁶ Report of the US House of Representatives (fn. 108), p. 70.

⁶⁷ Report of the US House of Representatives (fn. 108), p. 70.

⁶⁸ Snyder/Canaday/Hughes (fn. 23), p. 11.

⁶⁹ Snyder/Canaday/Hughes (fn. 23), p. 12.

Around 2006, AWS marketed its offering more aggressively, especially to business customers, offering for example the use of 20 GB for USD 20 per year.⁷⁰ AWS' first external customers included the US supermarket chain Target (building and providing an online shop) and Netflix.⁷¹ 50

In 2010, AWS' revenue was USD 500m with a profit margin of around 20 %. 2022 sales were USD 80 billion with a profit margin of 29 %.⁷² 51

2.3 Amazon's current business model and profit drivers

In contrast to the first decades after its foundation, Amazon can now regularly report a profit. Mostly, this is attributed in particular to the cloud computing services of AWS.⁷³ This impression is based in particular on the fact that although Amazon divides its net sales in its financial reports into the categories online shops, stationary shops, services to third-party sellers, subscription services, AWS and other (advertising revenue), it aggregates the operating income under the categories “North America”, “International” and “AWS”. This presentation leads to AWS, for example, reporting an operating profit of USD 13.5 bn for 2020, while all of Amazon's other business units in North America and International together “only” achieved a profit of USD 9 bn. In this view, AWS represents 60 % of Amazon's profit, while AWS' share of total net revenue is only 11.8 %.⁷⁴ From this observation, it is easy to draw the conclusion that AWS is Amazon's big profit driver. 52

However, this is increasingly countered by the fact that the segment of services to third-party sellers is similarly profitable, and that Amazon's real cash cow is Marketplace fees charged to third-party sellers.⁷⁵ Amazon is supposed to keep an average of 50% of the third-party sellers' revenue by means of the fees for services.⁷⁶ This total amount is made up of sales fees (approx. 8-15%) as well as (optional) fees for fulfillment (approx. 20-35%) and advertising (approx. up to 15%).⁷⁷ Amazon's revenue from third-party seller services fees (excluding advertising) has tripled in Europe from EUR 7.6 billion in 2017 to EUR 23.5 billion 53

⁷⁰ Snyder/Canaday/Hughes (fn. 23), p. 12.

⁷¹ Snyder/Canaday/Hughes (fn. 23), p. 12.

⁷² Miglani, “Amazon Sales And Profit Analysis For 2022: Top 10 Insights”, forrester.com as of 21 February 2023, available at: <https://www.forrester.com/blogs/amazon-sales-and-profit-analysis-for-2022-top-10-insights/#:~:text=AWS%20is%20the%20fastest%20growing%20and%20most%20profitable%20segment.&text=Additionally%2C%20its%20share%20of%20total.the%20company's%20most%20profitable%20segment>.

⁷³ Novet, “Amazon's cloud division reports 32% revenue growth”, cnbc.com, 29 April 2021, available at: <https://www.cnbc.com/2021/04/29/aws-earnings-q1-2021.html>; Herrera, “Amazon Reports Record Sales in Holiday Quarter”, wsj.com, 2 February 2021, available at: <https://www.wsj.com/articles/amazon-amzn-4q-earnings-report-2020-11612221803>; critical: Mitchell (fn. 54), p. 16 et seq.

⁷⁴ Also in 2019, Amazon's cloud business contributed more than 60 per cent of Amazon's total operating income, despite accounting for only 12.5 per cent of total revenue, see US House of Representatives Report (fn. 108), p. 207.

⁷⁵ Fundamental: Mitchell (fn. 54), p. 16 et seq.; Danziger, “Amazon's Third-Party Marketplace Is Its Cash Cow, Not AWS”, forbes.com, 5 February 2021, available at: <https://www.forbes.com/sites/pamdanziger/2021/02/05/amazons-third-party-marketplace-is-its-cash-cow-not-aws/>.

⁷⁶ Kaziukėnas, “Amazon Takes a 50% Cut of Sellers' Revenue”, marketplacepulse.com as of 18 July 2023, available at: <https://www.marketplacepulse.com/articles/amazon-takes-a-50-cut-of-sellers-revenue>.

⁷⁷ Kaziukėnas (fn. 76).

in 2022.⁷⁸ Revenue from advertising formats has also jumped in Europe from EUR 0.3 billion in 2017 to EUR 5.4 billion in 2021.⁷⁹ In Germany alone, Amazon's revenue from advertising formats is expected to be EUR 2.1 billion in 2021.⁸⁰ Amazon is already the third largest online advertising company in the USA behind Google and Meta (Facebook) with a market share of 7.3 %.⁸¹ In this respect, using the example of the reported and aggregated operating profit of USD 9 bn for 2020 for the own retail business, Prime and Marketplace, an attempt is made to separate the latter from the first two business segments. *Mitchell* comes to the conclusion that in 2020 Amazon probably achieved an operating profit of around USD 24 bn with the fees that third-party retailers had to pay to Amazon for the use of Marketplace. In a mirror image, this means a loss of around USD 15 bn for Amazon's own retail business and Prime in 2020.⁸²

Figure 1: P&L analysis of Amazon's e-commerce platform according to Mitchell⁸³



This view is understandable if one considers the following: In 2020, Prime contributions covered just under one-fifth of Amazon's costs for transport and fulfilment.⁸⁴ According to Amazon, these costs will rise to USD 168 bn in 2022.⁸⁵ Estimates therefore currently assume total annual sales of USD 35.22 bn with Prime memberships in 2022, which will be offset by costs for Prime of over USD 150 bn.⁸⁶

Even if it is not clear whether and to what extent the transport and fulfilment costs are attributable to Prime and Amazon's retail business alone, it remains obvious that these two areas cannot fully cover the costs they generate, especially since other costs such as license fees for Prime Video content to be paid by Amazon to third parties amounting to USD 16.6 billion must be added.⁸⁷ However, by Amazon's own admission, it is not Amazon's goal to operate Prime in a cost-covering manner.

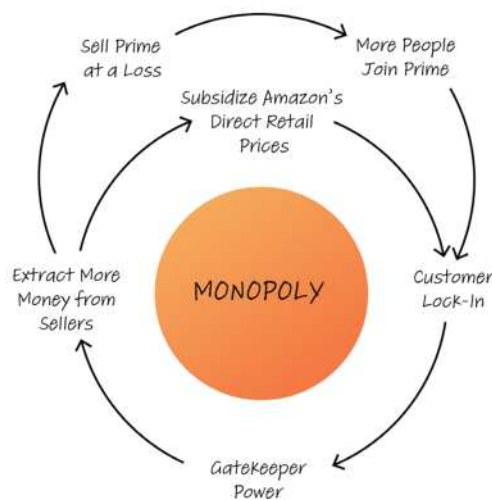
⁷⁸ Stichting Onderzoek Multinationale Ondernemingen (SOMO), (fn. 61), p. 9 et seq.
⁷⁹ Stichting Onderzoek Multinationale Ondernemingen (SOMO), (fn. 61), p. 11 et seq.
⁸⁰ Stichting Onderzoek Multinationale Ondernemingen (SOMO), (fn. 61), p. 12.
⁸¹ Vanian, "Amazon's advertising business grew 19%, while Google and Meta both deal with slowdowns", cnbc.com, 2 February 2023, available at: <https://www.cnbc.com/2023/02/02/amazons-advertising-business-grew-19percent-unlike-google-meta.html>.
⁸² Mitchell (fn. 54), p. 17.
⁸³ Adopted from Mitchell (fn. 54), p. 17.
⁸⁴ Mitchell (fn. 54), p. 18; Geradin/Smith (fn. 42), p. 21.
⁸⁵ Geradin/Smith (fn. 42), p. 21
⁸⁶ Geradin/Smith (fn. 42), p. 19.
⁸⁷ Geradin/Smith (fn. 42), p. 21.

Rather, it is about loyalty and increasing sales across various categories.⁸⁸ Amazon itself emphasizes that the equivalent value of Prime membership is supposed to be so high that it would be irresponsible not to be a member.⁸⁹ In fact, the equivalent value of a Prime membership is estimated at USD 1,100 annually.⁹⁰

At the same time, however, it is problematic that third parties cannot see how high Amazon's losses for its own retail business and Prime might be compared to the operating profit of the Marketplace. This concealment is no coincidence, but deliberately chosen by Amazon to avoid social discussions about the obvious cross-subsidization of its own business. Amazon also refused to provide the US House of Representatives with a corresponding breakdown.⁹¹ The fact that Amazon reports the operating profit of AWS individually is probably due to the fact that Amazon has to talk more openly about its AWS business, as many large companies report AWS as critical infrastructure to the US financial regulator.⁹² Calls for mandatory disclosures along the business lines are therefore becoming louder.⁹³

Starting from the plausible premise of cross-subsidization,⁹⁴ Mitchell, following “Amazon's flywheel” (see 2.4.2.1), illustrated the concept of cross-subsidization as Amazon's monopoly wheel:

Figure 2: Amazon's monopoly wheel according to Mitchell⁹⁵



⁸⁸ Report of the US House of Representatives (fn. 108), p. 207 (fn. 1514).

⁸⁹ *Bezos*, Letter to the Shareholders 2015: “We want Prime to be such a good value, you'd be irresponsible not to be a member.”, available at: https://s2.q4cdn.com/299287126/files/doc_financials/annual/2015-Letter-to-Shareholders.PDF.

⁹⁰ *Ribeiro*, “This is why JP Morgan is bullish on Amazon stock”, thestreet.com, 17 October 2022, available at: <https://www.thestreet.com/amazon/news/this-is-why-jp-morgan-is-bullish-on-amazon-stock>.

⁹¹ *Mitchell* (fn. 54), p. 17.

⁹² *Danziger* (fn. 75).

⁹³ *Kwoka/Valletti*, *Industrial and Corporate Change* 30 (2021), 1286, 1301; *Danziger* (fn. 75).

⁹⁴ Agreeing: *Geradin/Smith* (fn. 42), p. 21.

⁹⁵ Adopted from: *Mitchell* (fn. 54), p. 18.

Interim result: Amazon has now entered a phase in which it is reaping the fruits of its consolidated and expanded market leadership announced in 1997. The non-cost-covering predatory pricing of Prime and Amazon's retail business are the means to maintain market dominance, while the rising third-party merchant fees and Marketplace profits are the result of that dominance.⁹⁶ Put another way, from a competition law perspective, an announced monopoly with announced monopoly rents has not been prevented.

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2.4 Amazon's market position and competitive concerns

A number of competition authorities⁹⁷ and authors⁹⁸ have dealt with Amazon's market position in various antitrust-relevant markets over the last few years (see 2.4.1) and have expressed competition concerns (see 2.4.2).

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2.4.1 Amazon's dominant market position

Amazon has a high market share in many markets, which indicates a dominant position in each case.

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2.4.1.1 Market dominance in the e-commerce sector

As far as Amazon's offer to third-party sellers via the e-commerce platform is concerned, the EU Commission assumes relevant markets for marketplace services with which retailers reach end consumers in the individual Member States.⁹⁹ On these markets, the EU Commission assumes a market share of Amazon between 60 % and 70 %.¹⁰⁰ In conjunction with the other factors described below, such as network effects, the EU Commission assumes that Amazon has a dominant position for e-commerce platforms at least in Germany, France and Spain.¹⁰¹ The Italian Competition Authority has assumed a dominant position of Amazon on the Italian market for marketplace intermediation services.¹⁰²

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⁹⁶ Mitchell (fn. 54), p. 7.

⁹⁷ For example: **EU Commission:** Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*; **Germany:** FCO, decision as of 5 July 2022, B 5-55/21 (finding of paramount market importance within the meaning of Section 19a (1) ARC); press release as of 9 December 2013, B 6-46/12 (abandonment of the price parity clause); press release as of 17 July 2019, B 2-88/18 (amendment of GTCs vis-à-vis third-party sellers on Marketplace); **Italy:** AGCM, press release as of 9 December 2021 (<https://en.agcm.it/en/media/press-releases/2021/12/A528>); **France:** Paris Commercial Court, 2 September 2019; **UK:** CMA, press release as of 6 July 2022 (<https://www.gov.uk/government/news/cma-investigates-amazon-over-suspected-anti-competitive-practices>); **India:** <https://www.outlookindia.com/business/explained-why-is-competition-commission-of-india-probing-amazon-news-194362>.

⁹⁸ Khan (fn. 13), 973, 988.

⁹⁹ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 80 - *Amazon Buy Box*.

¹⁰⁰ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 86 - *Amazon Buy Box*.

¹⁰¹ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 95 - *Amazon Buy Box*.

¹⁰² AGCM, press release as of December 9, 2021, available at: <https://en.agcm.it/en/media/press-releases/2021/12/A528>.

2.4.1.2 Market dominance in individual product categories

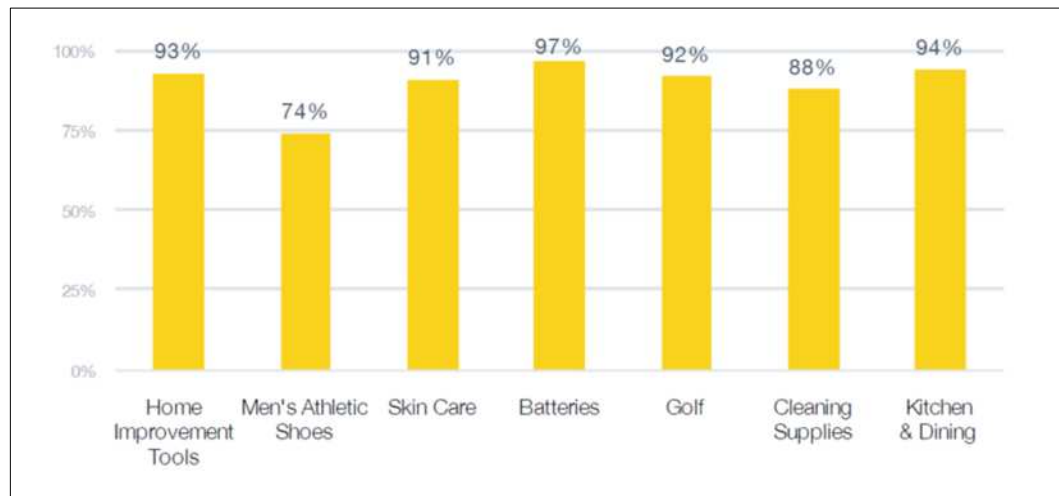
Several authors assume that Amazon is also dominant with regard to individual product categories.¹⁰³ 66

According to the British Booksellers Association, Amazon’s market share in the sale of printed books in the UK is around 50 %.¹⁰⁴ According to this, 70-80 % of all online sales of printed books in the UK take place via Amazon.¹⁰⁵ Online book sales account for about two-thirds of the total market in the UK. Amazon’s market share for eBooks is said to be 90 %.¹⁰⁶ A comparable situation is assumed in the USA.¹⁰⁷ 67

In the USA, Amazon’s home smart speaker systems under the name “Echo” are assumed to have a market share of 61.1 % in 2019.¹⁰⁸ In a representative survey in Germany in 2022, 78 % of the consumers surveyed named Amazon's Echo system when asked about the most popular smart speaker brands.¹⁰⁹ Although multiple answers were possible, Apple only came in second place with 13 %.¹¹⁰ 68

In addition, a report for the US market in the first quarter of 2018 assumes the following market shares of Amazon for the respective online sales: 69

Figure 3: Amazon's market shares for online retail in Q1 2018 in the USA¹¹¹ 70



¹⁰³ Geradin/Smith (fn. 42), p. 15 et seq.; Gresenhues, “Amazon Owns More Than 90% Market Share Across 5 Different Product Categories”, Martech.org from 31 May 2018, available at: <https://martech.org/amazon-owns-more-than-90-market-share-across-5-different-product-categories-report/>.

¹⁰⁴ Illustration according to: Geradin/Smith (fn. 42), p. 15.

¹⁰⁵ Geradin/Smith (fn. 42), p. 16.

¹⁰⁶ Geradin/Smith (fn. 42), p. 15.

¹⁰⁷ Geradin/Smith (fn. 42), p. 16.

¹⁰⁸ Report of the Subcommittee on Antitrust of the US House of Representatives of October 2020, Investigation of Competition in Digital Markets (Part I), p. 102, available at: <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>.

¹⁰⁹ Source: <https://de.statista.com/prognosen/999790/deutschland-beliebteste-smart-speaker-marken>.

¹¹⁰ Source: <https://de.statista.com/prognosen/999790/deutschland-beliebteste-smart-speaker-marken>.

¹¹¹ Source: Gresenhues (fn. 103) with further references.

This is confirmed by the Antitrust Subcommittee in the US House of Representatives, which in a report from October 2020 assumes a market position of Amazon of well over 50 % for the online trade of products from the categories of basic household needs, sports, fitness and outdoor.¹¹²

2.4.1.3 Logistics

According to some authors, Amazon's logistics business is already believed to be the largest parcel delivery company in the US,¹¹³ with an enterprise value of approximately USD 310 bn.¹¹⁴

For the parcel market in Germany, the current parcel market report of the Federal Network Agency from May 2022 paints the following picture:¹¹⁵

Figure 4: Market shares of parcel service providers in Germany by shipment volume 2020¹¹⁶



Amazon's market share in Germany is therefore still relatively small, especially compared to DHL, which emerged from the former state monopolist Deutsche Post. Nevertheless, the Federal Network Agency points out the following:

“If the share of parcel shipments transported via Amazon's own delivery network continues to grow at the same rate as in recent years, DP DHL could lose its leading market position. Whether and to what extent this will be the case is likely to depend crucially on how large the shipment volumes will be that Amazon, as a customer of DP DHL, will handle via its delivery network in future. It can be assumed that Amazon will also withdraw shipment volumes from other established

¹¹² Report of the US House of Representatives (fn. 108), p. 213.

¹¹³ Palmer, “Amazon poised to pass UPS and FedEx to become largest U.S. delivery service by early 2022, exec says”, cnbc.com, 29 November 2021, available at: <https://www.cnbc.com/2021/11/29/amazon-on-track-to-be-largest-us-delivery-service-by-2022-exec-says.html>.

¹¹⁴ Simons, “Amazon Logistics Will Be A Trillion-Dollar Business”, seekingalpha.com, 21 September 2021, available at: <https://seekingalpha.com/article/4455770-amazon-logistics-will-be-a-trillion-dollar-business-amzn>.

¹¹⁵ German Federal Network Agency, Parcel Market Report 2021 of 31 May 2022, p. 13, available at: https://www.bundesnetzagentur.de/SharedDocs/Mediathek/Berichte/2022/Paketmarktbericht2021.pdf?__blob=publicationFile&v=4.

¹¹⁶ Source: German Federal Network Agency (fn. 115), p. 13 (Figure 7).

*parcel service providers to the extent that its own delivery networks are expanded. The extent to which this will lead to a significant loss of market share for the established parcel services depends, among other things, on the general market development in the coming years.*¹¹⁷

Even though Amazon Logistics is currently still exerting competitive pressure on the market leader DHL in Germany, it must therefore be observed in perspective to what extent competition can be restricted in the future by Amazon's vertical entanglement in a way that has not been possible for other market participants up to now, even with high market shares. 79

The Italian Competition Authority already imposed behavioral sanctions on Amazon for exploiting its dominant position in the Italian market for marketplace intermediation services to favor the adoption of its own logistics service by sellers operating on Amazon.it to the detriment of logistics services offered by competing providers and to strengthen its own dominant position.¹¹⁸ 80

2.4.1.4 Amazon Web Services (AWS)

AWS is the provider with the largest global infrastructure, currently with over two hundred data centers.¹¹⁹ The global market share of AWS is estimated at 33 %.¹²⁰ However, the market structure and characteristics of the web services market differ significantly from other markets in which Amazon is active. First, AWS faces competition from companies with similar economies of scale and “deep pockets”, namely Microsoft (Azure), Google, IBM, Alibaba and others.¹²¹ In addition, there is a high degree of product differentiation in web services.¹²² Finally, customers resort to multi-sourcing, i.e. they do not only use web services from one provider, but distribute their demand among different providers as needed, so that there are basically no “lock-in” effects.¹²³ An exception to this may exist to the extent that Amazon uses AWS specifically with customers and users of the e-commerce platform, e.g. so that they receive a better ranking in search queries or in the Buy Box when they use services from AWS. 81

2.4.2 Competitive concerns vis-à-vis Amazon

In addition to the pure market position (see 2.4.1), competition concerns are expressed because of structural and behavioral measures on the part of Amazon. These are outlined below. 82

¹¹⁷ German Federal Network Agency (fn. 115), p. 16.

¹¹⁸ AGCM (fn. 102).

¹¹⁹ Snyder/Canaday/Hughes (fn. 23), p. 1, 13.

¹²⁰ Snyder/Canaday/Hughes (fn. 23), p. 13.

¹²¹ Snyder/Canaday/Hughes (fn. 23), p. 13.

¹²² Snyder/Canaday/Hughes (fn. 23), p. 14.

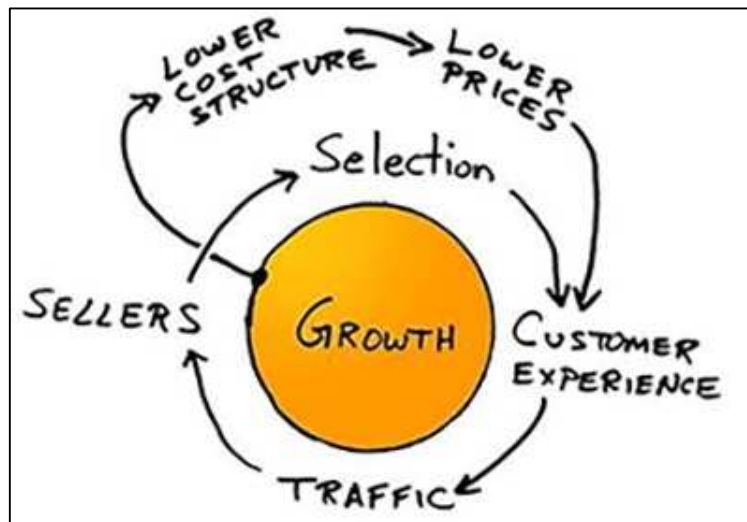
¹²³ Snyder/Canaday/Hughes (fn. 23), p. 14.

2.4.2.1 Amazon's (indirect) network effects

The market position, especially in the area of e-commerce, is not effectively contestable for third parties for several reasons: first and foremost, Amazon benefits from strong indirect network effects between the high and increasing number of buyers on the one hand and third-party sellers on the other.¹²⁴ The broad customer base attracts more third-party sellers and the more third-party sellers use Amazon's e-commerce platform, the larger the product selection there becomes, which in turn attracts more customers.¹²⁵ This effect is further strengthened by Prime membership and the associated loyalty of customers. Both Amazon itself¹²⁶ and analysts refer to the Prime program as a moat that secures Amazon's dominant position and makes it virtually unchallengeable even for the biggest competitors in the e-commerce sector (such as Walmart in the USA) (“**positive indirect network effects problem**”).¹²⁷

This thesis is also supported by the concept of “Amazon's Flywheel”.¹²⁸ Amazon and Bezos himself refer to it.¹²⁹ This flywheel is illustrated by means of an illustration, the authorship of which is partly attributed to Bezos himself.

Figure 5: Amazon's own flywheel illustration¹³⁰



¹²⁴ Comm., Case AT.40462 - Amazon Marketplace and Case AT.40703, para. 90 - Amazon Buy Box.

¹²⁵ Report of the US House of Representatives (fn. 108), p. 70.

¹²⁶ Report of the US House of Representatives (fn. 108), p. 71.

¹²⁷ Ramsey, “Walmart's talks with an insurance giant could be part of an assault on Amazon Prime”, businessinsider.in, 3 April 2018: “As the battle over consumer spending between Amazon and Walmart intensifies, we are concerned Amazon's Prime membership program is fortifying an impenetrable moat around its customers.”; available at: <https://www.businessinsider.in/walmarts-talks-with-an-insurance-giant-could-be-part-of-an-assault-on-amazon-prime/articleshow/63596019.cms>; Geradin/Smith (fn. 42), p. 21; Del Rey, “Prime Day is more than a gimmick, it's the single biggest event to expand Amazon's defensive moat”, vox.com, 16 July 2018; available from: <https://www.vox.com/2018/7/16/17574986/prime-day-2018-amazon-member-signups-defensive-moat>.

¹²⁸ Geradin/Smith (fn. 42), p. 18, referring to the image of the entrepreneurial flywheel introduced by John Collins in his book: “Good to Great: Why Some Companies Make the Leap...and Others Don't” (Harper Business 2001).

¹²⁹ Bezos, Letter to the Shareholders 2015: “With FBA, that flywheel spins faster because sellers' inventory becomes Prime-eligible - Prime becomes more valuable for members, and sellers sell more.”; available at: https://s2.q4cdn.com/299287126/files/doc_financials/annual/2015-Letter-to-Shareholders.PDF.

¹³⁰ Source: https://www.amazon.jobs/de/landing_pages/about-amazon.

Furthermore, it was found that a significant number of consumers start their shopping directly on the Amazon marketplace and are therefore much harder to reach through other sales channels.¹³¹ Finally, Amazon is better able to absorb losses than other e-commerce platforms as it is one of the five largest companies in the world in terms of market capitalization (i.e. the total value of the companies' shares) and is by far the most highly valued provider of marketplace services.¹³² 87

2.4.2.2 Amazon's access to data

Amazon's retail business is based on the evaluation of large data sets. According to a recent investigation by the EU Commission, the workflows and internal decision-making mechanisms of Amazon's retail business are largely automated. Decisions are largely no longer made by individual employees but by special algorithmic tools, e.g., about setting prices, managing inventory, identifying gaps in the product range, deciding to enter or exit certain product markets and identifying potential suppliers for Amazon's retail business.¹³³ 88

Third-party sellers must share the necessary data input for this automation with Amazon due to contractual ties. Third-party sellers who want to offer their products on Amazon's e-commerce platforms in the EU must conclude a “Business Solutions Agreement”. This has so far stipulated that third-party sellers provide data to Amazon free of charge. With regard to the transaction data generated on the e-commerce platform, Amazon grants itself exclusive property rights and may commercialize the data for any purpose. The third-party sellers are only entitled to limited rights of use (“**problem of access to data**”).¹³⁴ 89

2.4.2.3 Amazon's vertical integrations

Furthermore, with its complementary range of services, Amazon does not have to face any competition in relation to its “internal major customer“ Amazon Online Retail or Amazon E-Commerce Platform. Other providers of corresponding services (logistics, web services, etc.) are therefore deprived of Amazon as a central key account from the outset (“**problem of vertical integrations**“). 90

2.4.2.4 Amazon's economies of scale and scope

Also, Amazon can strongly scale its complementary services based on the “captive wholesale business” and exploit these economies of scale in expansion markets (“**economies of scale problem**”). Classically, such economies of scale only emerge with increasing market success and the expansion of production or service capacities based on the volumes that a company can actually or realistically sell. In 91

¹³¹ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 91 - *Amazon Buy Box*; in the US, 53% of product searches start directly on Amazon and “only” 23% on search engines such as Google: *Danziger*, “Amazon's Third-Party Marketplace Is Its Cash Cow, Not AWS”, *forbes.com*, 5 February 2021, available at: <https://www.forbes.com/sites/pamdanziger/2021/02/05/amazons-third-party-marketplace-is-its-cash-cow-not-aws/?sh=20718f2921c0>.

¹³² Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 92 - *Amazon Buy Box*.

¹³³ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 98 - *Amazon Buy Box*.

¹³⁴ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703, para. 99 - *Amazon Buy Box*.

the case of Amazon, however, scaling is undertaken or secured through “self-supply” in order to then use these economies of scale to one's own advantage in competition in the respective service markets.

2.4.2.5 Amazon's deep pockets

Due to its business strategy geared towards monopolization and long-term monopoly profits, Amazon can draw on considerable market capitalization and thus cash reserves (“**deep pocket problem**”). Amazon can use this capital for further expansion, marketing, acquisitions, research & development, etc. to further extend its lead. 92

2.4.2.6 Amazon's predatory price cross-subsidy

Amazon is cross subsidizing its predatory pricing for its own retail business and for Amazon Prime in particular. It has already been explained that Prime itself cannot and should not cover its costs. But that does not mean that Amazon's e-commerce business as a whole cannot be profitable. Amazon does not report profits and losses individually by segment. Nevertheless, it seems plausible that Amazon cross-subsidies its online retail business, including customer loyalty via Prime as the central core platform, via revenues from the AWS business and the fees of third-party retailers (on this already under 2.3). 93

2.4.2.7 Amazon's incentivization for self-promotion

The structural problems associated with Amazon's market position and business strategy also incentivize Amazon to engage in a number of behaviors that are classified as competitively problematic and are the subject of extensive and costly litigation (“**systematic self-advantage problem**”): 94

First of all, Amazon favors itself by evaluating data of third-party sellers in favor of its own online trade. This behavior was the subject of the antitrust proceedings for abuse of a dominant position under Article 102 TFEU in the “*Marketplace*” case.¹³⁵ The EU Commission now hopes to be able to stop this behavior by means of behavioral remedies (see 4.3.5). 95

Furthermore, Amazon favors its complementary services with regard to the allocation of the “buy box” on the e-commerce platform, which is imminently important for sales success. Amazon can thus incentivize retailers to make more use of Amazon's complementary services in order to expand its market position at the expense of competitors in the respective service sectors (fulfilment, logistics, etc.). This behavior was the subject of the antitrust proceedings for abuse of a dominant position under Article 102 TFEU in the “*Buy Box*” case.¹³⁶ The EU Commission 96

¹³⁵ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

¹³⁶ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

now hopes to be able to put an end to this behavior with behavioral remedies (on this see 4.3.5).

In addition, there are numerous reports that Amazon manipulates search results on the e-commerce platform to its own advantage.¹³⁷ These reports relate in particular to the so-called Amazon Fair Pricing Policy, according to which Amazon is supposed to monitor product prices and downgrade or block products if they are available at a lower price elsewhere.¹³⁸ Furthermore, Amazon is said to copy successful products from third-party sellers, manufacture them itself and distribute them through its own retail shop.¹³⁹ Finally, Amazon is said to make its decision on which brands to crack down on counterfeiting contingent on them fully cooperating with Amazon as a distribution partner.¹⁴⁰

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2.5 Interim result

Amazon's market position and business strategy are accompanied by a number of structural and systematically behavioral competition problems. The competition concerns are not based on selective infringements by Amazon, as can occur in individual cases with "classic" market dominators within the meaning of Art. 102 TFEU or Sections 19 et seq. ARC, for example, if a customer is not supplied by a dominant supplier or if a dominant company ties customers to itself by means of loyalty discounts in such a way that the market is closed to other suppliers. The reasons for the competition concerns against Amazon lie in its structure and strategy and are therefore of a systematic nature. Predatory pricing, discrimination and self-preferential treatment, market closures, market consolidation through strategic acquisitions, etc. are part of the strategy.

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The appropriateness of unbundling measures must be measured against their respective contribution to solving one or more of these problems (see 6.1).

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¹³⁷ *Angwin/Mattu*, "Amazon Says It Puts Customers First. But Its Pricing Algorithm Doesn't" *propublica.org*, 20 September 2016, available at: <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesn-t>; *Khan* (fn. 13), 973, 988; *Kirkwood*, *Florida Law Review* Vol. 74 (January 2022), 63, 79 et seq.

¹³⁸ *Stichting Onderzoek Multinationale Ondernemingen (SOMO)*, (fn. 61), p. 5.

¹³⁹ *Kirkwood* (fn. 137), 63, 81 et seqq.

¹⁴⁰ *Stevens/Germano*, "Nike Thought It Didn't Need Amazon-Then the Ground Shifted", *wsj.com*, 28 June 2017, available <https://www.wsj.com/articles/how-nike-resisted-amazons-dominance-for-years-and-finally-capitulated-1498662435?mod=searchresults&page=1&pos=4>; *Levy*, "Birkenstock quits Amazon in US after counterfeit surge", *cncb.com*, 20 July 2016, available at: <https://www.cncb.com/2016/07/20/birkenstock-quits-amazon-in-us-after-counterfeit-surge.html>; *Khan* (fn. 13), 973, 990 et seq.

3. Background to current unbundling debates

Discussions about the necessity and possibility of (antitrust) unbundling have been ignited in recent years, especially by the example of the large digital corporations in general and Amazon in particular.¹⁴¹ Comparable discussions in relation to the big oil magnates in the USA led to the birth of modern antitrust law with the Sherman Antitrust Act of 2 July 1890¹⁴².

The current unbundling debates are based in particular on the following reasons: Rising concentration rates in many markets including digital markets and the associated competition law concerns (see 3.1); social and societal disadvantages of the concentration of power of digital corporations (see 3.2); and the inadequacy of previous attempts to remedy the situation through behavioral measures (see 3.3).

3.1 Increasing Market concentration (in online trade)

Studies show the increasing concentration rates in many US product and service markets.¹⁴³ The consequences are rising company margins and fewer and fewer new companies entering the market.¹⁴⁴

For the EU and Germany, too, it can be stated that concentration in certain sectors is demonstrably and continuously increasing.¹⁴⁵ This does not take into account possible effects of the participation of institutional investors in competing companies.

If, despite an inhomogeneous overall picture, a varying degree of increase in concentration can be assumed in the markets examined, the finding of a high concentration in the area of online retailing applies in any case to the countries USA, Germany, France and Spain. In any case, these markets are dominated by Amazon.

One important driver of rising market concentrations is corporate takeovers. Between 1988 and 2020, the large digital corporations Amazon, Apple, Facebook, Google and Microsoft acquired approximately 855 companies.¹⁴⁶ Amazon has accounted for about 107 acquisitions since 1998.¹⁴⁷

¹⁴¹ Galloway, “Silicon Valley's Tax-Avoiding, Job-Killing, Soul-Sucking Machine”, in Esquire, 8 February 2018, available at: https://www.esquire.com/news-politics/a15895746/bust-big-tech-silicon-valley/?src=nl&mag=esq&list=nl_enl_news&date=020818; Steinberg/Hoest/Käseberg, WuW 2021, 414, 415. <https://www.law.cornell.edu/uscode/text/15/chapter-1>.

¹⁴² Kwoka/Valletti (fn. 93), 1286, 1288.

¹⁴³ Kwoka/Valletti (fn. 93), 1286, 1288.

¹⁴⁴ Comm., Single Market Performance Report 2019, SWD(2019) 444 final, p. 25: “The trend involving higher concentration ratios and markups is also reflected in increased market power, especially among larger firms.”; available at: <https://data.consilium.europa.eu/doc/document/ST-15321-2019-ADD-1/en/pdf>; Comm., Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, 12 July 2021, SWD(2021) 199 final, p. 13, available at: https://competition-policy.ec.europa.eu/system/files/2021-07/evaluation_market-definition-notice_en.pdf.

¹⁴⁶ Parker et al, 30 Industrial and Corporate Change (2021), 1307, 1312.

¹⁴⁷ Parker et al., loc. cit.

3.2 Social and societal disadvantages of the concentration of power

Even if social and societal aspects do not play a role in the competitive assessment of the concentration of power (of digital corporations), they nevertheless form the basis of societal discussions and demands for solutions, which in turn shape competition policy discussions also around issues of unbundling. These aspects are therefore briefly outlined below. 106

3.2.1 Political power

Market power always translates into lobbying power. Political power is fed by financial resources and the associated opportunities to influence political processes through donations, campaigns and lobbyists.¹⁴⁸ The acquisition of the Washington Post by Jeff Bezos is proof of the influence that economic power can have on the formation of public opinion. 107

3.2.2 Working conditions and displacement of self-employment

From a political point of view, Amazon in particular is often (initially) welcome as an employer, as large goods and logistics centers promise a high number of jobs at local and regional level. However, Amazon has not been able to get rid of accusations of poor working conditions for decades. Criticism in Germany also includes a “climate of fear” due to continuous monitoring of employees, which also raises doubts for data protection reasons (see 3.2.3).¹⁴⁹ 108

3.2.3 Concerns about data protection

The exploitation of customer data often forms an important basis for the business models of digital groups, as it enables them to either display targeted advertising or bring goods, services or information to the attention of users, which is likely to incite them to further interaction (purchase, reply to a post, etc.) with the digital group. Amazon also stores customers' orders and interactions with Amazon services, sometimes for decades.¹⁵⁰ This allows Amazon to create a customer profile that captures habits and preferences in the areas of ordering books and other consumer goods, food, music and videos, among others. Via “smart” home application devices and the Alexa voice assistant, a continuous recording of the 109

¹⁴⁸ Diaz/Birnbaum, “Amazon Breaks Lobbying Record Amid Antitrust Fight”, Bloomberg.com, 21 July 2022, available at: <https://www.bloomberg.com/news/articles/2022-07-21/amazon-breaks-lobbying-record-amid-antitrust-fight?leadSource=verify%20wall>; Oprysko, “Amazon adds another antitrust lobbyist”, politico.com, 3 February 2023, available at: <https://www.politico.com/newsletters/politico-influence/2023/02/03/amazon-adds-another-antitrust-lobbyist-00081172>.

¹⁴⁹ “Amazon: Mitarbeiter kritisieren Überwachung und Druck”, T-Online, 1 February 2023, available at: https://www.t-online.de/region/hamburg/id_100121898/arbeitsbedingungen-bei-amazon-mitarbeiter-kritisieren-arbeitsklima-der-angst-.html

¹⁵⁰ Heinrich, “Amazon: Was der Datenkrake alles über uns weiß - ein Selbstversuch”, Merkur.de, 29 March 2022, available at: <https://www.merkur.de/wirtschaft/amazon-daten-selbstversuch-datenschutz-auskunft-anfordern-kunden-loeschen-zr-91442626.html>

spoken word in the private rooms of the users can also be made.¹⁵¹ Digitalcourage e. V. awarded Amazon the Big Brother Award for this in 2015, a negative prize for data octopuses.¹⁵² The resulting danger of the “transparent citizen” is increasing the expansion of Amazon's business fields, especially in sensitive areas such as the health insurance sector.¹⁵³

The continuous monitoring of employees by Amazon (in Germany) also raises data protection concerns, even though the Administrative Court of Hanover recently assessed this continuous monitoring as compliant with data protection law and overturned a different order by the Lower Saxony data protection authority.¹⁵⁴ In this respect, demands for an Employee Data Protection Act remain loud.¹⁵⁵

3.2.4 Tax avoidance

Amazon is continuously criticized for tax avoidance tactics.¹⁵⁶ In Amazon's case, its initial success as an online bookseller in the USA was also based on the fact that, unlike local or stationary bookshops, Amazon did not pay sales tax and was able to pass this price advantage on to customers in order to clear the market.¹⁵⁷

The (minimum) taxation of large multinational companies from the digital economy, in particular the taxation of profits from user data, is currently being discussed (still fruitlessly) at the international level.¹⁵⁸ In response to the low level of taxation of the digital economy in Europe, a so-called digital services tax has been introduced nationally in France and the United Kingdom.¹⁵⁹ In addition, the possibility of tax evasion by traders on Amazon Marketplace is reported.¹⁶⁰

¹⁵¹ *Iqbal et al*, “Your Echoes are Heard: Tracking, Profiling, and Ad Targeting in the Amazon Smart Speaker Ecosystem”, available at: https://www.ftc.gov/system/files/ftc_gov/pdf/PrivacyCon-2022-Iqbal-Bahrami-Trimananda-Cui-Garrido-Dubois-Choffnes-Markopoulou-Roesner-Shafq-Your-Echos-are-Heard.pdf

¹⁵² See <https://bigbrotherawards.de/2018/amazon-alex>.

¹⁵³ *Rosenblatt*, “Amazon is becoming a health care company. What does that mean for you?”, The Seattle Times online, 7 August 2022, available at <https://www.seattletimes.com/business/amazon-is-becoming-a-health-care-company-what-does-that-mean-for-you/>

¹⁵⁴ VG Hannover, judgement of 9 February 2023 - 10 A 6199/20.

¹⁵⁵ E.g., Data Protection Conference, “Die Zeit für ein Beschäftigtendatenschutzgesetz ist „Jetzt“!”, Resolution of the Conference of the Independent Data Protection Supervisory Authorities of the Federation and the Länder of 29 April 2022 available at: https://datenschutzkonferenz-online.de/media/en/Entschliessung_Forderungen_zum_Beschaeftigtendatenschutz.pdf

¹⁵⁶ *Berthelot*, “Amazon Europe Unit Paid No Taxes on \$55 Billion Sales in 2021”, Bloomberg.com, 20 April 2022, available at: <https://www.bloomberg.com/news/articles/2022-04-20/amazon-europe-unit-paid-no-taxes-on-55-billion-sales-in-2021#xj4y7vzkg>.

¹⁵⁷ Tehrani, *The Tax Lawyer*, Vol. 67, No. 4 (summer 2014), 875 et seq.

¹⁵⁸ See OECD/G20, Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy as of July 11, 2023, available at: <https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.htm>; European Commission, proposal for a council directive regarding Rules relating to the corporate taxation of a significant digital presence as of March 21, 2018, COM(2018) 147 final.

¹⁵⁹ France: LOI n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés, JORF n° 0171 du 25 juillet 2019; United Kingdom: Digital Services Tax, 2020 c. 14, available at: <https://www.legislation.gov.uk/ukpga/2020/14/part/2/enacted>.

¹⁶⁰ *Böcking/Hecking*, “Die Amazon-Oase”, in Spiegel-Online of 21 October 2017, available at: <https://www.spiegel.de/wirtschaft/unternehmen/umsatzsteuer-wie-amazon-zur-hinterziehung-genutzt-wird-a-1171381.html>.

3.2.5 Enabling brand piracy

Online trading platforms such as Amazon or eBay facilitate the sale of counterfeit branded goods. In part, this has safety-relevant aspects, e.g., when counterfeit (and inferior) automotive spare parts are purchased and installed undetected by the consumer.¹⁶¹ 113

In addition, there are reports about how Amazon makes the decision on whether or not to effectively prosecute trademark piracy on the Marketplace dependent on whether or not the trademark owner itself also sells its products on Amazon.¹⁶² 114

3.2.6 Climate aspects

In addition to the immense energy requirements of the data centers to operate the business models of the digital corporations, accusations are repeatedly made against the masses of returns in the case of Amazon. According to research by Greenpeace, around twenty cubic meters of new goods are sent for scrapping every week at the Winsen logistics center alone.¹⁶³ In one warehouse in the UK, more than 120,000 new or as-new items were destroyed within a week, including high-priced consumer and household electronics.¹⁶⁴ 115

3.3 Inadequacies of behavioral interventions

The demands for unbundling of the digital corporations must also be seen against the background of the attempts, often perceived as insufficient, to get to grips with unwelcome consequences of the digital corporations' behavior through behavior-related measures. 116

The most recent example is Amazon's commitment to the EU Commission to ensure that information about third-party sellers on its e-commerce platform is not used for its own trading business (see 4.3.5).¹⁶⁵ In this respect, it must be stated that there is no lack of (antitrust) proceedings against Amazon,¹⁶⁶ without having succeeded so far in effectively addressing the (competitive) problems in connection with Amazon. 117

¹⁶¹ <https://www.swrf Fernsehen.de/marktcheck/amazon-marketplace-plagiate-faelschungen-100.html>

¹⁶² Khan (fn. 13), 973, 990 et seq.; Stevens/Germano, "Nike Thought It Didn't Need Amazon-Then the Ground Shifted", *wsj.com*, 28 June 2017, available at: <https://www.wsj.com/articles/how-nike-resisted-amazons-dominance-for-years-and-finally-capitulated-1498662435?mod=searchresults&page=1&pos=4>; Levy, "Birkenstock quits Amazon in US after counterfeit surge", *cnbc.com*, 20 July 2016, available at: <https://www.cnbc.com/2016/07/20/birkenstock-quits-amazon-in-us-after-counterfeit-surge.html>

¹⁶³ Greenpeace, "New images from Amazon warehouse in Winsen prove destruction of new goods", article of 12 February 2020, available at: <https://www.greenpeace.de/engagieren/nachhaltiger-leben/werk-abfall>.

¹⁶⁴ Pallot, "Amazon destroying millions of items of unsold stock in one of its UK warehouses every year, ITV News investigation finds", *itv.com*, 22 June 2021, available at: <https://www.itv.com/news/2021-06-21/amazon-destroying-millions-of-items-of-unsold-stock-in-one-of-its-uk-warehouses-every-year-itv-news-investigation-finds>.

¹⁶⁵ Comm., Case AT.40462 - Amazon Marketplace and Case AT.40703 - Amazon Buy Box.

¹⁶⁶ See references at fn. 97.

The current practice of dealing with non-horizontal mergers involving (digital) corporations with market power is essentially limited to behavioral measures.¹⁶⁷ 118

However, the effectiveness of behavioral interventions is questioned with reference to their shortcomings.¹⁶⁸ First of all, it is extremely complex to designate the undesirable behavior in a sufficiently concrete way. Therefore, the formulation of behavioral measures is very difficult. Behavioral measures are often very static and can be overtaken by technological adaptations and market dynamics.¹⁶⁹ Furthermore, monitoring is very time-consuming (also for the companies), and the detection of violations is demanding. Finally, there are many ways for companies to circumvent the behavioral measures. Behavioral measures are often very static and can be overtaken by technological adaptation and market dynamics.¹⁷⁰ 119

Even if undertakings violate conduct-related requirements, they usually only face a fine, which the companies concerned can chalk up as only relatively low transaction costs in view of the sometimes-immense transaction values of the mergers. An example of this is the cleared merger between Facebook and WhatsApp.¹⁷¹ In the course of 2016, the Commission found that Facebook had made misleading statements in the 2014 notification when it claimed that it was unable to perform reliable automated matching between the accounts of Facebook users and WhatsApp users.¹⁷² Due to the misleading information, the EU Commission imposed a fine of EUR 110 million. The EU Commission, however, refrained from a theoretically conceivable revocation of the clearance of the merger (see 5.1.4.2). 120

Structural unbundling measures offer certain advantages over behavioral measures. In particular, clearer boundaries can be drawn between the business areas to be separated for competition reasons, so that conflicts of interest are eliminated and economic incentives for self-preference, discrimination and barriers to entry, etc. are removed.¹⁷³ Behavioral measures, on the other hand, are often not suitable to address the underlying problem and at the same time overtax the capacity of competition authorities to efficiently and effectively monitor compliance with behavioral measures.¹⁷⁴ 121

3.4 Reservations against unbundling measures

Despite the inadequacies of behavioral measures (see 3.3), calls for unbundling are met with great skepticism, even in expert circles. They are described as a “radical” solution, not least in the USA.¹⁷⁵ In contrast to behavioral measures, unbundling 122

¹⁶⁷ *Kwoka/Valletti* (fn. 93), 1286, 1289.

¹⁶⁸ *Bernhardt/Voges*, WuW 2022, 651, 655; *Kwoka/Valletti* (fn. 93), 1286, 1289; *Loertscher/Maier-Rigaud*, in: Gerard/Komnios, Remedies in EU Competition Law, 2020, p 53, 61.

¹⁶⁹ *Kwoka/Valletti* (fn. 93), 1286, 1289.

¹⁷⁰ *Kwoka/Valletti* (fn. 93), 1286, 1289.

¹⁷¹ Comm., Case M.7217 - *Facebook/Whatsapp*.

¹⁷² Comm., press release of 18 May 2017, available at:

https://ec.europa.eu/commission/presscorner/detail/de/IP_17_1369.

¹⁷³ *Khan* (fn. 13), 973, 980.

¹⁷⁴ *Khan* (fn. 13), 973, 981.

¹⁷⁵ *Van Loo*, Cornell Law Review Vol. 105, 1955, 1957; *Khan* (fn. 13), 973, 1063 with further references.

measures do not relate directly to specific behavior that is in breach of cartel law, but attempt to remove the structural basis for it.¹⁷⁶ In some cases, it is argued against unbundling measures that they are time-consuming, cost-intensive and their competitive benefit is uncertain (see 6.2). Ultimately, however, this criticism in its generality can be applied to behavioral measures to the same extent.

3.5 Amazon and consumer welfare

In corresponding debates, Amazon is often defended against demands for unbundling with the argument that it is an extremely service-oriented, customer-friendly company that ensures a low price level and thus acts competitively.¹⁷⁷ A statement by columnist *Matthew Yglesias*, which has become a bon mot in the context of the discussions about Amazon, summarized the relationship between service orientation and the renunciation of short-term profits by saying that Amazon is a non-profit organization that is run by parts of the investment industry for the benefit of consumers.¹⁷⁸ 123

This raises the question of whether Amazon's business model appears legitimate or justified from a meritocratic and (indirectly) legal point of view, even in view of an assumed partial consumer friendliness. For this “legitimacy” is essential especially in supposedly justice-driven discussions about unbundling. Even if the focus of the unbundling debates should actually be on the assessment of expediency against the background of the competition rules' objectives aimed at freedom of competition, it cannot be denied that both public opinion and most expert analysts are unable to detach themselves from such a meritocratic dressing-up. One expression of this is the artificial distinction in the intervention threshold of unbundling according to whether the structure perceived as problematic is based on external growth through acquisitions of other companies or on internal growth. This is only understandable if one wants to or has to associate an “accusation of guilt” with the unbundling at the same time and the protection of the institution of “competition” is not supposed to be sufficient for such an intervention. 124

Ultimately, however, the question of legitimacy can be left aside if Amazon's consumer-friendliness does not provide a sufficient basis for this anyway. There are considerable doubts about this in particular because the advantages for Amazon's end customers are accompanied by considerable disadvantages for other consumer groups. The alleged consumer-friendliness of Amazon is rightly countered with the argument that many consumers are also owners of small and medium-sized enterprises or employees of Amazon's competitors, who presumably hardly benefit 125

¹⁷⁶ Comm., Decision of 20 September 2016, para. 140 Case AT.39759 - *ARA Foreclosure*: “The divestiture of the part of the household collection infrastructure which ARA owns is necessary to ensure that the infringement will not be repeated”.

¹⁷⁷ *Geradin/Smith* (fn. 42), p. 3.

¹⁷⁸ *Yglesias*, “Amazon Profits Fall 45 Percent, Still the Most Amazing Company in the World”, *Slate .com*, 29 January 2013), available at: http://www.slate.com/blogs/moneybox/2013/01/29/amazon_q4_profits_fall_45_percent.html.

from Amazon's strategy.¹⁷⁹ The concept of a legal justification of competition concerns through compensation on the basis of the appropriate participation of consumers is familiar to antitrust law in the context of the exemption from the prohibition of agreements restricting competition (ban on cartels) according to Article 101 (3) TFEU and Section 2 ARC. There, appropriate consumer participation is generally only recognized as justification if those consumers who have to bear the disadvantages of the restriction of competition also receive at least equivalent benefits. If, for example, the manufacturers of washing machines agree to levy a social compensation surcharge on customers in the future, which will be paid to employees, the necessary consumer participation is lacking, even if these consumers should welcome such a surcharge. The assessment may be different if the manufacturers of washing machines agree to sell only machines with a minimum level of electricity efficiency, but which are somewhat more expensive. If the higher purchase costs for consumers are offset by lower operating costs and it can be expected that these will at least offset the purchase costs, consumer participation is likely to be affirmed. Based on this competitive legitimacy measure of the impairment of competition for reasons of consumer friendliness, Amazon's consumer friendliness obviously lacks a sufficient connection or identity of the consumer groups that on the one hand have to bear the costs of the impairment of competition and on the other hand receive the benefits for this.

With regard to the “legitimacy debate”, it should not be ignored that consumer friendliness was never Amazon's goal but is only a means to the actual end of market leadership. This is impressively demonstrated by Jeff Bezos' letter to shareholders from 1997.¹⁸⁰ Amazon's goals are to maintain and expand its market leadership. This market leadership should lead to higher returns on capital for the shareholders. To maintain and expand market leadership, the customer base must be maintained and expanded. If anything, therefore, Amazon is a simulation of a dominant company that is financed by investors on the promise of supra-competitive returns on capital and, to this end, deliberately attracts certain consumer groups with low prices at the expense of other consumer groups. It is true that it should not play a role for the competitive perspective in this respect whether Amazon pursued such a strategy from the beginning or whether it is only a side effect today.¹⁸¹ In this respect, however, a level playing field of legitimacy arguments must be created, which does not proceed selectively and for the improvement of one's own position alone.

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¹⁷⁹ Greenfield, “Amazon: Still A Charity For Consumers Funded By Investors?”, Forbes.com, 30 January 2014, available at: <https://www.forbes.com/sites/jeremygreenfield/2014/01/30/amazon-a-charity-for-consumers-funded-by-investors/>; see also Geradin/Smith (fn. 42), p. 19 “[Amazon Prime] is in many ways an excellent deal for consumers in the short term. [...] But, Prime's success also produces harmful effects for competition and therefore for consumers in the longer term, especially when seen in the context of the other issues discussed in this paper.”

¹⁸⁰ Bezos, Letter to Shareholders 1997, available at: <https://www.sec.gov/Archives/edgar/data/1018724/000119312513151836/d511111dex991.htm>

¹⁸¹ Geradin/Smith (fn. 42), p. 19: “From a competition point of view, it is less relevant at this stage whether the strategy was intentionally predatory from the start than what effects it is now having.”

Regardless of the legitimacy debate, the focus of European and German competition law at any rate is on the institutional protection of effective competition and not on the targeted increase in the welfare of individual consumer groups.¹⁸² 127

Interim result: The legitimacy argumentation along supposed meritocratic merits for consumer welfare is out of place in the context of the unbundling debates, because the central issue here is the preservation or restoration of competitive structures and whether unbundling can contribute to this in an expedient and proportionate manner. Even if one conducts this discussion in this way, Amazon's consumer friendliness only benefits a certain consumer group, while other consumer groups have to face disadvantages under Amazon's business model. A comparison with the requirements of individual exemption under Article 101 (3) TFEU or Section 2 ARC proves that the competition rules only permit interference with competition in favor of consumer benefits if disadvantages and compensatory benefits of the interference materialize for the same consumer group. Burdening one consumer group in favor of another consumer group is not accepted. Why this should be different in the legitimacy debate about Amazon does not suggest itself. Moreover, in EU and German antitrust law, consumer welfare is not in the foreground anyway, but the preservation of competition as an institution. 128

¹⁸² *Geradin/Smith* (fn. 42), p. 4, referring to the ECJ's decision-making practice in: Case C-6/72 Europemballage Corporation and Continental Can Company v Commission [1973] ECR-215, para 26; Case C-95/04 British Airways v Commission [2007] ECR I-02331, para 106; Cases C-501/06P etc GlaxoSmithKline Services v Commission [2009] ECR I-09291, para 63.

4. Selection of historical unbundling procedures and their evaluation

Unbundling is an antitrust instrument that has been used for decades in the context of competition policy, albeit very cautiously at times. The pioneering role is held by the USA, which used this instrument as early as 1911 to unbundle a petroleum company (see 4.1). In recent years, Great Britain has also undertaken corporate unbundling, which has been successful (see 4.2). Furthermore, examples from the EU Commission are presented (see 4.3). Finally, there are examples in Germany where unbundling has been carried out, e.g., in the context of sector enquiries (see 4.4). 129

4.1 Unbundling in the USA

4.1.1 Prohibition of monopolization as legal basis

Unbundling in the US is ordered in particular as a remedy following a finding of a violation of the general prohibition of monopolization or attempt to monopolize (“Every person who shall monopolize, or attempt to monopolize...”) under Sec. 2 Sherman Act.¹⁸³ 130

This approach clearly distinguishes US law from current EU and German law. Due to the general prohibition of monopolization, US law does not require any further infringement of rules based on misconduct. 131

The prerequisite for a prohibited attempt at monopolization under Sec. 2 Sherman Act is, from an objective point of view, an unreasonable strategy of obstruction or displacement, which is supported by an intention to monopolize and a substantial probability of success.¹⁸⁴ The latter is determined in particular by the market shares already held by the company concerned, whereby an existing market share of 50 % or more is supposed to be indicative of such a probability of success. 132

In addition to unbundling on the basis of Sec. 2 of the Sherman Act, the competition authorities in the USA also regularly demand that parts of the companies involved in the merger be divested in advance. This practice differs in detail, but not in principle, from merger control practice in the EU (see 5.1.4) and Germany (see 5.2.5), so that a separate presentation for the USA will be dispensed with here. 133

In the following, some of the most important unbundling based on Sec. 2 of the Sherman Act will be discussed. In this respect, it is striking that the last structural unbundling enforced by the authorities or by the courts took place in 1982 in the case of AT&T (see 4.1.3). 134

¹⁸³ 15 U.S. Code § 2, available at: <https://www.law.cornell.edu/uscode/text/15/2>

¹⁸⁴ *Schweitzer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen Endbericht Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi), p. 43; available at: https://www.bmwk.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf?__blob=publicationFile&v=12; *Böni*, Sic! 2/2012, 71, 72.

4.1.2 Unbundling of Standard Oil into thirty-four individual companies

In *United States v. Standard Oil Company of New Jersey*, the US Supreme Court decided in 1911 to unbundle the petroleum company based on a violation of the prohibition of monopolization under Sec. 2 Sherman Act. The court ruled in the case at hand that Standard Oil was systematically buying up competitors in an anti-competitive manner to strengthen its market power. As a result, the Standard Oil Company was divided into thirty-four individual companies.¹⁸⁵ 135

The example shows that unbundling can be successfully based on a monopolization ban. The mineral oil market was more competitive because of unbundling and the unbundled companies continued to be highly profitable.¹⁸⁶ 136

4.1.3 Unbundling of AT&T into several individual companies

The unbundling of AT&T is probably one of the most prominent cases of vertical unbundling in the USA. In 1982, the company was split into seven independent Bell Operating Companies.¹⁸⁷ At the time of the decision, AT&T was active as a telephone service provider and also as a manufacturer.¹⁸⁸ The basis of this decision was that AT&T held a quasi-monopoly through the acquisition of local telephone providers.¹⁸⁹ Once again, unbundling was ordered on the basis of the Sec 2 Sherman Act. 137

Today, the unbundling is considered a success, as, among other things, a study shows that significant, long-term cost reductions of 20 % as well as efficiency increases were recorded.¹⁹⁰ 138

4.1.4 Unbundling proceedings against Microsoft

In the 1990s and early 2000s, unbundling proceedings were conducted against Microsoft in the USA. The competition authority had found that Microsoft was using its dominant market position to force users of Windows to also use other Microsoft applications, e.g., Internet Explorer as a web browser. 139

In order to remedy the situation, which was in breach of cartel law, the competition authority applied for a legal separation of ownership of Microsoft into one company for the Windows PC operating system and another company for the other PC applications such as Internet Explorer. While the competition authority was successful in the first instance, it lost on appeal. The Court of Appeal ruled that the 140

¹⁸⁵ *Kwoka/Valletti* (fn. 93), 1286, 1296.

¹⁸⁶ *Kwoka/Valletti* (fn. 93), 1286, 1296.

¹⁸⁷ *Bernhardt/Voges*, WuW 2023, 651, 654.

¹⁸⁸ *Grabel*, "This Month in Business History: The Breakup of the Bell System", historyfactory.com, 24 January 2022, available at: <https://www.historyfactory.com/insights/this-month-in-business-history-bell-system/>.

¹⁸⁹ *Grabel* (fn. 188).

¹⁹⁰ *Krouse et al*, 42 J. Law Econ (1999), 61, 83.

unbundling was not appropriate since Microsoft had not acquired its market position through corporate takeovers but through corporate growth.

4.1.5 Interim result

The USA has a long tradition of unbundling procedures even without prior mergers. The practice in the USA initially refutes the fear of uncontrolled and overzealous unbundling by competition authorities, which has recently been expressed in Germany as well as soon as the legal basis for facilitated unbundling is created. Although such proceedings are much easier to initiate in the USA than under EU and German law, there are only a few successful proceedings. At the same time, the fact that the last successful unbundling procedure (AT&T 1982) took place a long time ago demonstrates the difficulty of applying such a provision in the face of a restrained administrative and decision-making practice. 141

The discussions currently flaring up in the USA about reactivating the unbundling procedures, also and especially vis-à-vis the large digital corporations, at least lead us to expect that the neoliberal zeitgeist of the *Chicago school*, which has shaped US antitrust practice in recent decades, will at least be counterbalanced by the demands of the representatives of the *New Brand school*.¹⁹¹ 142

4.2 Unbundling in the United Kingdom

With regard to unbundling not related to abuse (see 4.2.1 et seq.) and the control of concentrations (see 4.2.3), UK laws clearly deviate from the continental European system. These deviations and the decision-making practice based on them are of particular interest, not least because the amendment to the ARC recently passed by the German legislature contains an unbundling provision in Section 32f (3) ARC which, according to the explanatory memorandum, refers to the practice in the United Kingdom.¹⁹² 143

4.2.1 Legal basis for unbundling independent of abuse

The UK Competition and Markets Authority (“CMA”) has powers to unbundle companies even in the absence of a specific infringement of competition law. The legal basis for this is Chapter 4 of the Enterprise Act 2002¹⁹³. Within the framework of a market investigation, the CMA can examine market structures to determine whether competition is affected (“*adverse effect on competition*”). Decisive factors for determining the existence of such an *adverse effect on competition* are primarily 144

¹⁹¹ See e.g. *Khan*, Speech at the International Competition Network Conference in Berlin, 6 May 2022, available at https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks; *Kanter*, Speech at the 49th Fordham Competition Law Institute Conference in New York, 16 September 2022, available at : <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham>; *Wu*, *The Curse of Bigness* (New York, 2018), *passim*.

¹⁹² *Wagner-von Papp*, WuW 2022, 642 et seqq.

¹⁹³ Available at: <https://www.legislation.gov.uk/ukpga/2002/40/part/4>.

structural market elements as they are also examined in merger control (cf. the criteria listed in Section 18 (3), (3a) ARC).¹⁹⁴

Although it does not follow from the law, the CMA has committed itself through administrative guidelines to apply Chapter 4 of the Enterprise Act 2002 only subsidiarily to proceedings for infringement of the prohibition of cartels or abuse of a dominant position.¹⁹⁵ 145

If an *adverse effect on competition* is identified, (ownership) unbundling may also be considered for elimination.¹⁹⁶ The relevant guidelines of the CMA explain this (own translation).¹⁹⁷ 146

“The objective of divestitures in the context of market investigations is generally to solve competition problems arising from structural features of a market. This can be done either by creating a new source of competition through the divestiture of a business or assets to a new entrant or by strengthening an existing source of competition through the divestiture of a business or assets to an existing entrant that is independent from the divesting party (or parties).” 147

A successful divestiture will remedy at source the lack of competition resulting from the structural characteristics of a market. Remedies in the context of divestitures do not normally require detailed ongoing monitoring beyond the completion of the divestiture of the relevant business or assets, although in some cases effective divestiture may require additional behavioral measures for a transitional period (e.g. to ensure the supply of an essential input or service by the divesting party to the divested business).” 148

Accordingly, it is an objective disentanglement directed towards the future and not a punishment for past behavior.¹⁹⁸ 149

4.2.2 Unbundling in the airport sector

In 2009, the British competition authority unbundled airports. The British Airports Authority was unbundled by selling three airports (Edinburgh, Gatwick, Stansted). Previously, the CMA outlined significant competition shortcomings as the company controlled 60 % of passengers in the UK and 90 % of runway capacity.¹⁹⁹ 150

¹⁹⁴ Wagner-von Papp, WuW 2022, 642, 644.

¹⁹⁵ Wagner-von Papp, WuW 2022, 642, 644 with further references.

¹⁹⁶ Wish, New Competition Tool: Comparative study of existing competition tools aimed at addressing structural competition problems, para. 2.5; available at: https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420573enn.pdf.

¹⁹⁷ Guidelines for market investigations: Their role, procedures, assessment and remedies (CC3), para. 372 et seq., available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf.

¹⁹⁸ Wish (fn. 196), para 2.6.

¹⁹⁹ CMA, BAA airports market investigation, Final report, 19 March 2009, available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402170726mp_/http://www.competition-

Evaluations of the unbundling conclude that the project has been successful, resulting in increased passenger numbers, higher efficiency, improved service performance and shorter check-in times.²⁰⁰ 151

4.2.3 Retroactive unbundling of the Facebook/GIPHY merger

Facebook is by far the largest provider of social media and messaging services in the UK, while GIPHY is the leading online database and search engine that allows users to search and share animated GIF files. Facebook completed its acquisition of GIPHY on 15 May 2020. The UK Competition Authority (CMA) examined the proposed merger and concluded that it would result in a significant lessening of competition. In addition, the CMA concluded that the full divestiture of GIPHY to a suitable purchaser alone could remove the competition concerns.²⁰¹ 152

First, the case demonstrates the increasing pressure on the competition authorities to examine acquisitions of digital platforms more closely. Furthermore, the case shows that if there are suitable “breaking points”, unbundling can still be ordered and carried out retrospectively. Finally, it can be seen from the case that structurally mediated competition concerns must primarily be countered with structural measures. 153

4.2.4 Self-unbundling of ICI

A particular case in the context of unbundling is the self-unbundling of ICI (Britain’s Imperial Chemical Industries) in 1993. Such self-unbundling can provide important insights into the implementation and appropriateness of regulatory unbundling.²⁰² The company itself decided to unbundle and split into two companies – ICI and Zeneca.²⁰³ The reason for this was that ICI had integrated several different businesses that were difficult to manage together. As some of the more highly valued businesses were lost in the conglomerate, the share value did 154

[commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/545.pdf](https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa_market_investigation_remedies.pdf); CMA, BAA airports: Evaluation of the Competition Commission's 2009 market investigation remedies, 16 May 2016, available at:

https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa_market_investigation_remedies.pdf.

²⁰⁰ CMA, BAA airports: Evaluation of the Competition Commission's 2009 market investigation remedies, 16 May 2016, available at:

https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa_market_investigation_remedies.pdf; Oxera, Evaluation of the Competition Commission's BAA airports market investigation, 25 January 2016, available at: <https://www.oxera.com/wp-content/uploads/2018/07/gal-final-oxera-report-1.pdf-1.pdf>; Kühling/Engelbracht/Welsch, “Verstoßunabhängige Maßnahmen zur Verbesserung des Wettbewerbs nach einer Sektoruntersuchung – der geplante § 32f GWB als Störung des Wettbewerbsrechts?” WUW1434620, 31 March 2023, available at: <https://research.owlit.de/document/004bbe1e-2a8a-3260-a696-00ba5a8d0a0f>.

²⁰¹ See for the whole: CMA, *Facebook/GIPHY*, Final Report of 18 October 2022; available at: https://assets.publishing.service.gov.uk/media/635017428fa8f53463dcb9f2/Final_Report_Meta.GIPHY.pdf.

²⁰² Van Loo, Cornell Law Review Vol. 105, 1955, 1959.

²⁰³ Owen/Harrison, Why ICI chose to demerge, in: Harvard Business Review March-April 1995; available at: <https://hbr.org/1995/03/why-ici-chose-to-demerge#:~:text=The%20managerial%20case%20for%20a,old%20ICI%20and%20better%20organized.>

not reflect the value of those businesses and ICI faced the threat of a hostile takeover.²⁰⁴

The process proves two things: unbundling is not economically harmful per se (not even for the companies concerned) and it can be conducted efficiently even if there has already been a high degree of interlocking within a group. 155

4.3 Unbundling at EU level

4.3.1 Ownership unbundling in the gas and electricity sector

Unbundling at EU level took place in the gas and electricity sectors as a result of antitrust investigations and subsequent undertakings by the companies concerned under Art. 9 of Regulation 1/2003 (on this under 5.1.3). 156

The background to these proceedings are market foreclosure allegations by the EU Commission against large energy groups, according to which the market-dominating companies systematically closed off the import and transport market as well as the subsequent stages through long-term capacity bookings in favor of their own companies, which were part of the vertically integrated group (violation of Art. 102 TFEU).²⁰⁵ It is therefore a matter of vertical unbundling along different market levels. 157

In some cases, real ownership unbundling took place, in which energy companies had to sell the grids to other companies.²⁰⁶ In other cases, there was only an obligation to transfer long-term capacities to third parties.²⁰⁷ 158

The “voluntary” unbundling of cartel proceedings by means of commitments according to Art. 9 of Regulation 1/2003 is criticized, as the EU Commission allegedly intervenes disproportionately in the market without substantial evidence of a cartel law violation and engages in market design.²⁰⁸ However, it can be countered that companies are free and, in case of doubt, can be expected to defend themselves against the official procedure, if necessary in court, in the case of unsubstantiated allegations of a violation of competition regulations. Conversely, the practice of the competition authorities proves that they are reluctant to bring cases before the courts where there is an increased risk of losing, as this is seen as a serious defeat in terms of authority policy both inside and outside the authority. 159

²⁰⁴ Owen/Harrison (fn. 203).

²⁰⁵ Wiedemann, in: HdB Kartellrecht, 4th ed. (2020), Section 34 Energiewirtschaft, para 36.

²⁰⁶ Comm., Case COMP/39.402 - RWE Gas Foreclosure; COMP/39.315 - ENI.

²⁰⁷ Case COMP/39.317 - E.ON Gas; Case COMP/39.316 - Gaz de France.

²⁰⁸ Wiedemann, in: HdB Kartellrecht, 4th ed. (2020), Section 34 Energiewirtschaft, para 39 with further references.

4.3.2 Threat of structural unbundling against Google

In the context of the formal antitrust proceedings initiated against Google and Alphabet, the EU Commission takes the preliminary view that only the mandatory divestment of part of Google's services would eliminate the competition concerns.²⁰⁹ Behavioral remedies were likely to be ineffective in preventing the risk that Google would continue self-referential conduct or engage in new conduct. This is because Google is present at nearly all levels of the online display advertising value chain and thus subject to inherent conflicts of interest. In particular, with its ad server for publishers on the one hand and its ad buying tools on the other, Google is active on both sides of the market and holds a dominant position on both sides. 160

The investigation aims to clarify whether Google has favored its own online display advertising technology services in the so-called “ad tech” supply chain to the detriment of competing providers of advertising technology services, advertisers and online publishers. In particular, a restriction on third-party access to user data for advertising purposes on websites and in apps – while simultaneously used by Google – is being examined. 161

4.3.3 Structural measures in other sectors

Apart from the gas and electricity sector (see 4.3.1) as well as threats of unbundling measures against Google in the market for publisher ad servers and for programmatic ad buying tools (see 4.3.2) and unbundling measures implemented in the context of merger control (see 4.3.4), the EU Commission has ordered or accepted as remedies only isolated further unbundling measures to eliminate the abuse of a dominant position.²¹⁰ 162

For example, the EU Commission ordered the dominant waste disposal company to sell the infrastructure for the collection of household waste.²¹¹ The competition authority justifies this step with the necessity to stop similar legal violations in the future in the form of the market dominator’s refusal of access to the infrastructure.²¹² The decision therefore proves the selective necessity of structural measures to prevent further infringements caused by behavior. 163

Structural measures ordered by the European Commission so far relate in particular to access orders, such as access to a particular technology²¹³, to an airport²¹⁴ or to a telecommunications supply network.²¹⁵ 164

²⁰⁹ Comm., Press release as of June 14, 2023, available at:

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.

²¹⁰ See overview in: *Loertscher/Maier-Rigaud* (fn. 168), p. 53, 67 et seqq.

²¹¹ Comm., Decision of 20 September 2016, Case AT.39759 - *ARA Foreclosure*.

²¹² Comm., Decision of 20 September 2016, para. 140 Case AT.39759 - *ARA Foreclosure*: “The divestiture of the part of the household collection infrastructure which ARA owns is necessary to ensure that the infringement will not be repeated”.

²¹³ Cf. Comm. 21 December 1987, OJ 1989, L 78/43 – *Magill*.

²¹⁴ Comm., 14 January 1998, OJ 1998 L 72/30 – *Frankfurt Airport*.

²¹⁵ Comm., 13 October 1999, M.1439 – *Telia/Telenor*.

4.3.4 Ownership unbundling in merger control proceedings

If the EU Commission raises competition concerns against a notified merger project, in the vast majority of cases it requires structural remedies to remove the concerns, i.e., in particular the sale of assets, business divisions or parts of companies involved in the merger to third parties. *Loertscher* and *Maier-Rigaud* have determined for the phase between November 2004 and December 2018 that the EU Commission linked more than 80 % of the conditional clearances to structural remedies.²¹⁶ Ownership unbundling measures are therefore the rule in the EU Commission's merger control practice, are common and do not meet with any fundamental reservations.

4.3.5 Unbundling measures in the digital sector or against Amazon

Also, in the context of commitments under Art. 9 of Regulation 1/2003, the EU Commission only recently closed two proceedings against Amazon for violation of the prohibition of abuse of a dominant market position (Art. 102 TFEU) with regard to the *Marketplace* and the *Buy Box*.²¹⁷

The “Marketplace” case was about the use of data that Amazon collects about third-party sales (e.g. items sold, prices, etc.) and also uses for the strategy of its own retail activities.²¹⁸ The EU Commission correctly recognizes that the origin of Amazon's anti-trust behavior is its dual role as online retailer and provider of the e-commerce platform to enable online retailing by third-party sellers. Unlike in the unbundling cases in the energy sector (on this see 4.3.1), the EU Commission does not take this as an opportunity to bring about a substantial structural separation. Instead, the EU Commission is content with the promise of technical and organizational separation of strategic information within the Amazon group.

In the “Buy Box” case, the issue was the placement of the offer for a product sought by the customer in the so-called Buy Box. Investigations by the EU Commission have shown that it is essential for the sales success of a third-party seller on Amazon's e-commerce platform to place its own offer in the Buy Box.²¹⁹ The investigations of the EU Commission have also clarified how Amazon's algorithm allocates the places in the Buy Box.

Interim result: The EU Commission is already using the possibilities of obliging digital groups such as Amazon to unbundle business areas. Unlike Google and its structural conflict of interest in the online advertising market, however, the EU Commission has not yet gone as far as to demand genuine ownership unbundling in the case of Amazon.

²¹⁶ *Loertscher/Maier-Rigaud* (fn. 168), pp. 53, 65 et seqq.

²¹⁷ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

²¹⁸ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

²¹⁹ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

4.4 Unbundling in Germany

4.4.1 Decartelization of IG Farben

IG Farben was an innovative company that was split up into several companies (BASF, Hoechst, Bayer, etc.) by the Allies in 1952. The background to the decartelization also had strong legal-political motives, since IG Farben played an essential role in the war machinery of Nazi Germany.²²⁰ The decartelization was intended to deprive Germany of the possibility of ever waging war again.²²¹ 170

Consequently, the background and purpose of the decartelization of IG Farben are in no way comparable to the constellation at Amazon. Nevertheless, a recent study shows that the decartelization of IG Farben led to considerable innovation competition and that the resulting companies were able to operate extremely successfully in the market and in competition.²²² The example thus refutes sweeping arguments against unbundling that these are too difficult, too lengthy, too cost-intensive or too much of a state market design (see 6.2). 171

4.4.2 Unbundling of the rolled asphalt market in Germany

In 2012, following a sector enquiry, the German Federal Cartel Office (“FCO”) found that there were a large number of joint ventures in the market for rolled asphalt, which in many cases were held by the same four large companies. 172

Andreas Mundt, the President of the Federal Cartel Office, states that “*such an extensive network [can] lead to conflicts of interest as well as mutual dependencies and considerations and thus have anti-competitive effects*”.²²³ In particular, it was problematic that in approx. 60 % of the cases, two shareholders and the joint venture were active on the same product and geographic market.²²⁴ The Federal Cartel Office therefore ordered the companies to unbundle themselves and in 2015 96 of the 104 unbundling procedures had been completed.²²⁵ The unbundling took place in three stages. In the first stage, the companies were to carry out a so-called self-assessment in order to declare to the Federal Cartel Office whether they were prepared to fully remedy the antitrust concerns. In the second stage, the company then submitted an unbundling plan and in the third stage the unbundling was completed.²²⁶ 173

²²⁰ Poege, Competition and Innovation: The Break-up of IG Farben, IZA DP No.15517, p.1, 6.

²²¹ Möschel, NZKart 2014, 42, 43.

²²² Poege (fn. 220), *passim*.

²²³ FCO, press release as of 1 October 2012, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/01_10_2012_SU-Walzasphalt.html?nn=3591568.

²²⁴ FCO (fn. 223).

²²⁵ FCO, press release as of 17 July 2015, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/17_07_2015_Walzasphalt.html.

²²⁶ Bischke/Brack, NZG 2015, 1150, 1151.

The distinctive feature of this unbundling procedure was that it affected an entire sector. The market structure showed a high degree of market concentration, which was reinforced by the high number of joint ventures. The proceedings prove that the Federal Cartel Office in principle regards ownership unbundling as a suitable means of preventing structurally mediated conflicts of interest and restrictions of competition. At the same time, the proceedings show that the Federal Cartel Office felt compelled to extend its previous practice of applying the ban on cartels under Section 1 of the ARC to joint ventures significantly beyond the practice of the Supreme Court in order to achieve the desired result of ownership unbundling.

4.5 Interim result

State- and private-sector unbundling in the USA, UK, at EU level and in Germany prove that there are some constellations that make ownership unbundling appear advantageous. General reservations against ownership unbundling therefore speak in their generality neither against instruments of no-fault unbundling nor against the application of such instruments to Amazon.

5. Legal framework for unbundling in the EU and Germany de lege lata

Already today, there are some norms in European and German law that allow unbundling as a structural measure. In the following, the corresponding legal foundations and their case practice at EU level (see 5.1) and German level (see 5.1.5) are presented and discussed. 176

5.1 Unbundling standards in the EU

At the EU level, under the currently applicable law, the connecting factors for unbundling measures are, in particular, Art. 18 of the Digital Markets Act (see 5.1.1), administrative remedies in the context of antitrust proceedings (see 5.1.2), “voluntary” unbundling in the context of antitrust proceedings (see 5.1.3) and unbundling in the context of merger control proceedings (see 5.1.4) may be considered. These are described in the following. 177

5.1.1 Art. 18 Digital Markets Act

The EU Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) was published in the Official Journal on 12 October 2022²²⁷ and will apply from 2 May 2023. Although tagged as the Digital Markets Act (“DMA”), it is an ordinary EU regulation which, as always, is directly applicable in the Member States. The DMA is aimed at large online platforms that are to be classified as so-called “gatekeepers” based on certain criteria such as turnover thresholds. Special obligations are imposed on them with regard to particularly relevant core platform services, which include online intermediaries, search engines, social networks, video sharing platforms, certain communication services and cloud services. 178

According to Art. 18 DMA, the European Commission may conduct a market investigation to determine whether a gatekeeper systematically fails to comply with its obligations. Should the investigation establish that the gatekeeper systematically fails to comply with an obligation and has maintained, strengthened or extended its gatekeeper position, the European Commission may order structural measures, i.e., including unbundling. 179

However, the law provides high hurdles for the presumption of systematic non-compliance. There is a presumption of non-compliance if the Commission has issued at least three non-compliance decisions against the company in a period of eight years. In addition, the scope of application is limited to “gatekeepers”. This classification is made by the European Commission according to Art. 3 DMA. However, Amazon is expected to be designated as such a company by the European Commission.²²⁸ 180

²²⁷ OJ 2022 L 265/1 et seq.

²²⁸ Podszun/Bongartz/Kirk, NJW 2022, 3249, 3250.

5.1.2 Unbundling measures in case of violation of Art. 101 TFEU or Art. 102 TFEU (Art. 7 Regulation 1/2003)

Another possibility of ordering structural measures exists according to Art. 7 of Regulation 1/2003. In this case, the European Commission can order structural remedies after finding an infringement of Art. 101 or Art. 102 TFEU. In principle, the Commission's measure is subject to proportionality. Accordingly, the decision-making power must be exercised in the most effective manner that is most appropriate to the circumstances of the individual case.²²⁹ 181

However, structural measures should only be ordered if either behavioral measures would not be equally effective or structural measures would impose a lesser burden on the company (Art. 7 para. 1 sentence 3 of Regulation 1/2003). In the recitals of Regulation 1/2003 it is explained that a structural measure, which would consist in bringing the company structure back to the state it was in before the infringement, is only proportionate if there is a significant risk of a new infringement due to the company structure.²³⁰ 182

Even though this would therefore be possible from a purely legal point of view, the EU Commission has not yet unbundled corporate structures on the basis of Article 7 (1) of Regulation 1/2003. However, the EU Commission has for the first time threatened ownership unbundling in the form of mandatory divestment of part of Google's services as part of the formal antitrust proceedings initiated against Google and Alphabet.²³¹ 183

5.1.3 “Voluntary” unbundling in the context of EU antitrust proceedings due to Art. 101 TFEU or Art. 102 TFEU (Art. 9 Regulation 1/2003)

Whereas under Art. 7 of Regulation 1/2003 the EU Commission can order affected companies to take (structural) measures to remedy what the authority considers to be a violation of Art. 101, 102 TFEU, under Art. 9 of Regulation 1/2003 a company affected by a cartel investigation offers such (structural) measures in order to conclude the ongoing proceedings quasi “amicably” and without acknowledging an unlawful act without a final decision on the unlawfulness of the conduct. 184

In principle, the same principles apply to (structural) measures under Art. 9 of Regulation 1/2003 as under Art. 7 of Regulation 1/2003. Consequently, the priority of behavioral over structural measures also applies in this respect. In addition, the proportionality test remains in place. In purely factual terms, however, the coordinates of the commitments shift due to the cooperative basic idea of Art. 9 of the Regulation 1/2003 compared to Art. 7 of the Regulation 1/2003. Accordingly, the decision-making practice on Art. 9 of the Regulation 1/2003, in contrast to Art. 185

²²⁹ Anweiler, in LMRKM, 4th ed. 2020, Art. 7 VerfVO, para. 48.

²³⁰ Recital 12, Regulation 1/2003.

²³¹ Comm., press release of 14 June 2023, available at:

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207.

7 of the Regulation 1/2003, also shows at least isolated unbundling measures, as already mentioned under 4.3.1 explained.

5.1.4 Unbundling in EU merger control proceedings

Unbundling can be considered in the context of EU merger control in the case of remedies (see 5.1.4.1) or a revocation of clearance (see 5.1.4.2) may play a role. 186

5.1.4.1 Remedies under the EU merger control procedures

In order to meet the EU Commission's concerns about the clearance of a notified concentration, the undertakings involved in the concentration can propose mandatory remedies in the preliminary proceedings (Art. 6 para. 2 Merger Regulation) or in the main review proceedings (Art. 8 para. 2 Merger Regulation). The EU Commission then examines whether these are sufficient to remove the merger control concerns. 187

Further details on permissible remedies are contained in a corresponding communication of the EU Commission.²³² These are merely administrative guidelines which can at best bind the EU Commission itself, but not the courts. This communication differentiates between divestments, other structural remedies, and behavioral remedies.²³³ Structural remedies other than divestments include, in particular, granting access to essential infrastructure or essential inputs on non-discriminatory terms.²³⁴ 188

As regards the appropriateness of the type of remedies, the Communication leaves no doubt that the benchmark is to ensure competitive market structures.²³⁵ Accordingly, structural measures, and in particular divestiture commitments, are generally preferred to behavioral measures. Divestiture commitments are therefore the most appropriate means to address competition concerns arising from horizontal overlaps but may also be the best means to address problems arising from vertical or conglomerate effects.²³⁶ Behavioral measures are also not assessed as appropriate in particular because they may require constant monitoring of undertakings. 189

Accordingly, the EU Commission regularly makes use of divestment commitments, for example with regard to the divestment of storage facilities.²³⁷ 190

Interim result: The assessment of the appropriateness of remedies in the context of merger control demonstrates the primacy of structural remedies in general and divestitures in particular when the focus is on maintaining competitive market 191

²³² Comm., Communication from the Commission on remedies permitted under Council Regulation (EC) No 139/2004 and Commission Regulation (EC) No 802/2004, OJ 2008 C 267/01.

²³³ Comm., (fn. 232), para 15 et seqq.

²³⁴ Comm., (fn. 232), para 17.

²³⁵ Comm., (fn. 232), para 15.

²³⁶ Comm., (fn. 232), para 17

²³⁷ Comm., Case COMP/M.3868, para 170 et seq. - *DONG/Elsam/Energi E2*.

structures. Compared to remedies in the context of antitrust proceedings, the rule-exception relationship between structural and behavioral remedies is reversed.

First of all, this calls into question the premise often put forward against unbundling that structural measures are regularly disproportionate, especially in the absence of culpable conduct. Merger control refutes this, as there not only structural measures are the rule, but their demand and enforcement are not linked to culpable conduct of the companies involved in the merger. Rather, the primacy of divestitures and structural measures in the context of merger control is based on its purpose of protecting a competitive market structure. On this basis, however, it does not seem compelling that such market structure control should only be proportionate in the context of merger control under EU and German law and cannot also be applied in other constellations and on the basis of different thresholds for seizure and intervention compared to merger control.

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5.1.4.2 Revocation according to Art. 8 para. 6 FKVO

According to Art. 8 (6) of the ECMR, the EU Commission may revoke the clearance of a concentration ex post if the decision is based on incorrect information or if a condition is violated. As far as can be seen, the EU Commission has never made use of this possibility.²³⁸

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In the case of the cleared merger between Facebook and WhatsApp,²³⁹ the Commission refrained from a revocation, although the Commission found that Facebook had provided misleading information in the 2014 notification.²⁴⁰ This was because at the time, Facebook stated both in the notification form and in a response to a Commission request for information that it would not be able to establish a reliable automated match between the accounts of Facebook users and WhatsApp users. However, in 2016, WhatsApp announced updates to its terms of use August and privacy policies, including the ability to link WhatsApp users' phone numbers to Facebook users' identities. According to investigations by the EU Commission, this technical possibility already existed in 2014. Instead of a revocation under Article 8(6) ECMR, the EU Commission only issued a fine of EUR 110 million under Article 14(1) ECMR due to the misleading information. The Commission justified this, among other things, by stating that the decision of October 2014 to clear Facebook/WhatsApp was based on a variety of factors that went beyond the possibility of matching user accounts and that the misleading information about the account matching had no effect on the clearance decision, which therefore remained valid.²⁴¹

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²³⁸ Comm., (fn. 232), para 17.

²³⁹ Comm., Case M.7217 - *Facebook/Whatsapp*.

²⁴⁰ Comm., press release of 18 May 2017, available at: https://ec.europa.eu/commission/presscorner/detail/de/IP_17_1369.

²⁴¹ Comm., press release of 18 May 2017, available at: https://ec.europa.eu/commission/presscorner/detail/de/IP_17_1369.

Interim result: With the revocation of the clearance of a merger, there is theoretically another instrument for controlling the market structure. However, this is again exclusively linked to misconduct on the part of the companies involved, namely the attribution of incorrect or deliberately misleading information or non-compliance with conditions or obligations. 195

5.1.5 New Competition Tool

In summer 2020, the EU Commission published a concept paper on the introduction of a “New Competition Tool” (“NCT”)²⁴² and asked for feedback in a public consultation.²⁴³ According to Commission President von der Leyen, the political focus should be on strengthening competition in all sectors. The New Competition Tool should close gaps in the current EU competition rules and enable timely and effective intervention against structural competition problems in all markets. In this respect, concerns have been expressed that current competition law is not sufficient to preserve the competitive structure of markets. 196

The EU Commission identified structural core problems such as monopolization strategies of non-dominant companies with market power or parallel leverage strategies of dominant companies in several neighboring markets and wanted to address these specifically with the NCT in order to eliminate the weaknesses of the current enforcement of competition law in the case of structural problems. In this respect, the NCT was intended to cover two risk areas in particular: first, structural risks to competition in markets with certain characteristics such as network, scale and lock-in effects, which individual companies can use to bring about a “tipping” of the market. Secondly, structural lack of competition in markets which is not due to the behavior of individual competitors but is based in particular on oligopolistic market structures. 197

In order to maintain or restore competition on such markets, the EU Commission proposed four options: 198

- **Option 1 - Market power-based competition instrument with horizontal scope:** This option provided for a no-fault finding of anti-competitive unilateral conduct by a dominant undertaking. In order to prevent a dominant undertaking from successfully foreclosing competitors or increasing their costs, the instrument was intended to allow the Commission to impose behavioral and, where appropriate, structural remedies. However, unlike in the case of a violation of Art. 102 TFEU, the Commission would not have found a culpable violation of Art. 102 TFEU and would not have imposed fines, so that there would not have been any subsequent claims for damages by third parties. 199

²⁴² Comm., Inception Impact Assessment on New Competition Tool, 4 June 2020, Ref. Ares(2020)2877634, [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PL_COM%3AAres\(2020\)2877634](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PL_COM%3AAres(2020)2877634).

²⁴³ Comm., Single Market - new complementary tool to strengthen competition enforcement, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en.

- **Option 2 - A market power-based competition instrument with limited scope:** Option 2 is to be understood in the same way as Option 1 but limited from the outset to certain industrial sectors. 200
- **Option 3 - A market structure-based competition instrument with horizontal scope:** Option 3 is essentially equivalent to Option 1 with the significant difference that the application of the instrument would not have been limited to undertakings with a dominant position. 201
- **Option 4 - A market structure-based competition instrument with limited scope:** Like Option 3, but limited from the outset to certain industry sectors, with the Commission naming digital markets as candidates from the outset. This option led to the Digital Markets Act. 202

The NCT would therefore have had the potential to introduce an abuse-independent unbundling at EU level. How this would have been designed in concrete terms and what requirements would have been placed on the adoption of ownership unbundling remained undiscussed. The example of the unbundling power according to Art. 18 DMA (see 5.1.1) proves that even in the creation of special regulation with a complementary function to the competition rules, the hurdles are very high to justify ownership unbundling. Whether the EU Commission will take up the idea of a cross-sectoral NCT again is currently uncertain. 203

5.2 Unbundling standards in Germany

In Germany, too, there are legal possibilities for ordering unbundling, not least due to the newly introduced unbundling after a sector enquiry (see 5.2.1). Even before that, the Federal Cartel Office could still order structural measures up to and including unbundling in various situations. This applies in particular to remedial measures to eliminate cartel law violations (see 5.2.2), in the case of certain conduct by companies with overriding cross-market importance (see 5.2.3), within the framework of the Energy Industry Act (see 5.2.4) or within the framework of merger control (see 5.2.5).. 204

5.2.1 Unbundling order following a sector enquiry

The 11th amendment of the ARC (“ARC Enforcement Act”) adopted by the German Bundestag in cabinet on 6 July 2023 contains in Section 32f (4) ARC the right of the Federal Cartel Office for ownership unbundling vis-à-vis market-dominant undertakings within the meaning of Section 18 ARC or vis-à-vis undertakings of paramount significance for competition across markets pursuant to Section 19a (1) ARC in the follow-up to a sector enquiry.²⁴⁴ The provision will for the first time enable the Federal Cartel Office to order unbundling even though no 205

²⁴⁴ German Government, Draft of a law amending the Act against Restraints of Competition and other Laws of 5 April 2023, p. 7, available at: https://www.bmwk.de/Redaktion/DE/Downloads/Gesetz/aenderung-des-gesetzes-gegenwettbewerbsbeschaenkungen.pdf?__blob=publicationFile&v=6.

violation of cartel law was found. The order is thus not based on blameworthy, culpable conduct, but on structural market problems.

5.2.1.1 Goals pursued with the unbundling power

The explanatory memorandum of the government draft bill makes it clear that the aim of introducing the abuse-independent unbundling provision is to eliminate current loopholes in competition disruptions that have structural causes.²⁴⁵ The proposal was prompted by the shortage of raw materials over the summer, especially on the mineral oil market.²⁴⁶ Although the Federal Cartel Office investigated the pricing on the petrol station market, it stated that due to the market characteristics a cartel violation could not be proven. On the one hand, the market has oligopolistic structures, and, on the other hand, the prices are very transparent, which makes parallel behavior by the mineral oil companies possible.²⁴⁷

5.2.1.2 Conditions for ordering ownership unbundling

The unbundling power under Section 32f (4) ARC is a special remedial measure of the Federal Cartel Office's power of intervention under Section 32f (3) ARC, so that the requirements of Section 32f (3) ARC must first be met. This power of intervention can initially only be considered as a measure after a sector enquiry within the meaning of Section 32e (1) ARC has been carried out.

Furthermore, there must be a significant and continuous disruption of competition on at least one nationwide market, several individual markets or across markets.

Disruption of competition within the sense of Section 32f (5) ARC may exist in particular in the following cases:

- 1. Unilateral supply or demand power,
- 2. restrictions on market entry, exit or capacity of undertakings or on switching to another supplier or demand side,
- 3. uniform or coordinated behavior, or
- 4. foreclosure of input factors or customers through vertical relationships.

Section 32f (5) sentence 2 ARC specifies the criteria for determining the existence of a restraint of competition:

- 1. the number, size, financial strength and turnover of the undertakings active in the markets concerned or across markets, the market share ratios and the degree of concentration of undertakings,

²⁴⁵ Federal Ministry of Economics, Draft Competition Enforcement Act, p. 12.

²⁴⁶ *Bartsch/Käseberg/Weber*, WuW 2023, 245.

²⁴⁷ Federal Ministry of Economic Affairs and Climate Action, <https://www.bmwk.de/Redaktion/DE/Artikel/Energie/bundeswirtschaftsminister-robort-habeck-plant-verscharfung-des-wettbewerbsrechts.html> .

- 2. interrelationships of the undertakings in the affected, upstream and downstream or otherwise related markets, 216
- 3. prices, quantities, choice and quality of the products or services offered in the affected markets, 217
- 4. transparency and homogeneity of goods in the markets concerned, 218
- 5. contracts and agreements between companies in the affected markets, 219
- 6. the degree of dynamism in the markets concerned, and 220
- 7. demonstrated efficiency benefits, in particular cost savings or innovation, with appropriate consumer participation. 221

Pursuant to Section 32f (5) sentence 3 ARC, whether a restraint of competition is continuous depends on a retrospective view and a prognosis: on the one hand, the restraint of competition must either have existed permanently over a period of three years or have occurred repeatedly and, on the other hand, at the time of the Federal Cartel Office's decision, there must be no indications that the restraint of competition will cease to exist within two years with overwhelming probability. 222

If these conditions are met, the Federal Cartel Office can first determine by means of an order that there is a significant and continuing disturbance of competition. However, this only applies if the Federal Cartel Office comes to the conclusion that the other remedies provided for in the ARC are unlikely to be sufficient to adequately counteract the identified distortion of competition. 223

Furthermore, the remedy of ownership unbundling pursuant to Section 32f (4) ARC is subsidiary to the behavioral and structural remedies mentioned in Section 32f (3) Sentence 6 ARC, i.e. the remedies mentioned in Section 32f (3) Sentence 6 ARC must either not be possible or not of the same effectiveness or, compared to ownership unbundling, be associated with a greater burden for the company. The priority measures are: 224

- 1. granting access to data, interfaces, networks or other facilities, 225
- 2. specifications on the business relationships between companies in the markets investigated and at different market levels, 226
- 3. a commitment to establish transparent, non-discriminatory and open norms and standards by companies, 227
- 4. requirements for certain forms of contracts or contractual arrangements, including contractual rules on the disclosure of information, 228
- 5. the prohibition of unilateral disclosure of information that favors parallel behavior by companies, 229

– 6. the organizational separation of company or business divisions. 230

A company can only be obliged to sell a part of its assets if the proceeds amount to at least 50 % of the value determined by an auditor to be commissioned by the Federal Cartel Office. If the actual proceeds of the sale fall short of the value determined by the auditor to be commissioned, the selling company shall receive an additional payment amounting to half of the difference between the determined value and the actual proceeds of the sale. 231

In the case of assets the acquisition of which was the subject of a clearance decision by the EU Commission or the Federal Cartel Office or the ministerial authorization, a grandfathering period of 10 years exists from the date of notification of the clearance decision under merger control law, i.e. during this period a divestiture decision cannot relate to corresponding assets (Section 32f (4) sentence 10 ARC). 232

Interim result: With the implementation of the 11th amendment to the German ARC, a sector- and abuse-independent unbundling power will presumably be created for the first time, which, however, is only applicable to market-dominant companies and those with an overriding cross-market significance for competition pursuant to Section 19a (1) ARC and is tied to very narrow conditions. 233

5.2.1.3 Reception in the economy and in the literature

The government draft (in its form prior to the departmental vote) with the proposal for an abuse-independent unbundling is controversially discussed in the trade press and unsurprisingly largely rejected by company stakeholders.²⁴⁸ 234

Critics argue that the proposal would be difficult to implement and would not lead to the desired result, especially in the mineral oil market, as the Federal Cartel Office would then have to conduct unbundling proceedings against all leading companies, which would be lengthy and tie up a lot of staff.²⁴⁹ In addition, there would be no objective justification for unbundling irrespective of abuse.²⁵⁰ 235

Several business associations criticize that Section 32f (3) and (4) ARC would in future give the Federal Cartel Office the possibility to define entrepreneurial room for maneuver, such as the use of certain contractual arrangements or general terms and conditions, compulsory licenses, the disclosure of know-how and data, the fixing of specific prices, the arrangement of supply areas or the establishment of supply relationships, organizational measures in the group of companies, and the break-up of companies.²⁵¹ As shown, however, both the EU Commission and the Federal Cartel Office already have corresponding powers based on a general clause. For decades, therefore, the authorities have been interfering with the companies' 236

²⁴⁸ See evidence in *Kühling/Engelbracht/Welsch*, WuW 2023, 250.

²⁴⁹ *Suliak*, “Kartellrechtspopulismus und Theaterdonner”, LTO.de of 13 June 2022, available at: <https://www.lto.de/recht/hintergruende/h/habeck-tankrabatt-kartellrecht-verschaerfung-gwb-kartellamt-entflechtung-gewinnabschoepfung-uebergewinn/>

²⁵⁰ *Suliak* (fn. 249).

²⁵¹ BDI et al, “Paradigmenwechsel im Wettbewerbsrecht”, December 2022, p. 2, available at: <https://bdi.eu/artikel/news/paradigmenwechsel-im-wettbewerbsrecht-innovationen-investitionen>.

scope for action and have also been implementing precisely the things mentioned by German industry here.

Furthermore, the lack of predictability of the Federal Cartel Office's orders up to unbundling measures without compensation is criticized.²⁵² On the one hand, this criticism is surprising, since measures pursuant to Section 32f (3) and (4) ARC may only be taken after a sector enquiry has been carried out, in the context of which the companies concerned must provide information and can thus usually assess well in advance whether or what consequences they may face. On the other hand, the changes to the amendment after the departmental consultations should have dispelled the remaining doubts, in particular due to the compensation provided for in the case of unbundling. 237

Elsewhere, however, the proposal also meets with approval and the criticism voiced is of a constructive and selective nature.²⁵³ In its main report “Wettbewerb 2022: XXIV. Hauptgutachten” (Competition 2022: XXIV Main Report), the Monopolies Commission once again described the introduction of unbundling independent of abuse as recommendable,²⁵⁴ as it had already done in its 58th special report with regard to the FDP's unimplemented unbundling draft from 2010 (“**Brüderle draft**”).²⁵⁵ However, on 6 July 2023, the German Bundestag passed the amendment. Shortly thereafter, the public tone changed, and the practical significance of the unbundling provision is also being played down by companies.²⁵⁶ 238

5.2.2 Unbundling measures in the event of violations of cartel law (Section 32 (2) ARC).

Section 32 (2) ARC gives the Federal Cartel Office the power to issue behavioral and structural measures to remedy violations of Section 32 (2) ARC in the case of violations of Article 101 TFEU and Article 102 TFEU or Section 1 ARC and Sections 19 et seq. ARC. Within the scope of the 8th ARC amendment in 2013, Section 32 ARC was aligned with Article 7 of Regulation 1/2003. Since then, reference can be made to the practice of the European Commission for the interpretation of the provision (see 5.1.2).²⁵⁷ 239

The decision on concrete remedial measures is also subject to proportionality in this respect. Consequently, suitability, necessity and appropriateness must always be 240

²⁵² BDI et al. (fn. 251), p. 2.

²⁵³ *Kühling/Engelbracht/Welsch*, WuW 2023, 250 ff; *Wagner-von Papp*, WuW 2022, 642 et seqq.

²⁵⁴ Monopolies Commission, XXIVth Main Report, Competition 2022, of 5 July 2022, p. 197; available at: https://www.monopolkommission.de/images/HG24/HGXXIV_Gesamt.pdf.

²⁵⁵ Monopolies Commission, Gestaltungsoptionen und Leistungsgrenzen einer kartellrechtlichen Unternehmensentflechtung, Special Report 58 of 27 April 2010, p. 42, available at: <https://www.monopolkommission.de/de/gutachten/sondergutachten/sondergutachten-auf-eigene-initiative/107-sondergutachten-58.html>.

²⁵⁶ *Ott*, “Eine harmlose Alien-Invasion”, LTO.de as of 12. July 2023, available at:

<https://www.lto.de/recht/hintergruende/h/kartellrecht-reform-gwb-novelle-sektoruntersuchung/>

²⁵⁷ *Emmerich*, in: Immenga/Mestmäcker, ARC Section 32 para 31.

examined.²⁵⁸ The affirmation of necessity presupposes that no milder, equally effective means is available.²⁵⁹ Structural measures regularly fail at this point in practice, as behavioral measures are available as milder means. This seems consistent in the case of violations of the prohibition of cartels (Article 101 TFEU or Section 1 ARC) and the prohibition of abuse of a dominant position (Article 102 TFEU or Sections 19 et seq. ARC), as these are also behavior related. At the same time, the selective measures do not go far enough as far as the impairment of competition is based on structural market problems.

5.2.3 Section 19a ARC in the case of paramount significance for competition across markets

Section 19a of the ARC, which has been in force since January 2021, allows for extended abuse control for companies with outstanding cross-market significance. Section 19a (2) sentence 4 ARC enables the Federal Cartel Office to take the full range of behavioral and structural measures by referring to Section 32 (2) ARC. Accordingly, the Federal Cartel Office also has the power to use this provision to order the unbundling of the company as *ultima ratio*.²⁶⁰ However, the advantage of Section 19a ARC is that, unlike Section 32 ARC, no violation of Article 101 TFEU or Article 102 TFEU has to be established. The only prerequisite is that it is an undertaking of paramount significance for competition across markets and that it also engages in one of the types of conduct exhaustively listed in Section 19a (2) ARC. 241

The Federal Cartel Office ruled on 5 July 2022 that Amazon had such cross-market significance.²⁶¹ However, Amazon has filed an appeal against the decision with the Federal Court of Justice, which has not yet been decided.²⁶² The abuse proceedings already underway are now also being further examined under the review standard of Section 19a ARC. Two proceedings are currently underway against Amazon. In one of the proceedings, price mechanisms are being investigated. The subject of the investigation is Amazon's algorithmic review of the pricing of third-party retailers.²⁶³ The other proceeding is investigating a possible disadvantage of marketplace traders through instruments of Amazon, such as agreements with manufacturers concerning sales.²⁶⁴ 242

Interim result: Theoretically, Section 32 (2) ARC provides a sufficient legal basis within the framework of Section 19a ARC to order unbundling of undertakings with overriding cross-market importance. In practice, however, this is made 243

²⁵⁸ *Staebe*, in: Schulte/Just, 2nd ed. (2016), Section 32 ARC, para 15.

²⁵⁹ *Staebe*, in: Schulte/Just, 2nd ed. (2016), Section 32 ARC, para 16.

²⁶⁰ *Paal*, in: BeckOK InfoMedienR, Section 19a ARC, para 35 et seqq.

²⁶¹ FCO, press release of 6 July 2022, available at:

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2022/B2-55-21.pdf?__blob=publicationFile&v=4.

²⁶² FCO, press release of 14 November 2022, available at:

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_11_2022_Amazon_19a.html?nn=3591568.

²⁶³ FCO (fn. 262).

²⁶⁴ FCO (fn. 262).

considerably more difficult due to the primacy of behavioral remedies under Section 32 (2) ARC and is consequently not a realistic consequence.

5.2.4 German Energy Industry Act (EnWG)

Unbundling is also an option under energy law. The German Energy Industry Act (EnWG) provides for several types of unbundling with varying degrees of intensity of intervention. On the one hand, there is the possibility of accounting unbundling (Section 6b EnWG) and informational unbundling (Section 6a EnWG) as behavioral measures with low intensity. Within the framework of informational unbundling, the company is ordered to separate certain information from each other and not to exchange information. Operational unbundling (Section 7a EnWG), which provides for organizational independence of individual parts of the company, is more intensive. In the case of legal unbundling according to Section 7 EnWG, various parts of the company are split into legally independent units. 244

The distinct types of unbundling under the EnWG offer clues as to the possible ways in which an unbundling of Amazon could be carried out (see 6.) even if energy law itself is not applicable. 245

5.2.5 Unbundling in national merger control proceedings

As at the EU level, there are two possible starting points for unbundling in merger control proceedings at the German level: “voluntary” unbundling in order to remove competitive concerns against a proposed concentration (see 5.2.5.1) or a subsequent unbundling of a proposed concentration that violates the prohibition of enforcement (see 5.2.5.2). 246

5.2.5.1 “Voluntary” unbundling in the context of merger control

If the German Federal Cartel Office expresses competition concerns with regard to a notified proposed concentration, the parties to the concentration may also address these concerns by proposing partial ownership unbundling, e.g., by selling certain business divisions or assets of at least one of the companies involved in the concentration to a third party.²⁶⁵ 247

On balance, this form of “unbundling” does not regularly lead to an improvement in the competitive structure either, as it can only cushion part of the structural consequences that may occur as a result of the merger as a whole. 248

5.2.5.2 Unbundling of completed mergers, Section 41 (3), (4) ARC

Section 41 (3) ARC grants the Federal Cartel Office the power to dissolve mergers that have already been implemented. However, this is subject to the condition that the merger violates merger control standards, i.e., that it was either implemented 249

²⁶⁵ See, for example, the overview of the decisions of the FCO on clearance decisions with ancillary provisions in the activity report BT-Drs. 19/30775, p. 32 et seq.

prior to clearance or prohibited after implementation, that the clearance or ministerial authorization subsequently lapses, or that it is annulled by a court, revoked or subject to a condition subsequent.²⁶⁶

The Federal Cartel Office regularly conducts proceedings pursuant to Section 41 (3) ARC, without this having been associated with the ordering of unbundling in recent times.²⁶⁷ The main cases of application of the proceedings under Section 41 (3) ARC are infringements of the enforcement prohibition where a (timely) notification to the Federal Cartel Office has not been made. Even if an unbundling decision is taken, restitution, i.e., the reversal of the unlawful concentration, can usually be ordered.²⁶⁸ Thus, the unbundling power under Section 41 (3) ARC can at most eliminate the structural disadvantages caused by the illegal merger, but not contribute to improving the market structure.

²⁶⁶ *Thomas*, in: Immenga/Mestmäcker, Wettbewerbsrecht, 6th edition 2020, Section 41 ARC, para 103.

²⁶⁷ See for example activity report BT-Drs. 19/30775, p. 36.

²⁶⁸ *Thomas*, in: Immenga/Mestmäcker, Wettbewerbsrecht, 6th edition 2020, Section 41 ARC, para 120.

6. Approaches to unbundling Amazon

In the context of an unbundling of Amazon, the various possibilities must first be examined and their appropriateness in terms of competition policy must be assessed (see 6.1). Subsequently, the expected counter-arguments are to be discussed (see 6.2) and to examine the legal feasibility of the unbundling (see 6.3)

6.1 Appropriateness of different unbundling scenarios

In the following, different unbundling approaches are applied to the example of Amazon and examined with regard to their appropriateness, which is primarily based on whether the competitive disadvantages identified can be eliminated by the unbundling measure.

6.1.1 Horizontal unbundling of the Amazon e-commerce platform

A conceivable first step would be to divide Amazon's e-commerce platform into a number of e-commerce platforms of comparable size. These platforms would then have to compete with each other for end customers but also for third-party sellers. Due to this competition, none of the competing platforms could initially allow themselves to demand conditions from the third-party sellers with which they do not agree.

The argument in favor of such a form of unbundling is that it would first of all lead to a clear break-up of the encrusted competitive structures from the point of view of third-party sellers and other third-party service providers around fulfilment services.

However, the first argument against this form of unbundling is that a tipping of the market will probably occur again over time, i.e. indirect network effects will quickly lead to a concentration of the market on a few or one supplier.²⁶⁹ This is due to the low value-added depth of the trade and the lack of differentiation opportunities beyond cheaper prices.

In addition, platform markets exhibit strong network effects. Very minimal marginal costs are incurred for additional users, so that significant economies of scale can be observed.²⁷⁰ The network effects and economies of scale increase the larger the platform and its user numbers are. These market characteristics lead to a strong tendency towards monopolization. Due to the monopolization tendency, the effect of horizontal unbundling would probably be short-term. In the long term, monopolies would emerge again due to the network effects. Safeguarding the outcome of unbundling does not appear possible for this market structure. This

²⁶⁹ Kirkwood (fn. 137), 63, 111; Kwoka/Valletti (fn. 93), 1286, 1295.

²⁷⁰ Paal/Kieß, ZfDR 2022, 1, 4.

assumption is strengthened by the fact that users do not behave in a rationally utility-maximizing way but stay with platforms they know.²⁷¹

Even if it can be assumed that there will be fierce competition between these platforms at the beginning when the marketplace is divided into several trading platforms, it is to be expected that this will be replaced by a strong market concentration within a few years due to the withdrawal of some providers. 257

Interim result: A horizontal unbundling of the Amazon marketplace in the form of a division into several marketplaces can provide for considerable competition in the short term but will probably result in a dominant platform again in the medium term with the same competitive disruptions as those currently emanating from Amazon. 258

6.1.2 Information unbundling

Following Amazon's offer of commitments in the *Marketplace* and *Buy Box* proceedings, the EU Commission will have the opportunity to test the efficiency and effectiveness of informational unbundling between Amazon's retail business and Marketplace.²⁷² In particular, the Commission will have to prove that the strategic information of third-party traders on Marketplace is no longer used for Amazon's retail business. 259

The disadvantage of this information unbundling is, on the one hand, the high monitoring effort by the authority. Theoretically, the blocking of information would have to be permanently monitored in a resource-intensive manner in order to ensure the non-disclosure of information. On the other hand, the economic incentive to pass on the information remains unchanged.²⁷³ The companies remain economically linked and benefit from potentially higher profits of the vertically integrated business units. Even if a violation were discovered, the cost of non-compliance for Amazon in the form of a fine would be low, making non-compliance an investment decision for Amazon.²⁷⁴ 260

Interim result: Informational unbundling is obviously not sufficient in the case of Amazon's enormous market power due to the persistence of the structurally mediated conflict of interest, if one wants to address the identified competitive problem areas efficiently and effectively. 261

²⁷¹ Bernhardt/Voges, WuW 2022, 651, 652.

²⁷² Comm., Case AT.40462 - Amazon Marketplace and Case AT.40703 - Amazon Buy Box.

²⁷³ Bernhardt/Voges, WuW 2022, 651.

²⁷⁴ Cf. Kirkwood (fn. 137), 63, 111: "These twin sanctions would alter the tech giants' financial calculus, raising the cost of exclusionary conduct substantially. Of course, the increased penalties might not stop them in every case. They might calculate that the cost of any sanction they would have to pay for suppressing rivals would be offset by the profits they gain by achieving greater dominance and higher barriers to entry".

6.1.3 Structural unbundling between Amazon's online retail and e-commerce platform

Conceivable, and not far-fetched according to the EU Commission's findings in the *Amazon Marketplace case*, is a structural unbundling between Amazon's own online retail business and its links with third-party sales via the marketplace.²⁷⁵ 262

The EU Commission has already identified the anticompetitive effects of the close links between Amazon's online business and the offerings of third-party sellers on the e-commerce platform.²⁷⁶ In particular, the collection and use of strategic information from third-party sellers for the benefit of Amazon's online business is problematic.²⁷⁷ Insofar as the EU Commission has only recently come to the conclusion that these competition concerns are sufficiently addressed by informational unbundling, the criticism of behavioral measures must be renewed.²⁷⁸ There are considerable doubts as to how the EU Commission intends to effectively monitor compliance with the technical and behavioral remedies. 263

At the same time, such a separation of Amazon's online trade and the e-commerce platform only makes sense if these two offerings are actually and effectively separated, i.e. in any case there should be a spatial (different URLs) and personal separation (change of name of the e-commerce platform; socially independent companies) in order to efficiently end the connections. 264

The expediency of this separation could be opposed by the fact that the marketplace could not exist in the short term alongside the original Amazon online trade. Amazon could continue to offer such low-priced products via its own web shop, which would be cross subsidized by other Amazon shops, that the third-party sellers would have little chance of success in price competition with the end customers. The third-party sellers could then feel compelled to offer themselves to Amazon as suppliers for its own online business. 265

Interim result: A separation of Amazon's online retail business and the e-commerce platform in such a way that the latter are not only separated in terms of ownership, but also in terms of the name and discoverability on the internet (change of URL), is suitable to address substantial competition concerns which are based on conflicts of interests and cross-subsidization. In addition, the danger of arbitrary dealer blocking could be reduced. Due to the de facto geographical separation of the e-commerce platforms (e.g., Germany, France, Spain), it could also be considered to separate these e-commerce platforms accordingly also geographically in order to find suitable acquirers. The separation would have to be done in such a 266

²⁷⁵ Depending on the focus, this may be regarded as horizontal, vertical or conglomerate unbundling; see also *Bernhardt/Voges*, WuW 2022, 651, 652. as the links between the competitors Amazon Retail and third-party sellers are severed, or as vertical, as Amazon's provision of the e-commerce platform is to be regarded as an upstream market level vis-à-vis the third-party sellers. However, this distinction does not matter for the purpose of the unbundling measure.

²⁷⁶ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

²⁷⁷ Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

²⁷⁸ On this already under 3.3.

way that the unbundled marketplace would not be vulnerable to Amazon's initial predatory pricing strategies.

6.1.4 Unbundling along Amazon's business lines

Mitchell, in particular, advocates unbundling Amazon along the lines of retail, services to third-party sellers (Marketplace), AWS, smart home devices (Echo & Alexa) and logistics.²⁷⁹ Such unbundling serves the following purposes in particular:

- The **cross-subsidization of Amazon's retail business** and the Prime program by profitable areas such as AWS and Marketplace will be prevented. This will make Amazon's previous price war strategy more difficult. Amazon will then have to face fair competition from other (online-) retailers as an (online-) -retailer. 268
- The separation of AWS and Amazon Logistics from the retail business and the Marketplace is important to **keep the respective market and customer access open**. Amazon's retail business and Marketplace represent a huge portion of total online commerce in many regions. Amazon's vertical integration means that neither is freely accessible to other providers of logistics solutions and web services in competition. 269
- The separation of AWS and Amazon Logistics from the retail business and Marketplace is also important in order not to give Amazon's web services and logistics such an “inherent” **scaling advantage** that other competitors can hardly keep up in these areas who do not have a large internal customer exempt from competition. 270
- The separation of Amazon's retail business from the Marketplace is essential to effectively eliminate the **excessive tapping of third-party merchants' data in** favor of Amazon's own business. Furthermore, the separation is necessary to effectively eliminate **Amazon's arbitrary self-preferential treatment** (placing advertisements, demanding fulfilment services from Amazon for better ranking, arbitrary merchant blocks, etc.). 271
- The separation of Amazon's smart home devices (Echo & Alexa) from Amazon's retail business and from the Marketplace is essential, as Amazon is the dominant supplier of these devices in many regions and they thus constitute a **bottleneck in** this ordering channel, which in turn gives rise to fears of “**Amazon taxation**” and **arbitrary self-preference**. The separation of vertically integrated bottlenecks from the core platform is considered a typically suitable unbundling variant.²⁸⁰ 272

²⁷⁹ *Mitchell* (fn. 54), p. 21
²⁸⁰ *Khan* (fn. 13), 973; *Bernhardt/Voges*, WuW 2022, 651, 655.

This approach to unbundling Amazon also corresponds to the main criteria of the test for expedient unbundling of dominant corporations developed by the former Chief Economist of the EU Commission *Tommaso Valletti* together with *John Kwoka*.²⁸¹ This test includes the following three steps in particular:²⁸² 273

- (1) Since dominant companies tend to acquire other companies in series, the first step would be to consider reversing acquisitions of the company that have proven to be problematic under competition law. 274
- (2) If this is not appropriate or feasible, the next alternative would be to look for fault lines that delineate important separable parts of the business, even if they do not perfectly match an acquired business. 275
- (3) In this context, various products and services that potentially or actually compete with or complement the core platform could be the main candidates for separation. 276

Looking at Amazon's corporate acquisitions, these are primarily expansions of the core platform in material or spatial terms. Step (1) of the test presented above therefore does not seem appropriate in the case of Amazon. As described in 6.1.1 such a horizontal reversal as the takeover of the online shoe retailer Zappo makes little sense and is not suitable for solving the identified (competitive) problems on the part of Amazon. Steps (2) and (3), on the other hand, support the separation of the complementary services from the core platform proposed here. 277

Interim result: Insofar as the competition concerns about Amazon's business model are to be seriously addressed, Mitchell's proposal to unbundle Amazon along its business lines (retail, services to third-party sellers (Marketplace), AWS, smart home devices (Echo & Alexa) and logistics) is to be agreed with in principle. 278

6.1.5 Interim result

Amazon relies on a business model that offers goods and services (video and music streaming) very cheaply and without short- to medium-term profit expectations, so that complementary services with high profit margins can be offered around this offering that has been expanded into infrastructure. In combination with intra-group scaling (basic utilization of web services and logistics through cross-subsidized online retailing) and self-preferentialisation²⁸³, Amazon is enabled to expand its business activities into other areas such as logistics, fulfilment, web services, etc. These additional services have a built-in advantage over providers already active in the market, as they already have Amazon, by far the largest online retailer in the world and the fifth largest company in the world (by market capitalization), “as a customer” for which they do not have to compete. This structure enables and incentivizes Amazon to engage in unfair trading practices such as predatory pricing 279

²⁸¹ *Kwoka/Valletti* (fn. 93), 1286, 1301.

²⁸² *Kwoka/Valletti* (fn. 93), 1286, 1301

²⁸³ See e.g., conduct around Marketplace information of third-party sellers and allocation of the Buy Box: Comm., Case AT.40462 - *Amazon Marketplace* and Case AT.40703 - *Amazon Buy Box*.

below cost recovery, excessive tapping of strategic competitive data, diversion of demand to its own products, high access fees (for *Buy Box* and better ranking in search results on the Amazon website/marketplace).

This strategic, structural and systematic construct leads to far-reaching competition concerns “*by design*” and cannot be efficiently addressed with selective behavioral controls. Provided one agrees with the idea that the remedy must reflect the anti-competitive behavior,²⁸⁴ it is obvious and necessary in the case of an intended anti-competitive business model in Amazon's case to remedy it altogether.²⁸⁵ If as many of the anti-competitive concerns about Amazon's current business model as possible are to be eliminated, unbundling along the lines of retail, services to third-party sellers (Marketplace), AWS, smart home devices (Echo & Alexa) and logistics is appropriate.

6.2 Potential counterarguments against expedient unbundling

A number of counterarguments are put forward against structural unbundling in general and against digital platforms in particular. These are presented below and their impact on the appropriateness of the recommended unbundling scenario (see 6.1.4) are discussed.

6.2.1 Prohibitive costs

Prohibitive costs are cited against structural unbundling measures.²⁸⁶ Sometimes it is not precisely explained what these costs refer to. On the one hand, it is probably about legal enforcement costs, i.e., the effort that competition authorities and courts have to make to enforce unbundling.²⁸⁷ On the other hand, it is about efficiencies resulting from the vertical integration of dominant digital platforms.²⁸⁸

A problem with the general reference to the allegedly prohibitive costs of structural unbundling is the frequent lack of comparison with the opportunity costs of non-unbundling or with the costs of other remedial measures. This is because the alternative to refraining from structural unbundling is not necessarily to refrain from all remedial measures or procedures. It is precisely the non-structural remedies in procedures such as Google Shopping (see 3.3) demonstrate how much regulatory and judicial effort is involved in enforcing these measures, with much of the work owed not to the actual enforcement of clear remedies but to the “cat-and-mouse game” between the EU Commission and Google regarding the possibilities and limits of practical implementation and their imaginative circumvention.

²⁸⁴ Cf. *Loertscher/Maier-Rigaud* (fn. 168), p. 53, p. 60 et seq.: “*In antitrust cases, behavioral remedies are often designed to mirror the abuse: for example, a refusal to supply would be remedied with a commitment to supply or anticompetitive tying would be addressed with a commitment to untie.*”

²⁸⁵ Cf. *Bernhardt/Voges*, WuW 2022, 651, 656: “*There is much to be said for making a change in the structure of an undertaking if an anti-competitive practice is causally attributable to the same.*”

²⁸⁶ *Kwoka/Valletti* (fn. 93), 1286, 1292.

²⁸⁷ *Bernhardt/Voges*, WuW 2022, 651, 653.

²⁸⁸ *Kirkwood* (fn. 137), 63, 68 et seq.; *Khan* (fn. 13), 973, 1085.

Moreover, it does not seem appropriate to deny economic efficiency to state interventions because companies affected by remedial measures spend a lot of money and creativity to circumvent the decisions. As far as the problem is seen in lengthy administrative and judicial procedures, it should rather be examined within the framework of efficient justice claims whether these can be made more efficient. An example of this is the “first-instance” jurisdiction of the BGH for decisions of the Federal Cartel Office under Sections 19a, 73 (5) ARC. 284

Insofar as the loss of economic efficiency is claimed, it has already been pointed out that, at least in the context of EU and German competition law, the reference to consumer welfare as a yardstick for structural measures is axiomatic (see 3.5). In addition, typical efficiency advantages of vertical integration do not play a significant role in digital platforms, such as the problem of double marginalization.²⁸⁹ Other efficiency gains can be expected from Amazon's structural unbundling, for example a greater willingness to sell product innovations via the Marketplace and to maintain its own offering, which many third-party sellers now immediately refrain from doing as soon as Amazon decides to become active as a retailer for the products concerned. 285

6.2.2 Lengthiness of the procedures

The objection to (structural) disentanglements is that they are lengthy. However, this also applies to behavioral procedures to at least the same extent, without the latter being able to provide comparable certainty. In addition, structural unbundling is likely to have a much greater upstream effect, because in the case of behavioral measures, affected companies always have the choice between voluntarily changing their own behavior at an early stage or waiting a long time until they are possibly forced into this very behavior through several instances. Consequently, the companies have “nothing to lose” with behavioral measures, except possibly monetary consequences, which obviously do not play a role with the large digital platforms and do not have a behavioral effect. 286

Moreover, the slowness of enforcement of both unbundling and conduct measures is partly due to blocking behavior by the companies concerned, which is not controlled by efficient conduct rules. An example of this behavior is described by *Kwoka and Valletti*: 287

In the USA, a five-year behavioral order was issued against Microsoft to license communication protocols for connecting servers to desktop computers to third parties. Microsoft was to produce and submit the necessary documentation for this within the first three years. It soon became clear that Microsoft was making little progress in meeting this requirement and as the end of the 3-year term approached, Microsoft told the court that it needed a further 2 years to complete the task. After another year, the Justice Department renegotiated the terms of its order and granted Microsoft another 2-year extension. These additional 2 years passed without 288

²⁸⁹ *Bernhardt/Voges*, WuW 2022, 651, 654; *Khan* (fn. 13), 973, 1085.

completion of the documentation. At this point, the Justice Department and third parties effectively gave up and agreed to declare Microsoft's work “substantially complete” even though there were still hundreds of unresolved technical issues. The process ended four and a half years after the original consent decree deadline and nine and a half years after the original order was issued.²⁹⁰

Irrespective of the existence of a (structural) unbundling measure or behavioral measures, procedures must be structured in such a way that efficient and effective enforcement is possible. This primarily concerns procedural rules such as time limits, remedies, penalties for non-compliance and appeal procedures, as well as sufficient staffing of competition authorities and courts. 289

6.2.3 Market design by the government / state as entrepreneurial decision-maker

In some cases, there are sweeping claims that the state should not be involved in market design and that it should not become an entrepreneurial decision-maker who believes that it is in a better position to judge competitive processes than companies.²⁹¹ 290

First of all, the accusation of state market design cannot be thought of without the question of the alternative of private sector market design. To what extent does the situation improve when dominant companies take over the market design? Unlike competition authorities, these companies lack democratic control and feedback through elections. In addition, dominant companies lack the market-economy equivalent of democratic elections in the form of freedom of choice for business partners and consumers. Moreover, these companies have a vested interest in the concrete design of the market, which is at least not evident in state authorities outside corruption. Finally, dominant companies become de facto legislators in the market within their sphere of influence.²⁹² From this perspective, it could be asked in a similarly sweeping and polemical manner who elected these companies as substitute legislators, without creating any added value for the political debate. 291

Competition as the most important instrument of disempowerment of private economic power and as such the twofold twin of democracy in relation to state power must be the goal of competition authority action and not market design. At the same time, the blanket framing of unbundling measures oriented towards preserving or restoring competitive processes is gimmicky but does not achieve its goal. Moreover, it may be true that the state cannot make better entrepreneurial decisions than companies. In the case of unbundling measures, however, the question of “better” can only ever refer to the restoration or maintenance of competitive structures. The state should not and does not have to forecast whether unbundling will increase consumer welfare (which consumer group?) or innovation. It may trust that competition will bring this about. The unbundling is 292

²⁹⁰ Translated and summarised according to *Kwoka/Valletti* (fn. 93), 1286, 1290.

²⁹¹ BDI et al. (fn. 251), p. 2; cf. *Lübbig*, WuW 2023, 193, 195.

²⁹² *Khan* (fn. 13), 973, 976.

not accompanied by a state central plan, but rather by the unbundling of a private sector central plan, so that the many decentralized plans can unfold anew, and competition can play out the positive effects attributed to it.

6.2.4 Only limited effect of national decisions

Part of the argument against the desirability of unbundling is that, if pronounced at the national level, it would have limited impact. In the end, national companies would be more threatened and burdened than large, global companies that could escape national decisions.²⁹³

The fact that this is not the case has already been proven by the Federal Cartel Office's decision in the case of the Amazon Marketplace merchants' terms and conditions. There, the Federal Cartel Office conducted proceedings against Amazon because, among other things, Amazon had practically exempted itself from any liability vis-à-vis the traders by means of its general terms and conditions and had allowed itself to be granted an unlimited right of immediate termination and immediate blocking of traders' accounts without giving reasons.²⁹⁴ In this respect, the President of the Federal Cartel Office expressly emphasized that Amazon had changed its terms and conditions worldwide as a result of the proceedings:

*“To conclude our proceedings, Amazon will amend its terms and conditions for merchants operating on the Marketplace for the German marketplace amazon.de, for all European marketplaces (amazon.co.uk, amazon.fr, amazon.es, amazon.it) and worldwide for all its online marketplaces including the American and Asian marketplaces.”*²⁹⁵

Furthermore, the subsequent unbundling order of the British competition authority “CMA” in the *Facebook/GIPHY case* (see 4.2.3) also proves that national antitrust decisions with an unbundling order can have a de facto global effect (see 4.2.3).

Interim result: Decisions such as those of the German Federal Cartel Office in the matter of Amazon merchant terms and conditions and of the British competition authority CMA on the unbundling of *Facebook/GIPHY* prove that national decisions by competition authorities also have a global effect.

6.2.5 Lack of demonstrability of efficiency gains through unbundling

Another argument against unbundling is that there is a lack of evidence of efficiency gains from unbundling, especially in the area of application of digital platforms.

²⁹³ BDI et al. (fn. 251), p. 2.

²⁹⁴ FCO (fn. 58).

²⁹⁵ FCO, Press release of 17 July 2019, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2019/17_07_2019_Amazon.html.

The effect of unbundling on prices cannot be isolated.²⁹⁶ There is also a supposed lack of analysis of the effects on technological progress and innovation.²⁹⁷

These statements are based on the assumption that unbundling can only be legitimate, expedient or legal if it can be expected to lead to efficiency gains ex-ante with sufficient certainty. In this respect, it is misunderstood that the increase in efficiency gains cannot be a goal that justifies unbundling, even at the outset. The legislature has no recognizable constitutional mandate to interfere with the fundamental rights of companies in order to increase “efficiency gains”. Unbundling can therefore only be a legitimate means to achieve constitutional and legislative goals such as the protection and preservation of competition as an institution. Consequently, for example, the prognosis decisions pursuant to Section 32f (3) sentence 1, 4 (1) ARC²⁹⁸ focus on the elimination of the distortion of competition.

From a global perspective, the axiomatic demand for sufficiently verifiable efficiency gains in the run-up to unbundling is an expression of the internalization of the “*more economic approach*”, which was in vogue until recently, and its consolidation into a “law”. One looks in vain for constitutional and legal foundations for this. On the contrary, in the antitrust tradition and legislation, such efficiency pleas are typically the prerequisite for companies to be allowed to hinder competition by way of exception.²⁹⁹ Why this requirement should be applied to state actors in the same way is not clear, especially since they do not aim at or effect a restriction of competition with a measure such as unbundling. Even in the case of ownership unbundling, Article 14 of the Basic Law does not provide for “efficiency compensation”. Therefore, those who claim that unbundling would only be appropriate and lawful if there is sufficient certainty that (excessive) efficiency gains can be expected are obliged to justify it. The yardstick for the appropriateness of unbundling measures can thus only be the contribution to maintaining or restoring competitive processes. Efficiency gains are neither a necessary nor a sufficient criterion for appropriate unbundling.

The accusation of the lack of predictability of the effect of unbundling also falls flat as far as it serves to preserve or restore competition. For competition draws its power of creative destruction precisely from the lack of predictability.

²⁹⁶ *Bernhardt/Voges*, WuW 2022, 651, 652 (fn. 24).

²⁹⁷ *Bernhardt/Voges*, WuW 2022, 651, 652; but see *Poegel* (fn. 220), *passim*; *Watzinger/Fackler/Nagler/Schnitzer*, *American Economic Journal: Economic Policy* 2020, 12(4): 328 et seq.; available at: <https://doi.org/10.1257/pol.20190086>; *Oxera* (fn. 200), p. 42 on innovations identified after ownership unbundling of British airports: “*There are a number of examples of innovative approaches being introduced by GAL after the break-up. Many of these could have been implemented by BAA prior to the break-up, but it might not have had the incentive, as any such innovation would be likely just to transfer business away from other BAA airports while potentially creating financial and operational risk for the airport.*”

²⁹⁸ German Government (fn. 244), p. 7.

²⁹⁹ For the prohibition of cartels, see Art. 101 (3) TFEU or Section 2 (1) ARC (“improving the production or distribution of goods or promoting technical or economic progress”); for the prohibition of abuse of a dominant position, see the efficiency defence, e.g., in ECJ, Judg. as of 15 March 2007, [2007] ECR I-2331, para. 86 - *British Airways*; ECJ Judt. as of 17 September 2007, [2007] ECR II-3601, para. 1114 et seq. - *Microsoft*; ECJ Judgment of. 17 February 2011, ECR 2011, I-527, para. 75 et seq. - *TeliaSonera Sverige*; for merger control compare the balancing clause under Section 36 (1) sentence 2 no. 1 ARC.

6.2.6 Legal uncertainty for companies

It is usually argued that unbundling procedures are associated with a high degree of legal uncertainty or a lack of predictability for the companies.³⁰⁰ Insofar as this uncertainty relates to the development of competition after unbundling, this is due to the nature of competition. In this respect, it can also be argued that the unbundling measure is particularly appropriate if the competitive uncertainty is as great as possible. However, as far as it is solely a matter of legal certainty for the companies, i.e., a protection of confidence vis-à-vis the state and society not to eliminate a permanent and structural distortion of competition, this is not convincing.³⁰¹

In addition, the counterfactual scenario is not one in which the companies would be confronted with complete legal clarity. The unbundling measures of the EU Commission within the framework of Art. 102 TFEU in conjunction with Art. 7, 9 of Regulation 1/2003 (see 4.3.1), the extensive interpretation of the ban on cartels in the case of joint ventures in the context of the Federal Cartel Office's sector enquiry into rolled asphalt (see 4.4.2) and the latest extensions of merger control, for example through the extended referral under Art. 22 of the Merger Regulation³⁰² or the ex-post control of mergers that have already been implemented on the basis of the control of abuse of dominance under cartel law³⁰³ prove that the authorities are willing and able to exhaust and overstretch the existing regulations if the pressure to prosecute is too great. In some cases, this is done by raising the costs for affected companies in the event of losing in court to such an extent that the companies seek or accept an amicable solution.

6.2.7 Fundamental legal concerns against unbundling

Legal objections are raised against (ownership) unbundling measures.³⁰⁴ It is correct that unbundling is at least a content and limitation provision requiring compensation within the meaning of Article 14 (3) of the Basic Law.³⁰⁵ Therefore, compensation within the meaning of Article 14 (3) sentence 2 GG is necessary, which can also be paid by the purchasers of the unbundled parts of the company.³⁰⁶ In this respect, however, there are no general constitutional objections to unbundling measures, but at most requirements for concrete statutory powers of intervention (e.g. Section 32f (3), (4) ARC³⁰⁷) and official decisions in individual cases.³⁰⁸

³⁰⁰ Wegner, BB 2022, Heft 44, Umschlagteil, I; BDI et. al (Fn. 251), p. 2.

³⁰¹ Bartsch/Käseberg/Weber, WuW 2023, 245, 246.

³⁰² ECJ, Judg. as of 13 July 2022, T-227/21 - *Illumina v Commission*.

³⁰³ ECJ, Judg. as of 16 March 2023, C-449/21 - *Towercast*.

³⁰⁴ Cf. Ackermann, ZWeR 2023, 1, 18 et seq.; BDI et. al (fn. 251), p. 2; Monopolies Commission (fn. 255), p. 31 ff (para. 92 ff); Böni, Sic! 2/2012, 71, 80 et seqq.

³⁰⁵ Kühling, Missbrauchsunabhängige Entflechtung - verfassungswidriger Kartellrechtspopulismus oder sinnvolle Ultima Ratio?, Verfassungsblog 14.06.2022, available at: <https://verfassungsblog.de/missbrauchsunabhängige-entflechtung/>; Ackermann, ZWeR 2023, 1, 18.

³⁰⁶ Monopolies Commission, XXIV Main Report, para. 377.

³⁰⁷ German Government (fn. 244), p. 7; a compensation clause is now expressly provided in Section 32f (8) and (9) ARC.

³⁰⁸ Monopolies Commission (fn. 255), p. 31 et seqq. (para 92 et seqq.).

The focus of constitutional conformity will therefore be on the case-by-case examination and there in particular on the proportionality of the individual measure. In the context of (ownership) unbundling, there is frequent and rather reflexive talk of the “*ultima ratio*”, including by the top competition watchdogs such as Margarete Vestager or the German Ministry of Economics.³⁰⁹ The reference to the “*ultima ratio*” is to be agreed with insofar as it is a special form of expression of the necessary proportionality test and the positions of the companies affected, which are protected by fundamental rights, are to be included in the test with sufficient weight. At the same time, however, it must be acknowledged that an intertwining of property rights does not always have to be the most drastic means for the company concerned. Compulsory licensing or other conduct-related measures can hit a company harder than the sale of a part of the company. Consequently, this is taken into account accordingly in laws or draft laws. The “Ultima Ratios Argument” is therefore not one by itself.

Incidentally, the “*ultima ratio*” is also introduced in other areas in a clichéd manner, without any substantive argument being associated with it. This is particularly evident in criminal law, which is generally and sweepingly referred to as “*ultima ratio*”, but in Germany, for example, makes the use of public transport without a ticket or leaving the scene of an accident after damaging property punishable (contrary to the principle of freedom from self-incrimination).

6.3 Legal feasibility

The unbundling recommended under 6.1.5 can at best be described as difficult to implement under current law. However, proceedings of the EU Commission, such as in the gas and electricity sector and most recently against Google, show that corresponding structural unbundling is also possible within the framework of Art. 102 TFEU in conjunction with Art. 7, 9 of Regulation 1/2003 (see 4.3.1) are not excluded. However, the EU Commission decided against unbundling measures in the proceedings against Amazon due to the *Marketplace* and the *Buy Box* (see 4.3.5).

A further basis would be Art. 18 Digital Markets Act (see 5.1.1). Due to the rigid time limits and infringement regulations, it is doubtful from a practical point of view whether the norm will be effectively applied. In any case, it should be relatively easy for digital platforms to prevent the initiation of unbundling proceedings under Art. 18 Digital Markets Act through appropriate blocking behavior.

Under emerging law, the unbundling procedure following a sector enquiry pursuant to Section 32f ARC, in particular, is an appropriate legal basis for the proposed unbundling of Amazon. The upstream sector enquiry into online retailing in

³⁰⁹ See Zalan, “Breaking up tech giants is last resort, Vestager tells MEPs”, euobserver.com, 9 October 2019, available at: <https://euobserver.com/green-economy/146208>; German Government (fn. 244), pp. 2, 15 et seq., 26 et seq. and 28.

Germany would ensure that the allegations and competition concerns are sufficiently investigated using the authorities' powers of information and investigation before a corresponding decision is taken.

At least for a certain period of time, unbundling measures must also be backed up by accompanying measures, for example by stricter control of company takeovers or selective behavioral measures. It is of crucial importance in this context that vertical unbundling is secured. A line-of-business restriction, which at least prohibits the company from resuming activities in this business area, is an effective way of doing this.³¹⁰ 310

6.4 Interim result

Many of the criticisms of structural measures are, when viewed in the light of day, only understandable if the alternative were complete non-intervention by the authorities. It is thus often a call for outright non-action by the state in favor of dominant firms or despite obvious distortions of competition. If the counterfactual scenario is official inaction, any structural measure is inherently more protracted, costly and invasive. 311

However, the situation is different when behavioral measures are considered as a counterfactual scenario to structural measures. In this respect, design, enforcement, monitoring and control are often significantly more burdensome than structural unbundling measures. Structural unbundling measures are often justified precisely because competition authorities would be overwhelmed by the implementation of behavioral remedies.³¹¹ 312

In summary, there are therefore good reasons that speak against structural measures and in particular ownership unbundling. However, these do not preclude, either abstractly or concretely, that structural measures are taken to solve structural problems in the case of identified competition problems. Consequently, an examination of the individual case is always necessary, which, however, must be able to lead to ownership unbundling with an open mind. 313

³¹⁰ *Bernhardt/Voges*, WuW 2022, 651, 658.

³¹¹ *Khan* (fn. 13), 973, 1063 with further references.

7. Final evaluation and recommendation

Building in particular on the above findings on the restrictions of competition emanating from Amazon's long-standing and current business model and on the appropriateness of the unbundling measures examined, the following assessment and recommendation are made in conclusion. 314

7.1 Structural unbundling along business area possible and appropriate

As described, a multiple structural unbundling between Amazon's own online retailing, the e-commerce platform and the complementary services (web service, fulfilment, logistics) appears to be an expedient means of solving the majority of the problems associated with Amazon's market position and business strategy (see 6.1.5). 315

The application of Section 32f (3), (4) ARC provides a sufficient legal basis for the investigation and implementation of such unbundling. 316

7.2 Introduction of a monopolization provision into German law

As an alternative or complementary to the unbundling independent of abuse according to Section 32f (3) and (4) ARC, an extension of the offences of unilateral conduct disapproved of under antitrust law is conceivable. In this respect, German law, in the second section of the first chapter of the ARC (Sections 18-21 ARC), in addition to the prohibition of abuse of a dominant position, also knows further prohibitions such as the abuse of relative (Section 20 (1) ARC) or superior market power (Section 20 (3) ARC), the refusal of admission to a professional or trade association (Section 20 (5) ARC) or the prohibition of boycotts under antitrust law. (Section 21 (1) ARC). 317

In this respect, an extension to include a prohibition of monopolization would also be in conformity with EU law, as the member states may enact and apply stricter national law in the area of antitrust regulation of unilateral conduct (Art. 3 para. 2 sentence 2 of Regulation 1/2003).³¹² 318

The prohibition of monopolization can be oriented towards Sec. 2 Sherman Act, without necessarily having to adopt the entire legal doctrine and case law of the prohibition from the USA.³¹³ On the legal consequences side, the general clause of Sec. 32 (2) ARC was retained, so that all remedial measures, including structural ones, could be taken if and to the extent that they are suitable for eliminating 319

³¹² 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 Treaty, OJ 2003 L 1/1.

³¹³ Critical of a takeover in this respect: *Schweizer/Haucap/Kerber/Welker*, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, 29 August 2018, p. 45, available at: https://www.bmwk.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf?__blob=publicationFile&v=12.

monopolization. Following the logic of the “natural hierarchy” between behavioral and structural remedies in the context of structural control through merger control, a priority of structural remedies over behavioral remedies would also have to be assumed for the monopolization prohibition.

In fact, the hurdles of proof that are currently attached to monopolization in the USA are so high that its enforcement hardly seems realistic. For this reason, there are reform proposals in the USA to expand the Sherman Act in such a way that certain types of behavior are prohibited even if they do not lead to monopoly power.³¹⁴ These proposals therefore tend more towards a Europeanisation of the American rules, according to which behavioral control is to be strengthened as in the Digital Markets Act or according to Art. 102 TFEU. 320

The mutual search for a solution on the other side of the “big pond” only proves that the problem emanating from dominant digital platforms like Amazon and the demand for an antitrust response are universal. These cases, however, both lacked the clear view and the courage to set up competition law in such a way that it efficiently protects what it is primarily supposed to protect: competition as a disempowering process full of creative destruction. As long as the clear view remains obscured, there is no solution in sight. Nevertheless, not least because of the new unbundling provision in German cartel law, the Federal Cartel Office can now be expected to summon up this courage and prove that it has this clear view. 321

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³¹⁴ Kirkwood (fn. 137), 63, 110: “The Sherman Act should be amended to reach unilateral exclusion by the tech giants that reduces competition significantly-even if it is unlikely to create or maintain monopoly power. In addition, the Department of Justice and the FTC should be authorized to obtain civil penalties if they establish a violation of this new section”.